COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and WILLIAM J. GLYNN,
Complainants

v. Docket No. 07 BEM 01534

MASSASOIT INDUSTRIAL
CORPORATION,
Respondent

Appearances: Christopher Maffucci, Esq., for Complainant
Marc D. Rie, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 22, 2007, William J. Glynn ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that he was subjected to discrimination by Respondent on the basis of age and disability.

The MCAD issued a probable cause finding and on October 27, 2009, certified the case for public hearing. A public hearing was conducted on May 27 and 28, 2010. The parties introduced 14 joint exhibits into evidence. The following individuals testified at the public hearing: Complainant, Suzanne Glynn, Thomas Clifford, William Haskell, Lesa Briggs, and Russell Munies.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected.

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

I. FINDINGS OF FACT

1. Complainant William J. Glynn was born on December 30, 1932. At all relevant times he lived with James and Suzanne Glynn, his son and daughter-in-law, at 53 Yarmouth Avenue, Brockton, MA.
2. Respondent is a Massachusetts corporation based in Raynham, Massachusetts. It is a subsidiary of Massasoit Greyhound Association, Inc. Transcript II at 5. Its offices are at the Raynham Taunton Greyhound Park in Raynham, Massachusetts.
3. Complainant began his employment with Respondent in December of 1986. During all relevant times he was a part-time custodian in Respondent's outside maintenance department. Complainant performed light housekeeping, trash removal, floor sweeping, restroom cleaning, and grounds clean-up. Transcript II at 13-14. Complainant's weekly work schedule was Monday through Friday, 5:00 p.m. to 9:00 p.m. Complainant was assigned to the Registry of Motor Vehicles in Brockton, MA for approximately ten years prior to his termination in March of 2007. Transcript I at 65. Complainant worked alone for a period of time, after which Respondent assigned another custodian, William Haskell, to work with him. Transcript II at 14, 66, 85.
4. Complainant never called in sick or missed work because of illness while working for Respondent. Complainant's personnel file does not contain any warnings, reprimands, disciplinary notes, or records of tardiness or absenteeism.
5. Complainant earned an average weekly income of $200.00. Stipulated Facts 9

and 10; Transcript I at 15. In addition, Respondent contributed approximately $10.00 per week to Complainant's 401K retirement plan.

6. Complainant first received an Employee Handbook on November 12, 2003. Stipulated Fact 11. According to Respondent's Employee Handbook, management will not to discharge an employee without giving the decision "a great deal of consideration." Transcript II at 41; Agreed Exhibit No. 2 at p. 9.
7. Massasoit Greyhound Association maintains one Human Resource Department to oversee the personnel operations of its thirteen subsidiaries. The subsidiaries consist of approximately 800 employees. Human Resource Manager Lesa Briggs and one assistant perform all human resource functions. Transcript II at 153-155.
8. Thomas Clifford is a thirty-year employee of Respondent with the title of Maintenance Facility Manager. Transcript II at 9. Clifford oversees twelve buildings in the Brockton area. He manages their heating systems, HVAC, cleaning, the ordering of supplies, and the hiring of maintenance staff**.** Joint Exhibit 4; Transcript II at 7-8. Clifford has approximately seventeen employees reporting to him directly or indirectly. Joint Exhibit 4. Clifford decides whether or not to terminate employees under his supervision. Transcript II at 42. Clifford testified that Complainant did a "good job" for Respondent. Transcript II at 13.
9. Russell Munies is a twenty-three year employee of Respondent with the title of Outside Maintenance Supervisor. Munies oversees the evening maintenance crews and reports to Clifford. Joint Exhibit 4: Transcript II at 9, 51, 108-109. Munies works from 5:00 p.m. to 9:00 p.m., Mondays through Fridays. Transcript II at 110. He visits the Registry of Motor Vehicles and other buildings daily to

make repairs, remove rubbish from the outside curb, make sure employees are working, and check attendance. Transcript II at 40-41, 85, 109-112. At all relevant times, Munies supervised twelve or thirteen individuals, including Complainant. Id. Munies testified that he gave his cell phone number to his maintenance staff and "believes" that Complainant had it. Transcript II at 119.

10. William Haskell has worked for Massasoit Industrial Corporation since 1995 in the same position as Complainant, i.e., part-time custodian in Respondent's Outside Maintenance Department. Haskell reports to Russell Munies, as did Complainant. In or around the year 2000, Munies assigned Haskell to work with Complainant at the Registry of Motor Vehicles. Transcript II at 75.

11. According to Haskell, he and Complainant worked together "as a team," with Complainant taking care of the vacuuming and the rubbish and Haskell taking care of the bathrooms, windows, and sweeping. Transcript II at 70, 76-77, 85. Haskell testified that they both had their own keys to the Registry and their own alarm codes and either one of them could lock up at night and set the security alarm. Transcript II at 77-78, 95. Complainant, on the other hand, testified that after Haskell started working at the Registry, he (Complainant) was no longer allowed to have keys or to operate the security alarm and that he received his weekly paycheck from Haskell. Transcript I at 68-72, Transcript II at 86. Complainant testified that even though Munies was his immediate supervisor, he considered Haskell to be "over" him because Haskell had the keys, had exclusive access to the alarm system, and told Complainant what to do. Transcript I at 105-107, 108. I credit Haskell's testimony that he and Complainant were co-workers.

12. Munies and Clifford testified that Complainant's duties were the same as Haskell's. Transcript II at 112-113; Transcript II at 14-15, 24-25. Clifford testified that Complainant had keys to the Registry building and could operate the Registry's keypad alarm system at night by pressing the on/off button. Id.
13. The last day that Complainant worked was Friday, March 30, 2007. Transcript II at 43. Munies testified that he saw Complainant at the Registry between 6:00 and 6:30 p.m. that night. Complainant left work at approximately 6:30 p.m. because he had a bump on his head and wasn't feeling well. Haskell advised him to go to the hospital and have his bump checked. Transcript I at 78.
14. Complainant testified that he had gotten the bump the previous night as a result of tripping over his grandson's weight-lifting equipment. Transcript I at 77. Complainant hit his head on the cement floor in the basement when he tripped. Transcript I at 25, 49. On the evening of March 30, 2007, James Glynn took his father to Good Samaritan Hospital for treatment of his head injury, but Complainant was admitted when it was discovered that he also had pneumonia. Transcript I at 25-28, 79.
15. Haskell testified that Complainant came to work at his usual time on March 30, 2007 with a "good size knot" on his forehead, seemed to be a "little incoherent," and said that he had hit a telephone pole while driving his truck. Transcript II at 79. Haskell testified that he informed Munies that night that Complainant left work early because he was feeling ill. Transcript II at 90, 97. I do not credit Haskell's testimony about how Complainant sustained his head injury. Hospital records confirm that Complainant tripped and fell. Joint Exhibit 5.

16. Munies testified that he received a call from Haskell on March 30, 2007 stating that Complainant had gone home sick. Transcript II at 146. According to Munies, in twenty years of supervising Complainant, he had never known Complainant to leave work sick. Transcript II at 146-147, 151.
17. During his hospitalization, Complainant asked his daughter-in-law to go to the Registry and tell Haskell that he was in the hospital with pneumonia and that he'd be out of work for a while. Transcript I at 79. Complainant did not call Munies or Clifford. Transcript I at 125. On April 2, 2007, Suzanne Glynn went to the Registry to tell Haskell that Complainant was in the hospital with pneumonia and that she wasn't sure when he was going to be discharged. Transcript I at 32. According to Suzanne Glynn, Haskell said that he would pass the information on to his boss and asked if he could visit Complainant when he was released from the hospital. Transcript I at 33, 35. I credit the testimony of Suzanne Glynn.
18. Haskell confirmed that Suzanne Glynn stopped by the Registry during the week following March 30, 2009 to say that Complainant was in the hospital with pneumonia, but he testified that he told her to contact Russell Munies herself. Transcript II at 87. Id. I do not credit this testimony to the extent that it differs from the testimony of Suzanne Glynn.
19. Munies testified that he went to the Registry on April 2, 2007, didn't see Complainant's truck, and asked Haskell, "Where's Bill?" to which Haskell purportedly replied, "I don't know." Transcript II at 134-135. Munies claims that he went to the Registry nightly over the next several weeks and repeatedly said to Haskell, "He [i.e., Complainant] still hasn't shown up?" and that Haskell did not

respond. Transcript II at 114-117. I do not credit this testimony.

20. According to Haskell, Munies stopped by the Registry approximately twice a week during April of 2007 and asked if Complainant was at work. Transcript II at 103. Haskell testified that he doesn't think he told Munies that Suzanne Glynn had reported her father-in-law was in the hospital with pneumonia, stating, "I don't think I did. I don't think I did. I may have, but I'm not positive." Transcript II at 102, 103-104. Haskell claims that he did not report that Complainant was in the hospital or tell Complainant that Munies was asking about him because he viewed Complainant as his friend, not his employee, and that it never occurred to him to be concerned that Complainant could lose his job. Transcript II at 104-105. I do not credit this testimony. Instead, I credit Complainant's testimony that Haskell said he told Munies that Complainant was out sick. Transcript I at 37, 81, 84.

21. On April 6, 2007, the Friday after Complainant was released from the Good Samaritan Hospital for the treatment of pneumonia, he developed chest pains. Suzanne Glynn drove him back to Good Samaritan Hospital. Transcript I at 36, 39, 85. Complainant was diagnosed with a heart attack. Transcript I at 40. He was transferred to Massachusetts General Hospital where he had a cardiac procedure. Transcript I at 86. Complainant subsequently recuperated at the house of his son William Glynn Jr. for three to four days and then returned to the home of James and Suzanne Glynn. Transcript I at 44, 87.

22. On April 9, 2007, the Monday after Complainant's second hospitalization, Suzanne Glynn again went to the Registry to inform Haskell that Complainant

had been re-admitted to the hospital with a heart attack. Transcript I at 41, 87. According to Suzanne Glynn, Haskell said he was going to tell his boss. Transcript I at 42. I credit Suzanne Glynn's testimony.

23. Haskell again visited Complainant during his recuperation from the heart attack. Transcript I at 45, 88. Complainant testified that during the visit, he asked if Haskell had "told Munies" [i.e., about the heart attack] and Haskell said he would or he had. Transcript I at 89, 146. I credit this testimony.
24. Haskell testified that he never promised to contact anyone on Complainant's behalf, denied that he informed Munies about Complainant's condition, and asserted that he told Complainant to report it himself. Transcript II at 88-89, 92. I do not credit Haskell's testimony.
25. Following Complainant's recuperation, he went to see his primary care physician, Dr. Dern, and obtained a doctor's note clearing him to return to work. Transcript I at 46.
26. Russell Munies testified that it was not his practice to call absent employees and that he did not have Complainant's telephone number, although he admits that he could have gotten it from Respondent's personnel office. Transcript II at 151.
27. After Complainant failed to report for work, Munies arranged for Robert Doulette to fill in part time to cover some of Complainant's duties between April 5, 2007 and June 1, 2007. The use of Doulette was consistent with Munies's practice to assign a "floater" to fill in for maintenance employees who call in sick. Transcript II at 49, 124- 126.
28. As renovations at the Registry and an adjacent insurance office neared

completion, Munies spoke to Clifford about Complainant's absence and the need to hire someone on a permanent basis to work with Haskell. Munies testified that he discussed Complainant's absence with Clifford on or about April 27, 2007 and informed Clifford that Complainant hadn't called about his continuing absence. Transcript II at 124, 129. Munies claims that at the time he discussed the matter with Clifford, he was unaware of Complainant's medical problems. Transcript II at 124; Joint Exhibit 9. According to Munies, had he known that Complainant was hospitalized with pneumonia and a heart attack and was unable to work during the weeks following March 30, 2007, he would not have recommended termination. Transcript II at 140-141. I do not credit the testimony of Munies that he did not know about Complainant's medical problems and that he would not have recommended termination had he known.

29. Clifford testified that on Friday, April 27, 2007, he first learned from Munies that Complainant hadn't been to work for three to four weeks and that another custodian was needed to replace Complainant on a permanent basis in order to work with William Haskell at the Registry. Transcript II at 17, 148. Clifford testified that he decided to replace Complainant on or around Monday, April 30, 2007 for "no call/no show" because Complainant hadn't been to work for three or four weeks. Transcript II at 17-19, 51, 58, 124-125, 134; Joint Exhibit 10. Clifford did not make any attempt to call Complainant. Transcript II at 26. According to Clifford, it is not Respondent's practice to "track down" employees who have left their positions because there are too many other ongoing functions. Transcript, II at 26-27.

30. Clifford notified Human Resource Manager Lesa Briggs that Complainant's status as a maintenance employee at the Registry was "no call/no show," that he was to be terminated, and that his position needed to be filled. Transcript II at 164-165. Briggs testified that when she received this information on April 30, 2007, she sent Complainant unemployment paperwork.

31. In notes that Briggs made concerning Complainant's termination, she wrote that on 5/3/07, she left a message asking Complainant to return her call; on 5/11/07, she called Complainant and again left a message; and later on 5/11/07 she received a return call from Complainant. Joint Exhibit 10. According to Briggs's notes, she explained to Complainant on 5/11/07 that he was "no call/no show" and he said in response that he had "told the person he worked with in the building." Id. Briggs made the following undated notation in her notes: **"**William Haskell (that works in the same building as Bill Glynn) said he had to track him down when he didn't come in for a couple of week [sic]." Id. I interpret the "tracking down" statement to refer to Haskell visiting Complainant at his son and daughter-in-law's home during Complainant's recuperation from his heart attack and asking when Complainant was going to return to work. Transcript I at 90.

32. On May 7, 2007, Complainant took to work a doctor's note which said that Complainant could return to work with no restrictions. Joint Exhibit 1; Transcript I at 92. Complainant gave the note to Munies who said that Complainant should give it to Clifford. Transcript I at 93; Transcript II at 129, 144; Joint Exhibit 8. Munies did not ask Complainant where he had been or inquire about his health

even though he thought Complainant was a good worker, was punctual, and rarely missed time from work in twenty years. Transcript II at 145, 148.

33. Complainant obtained Clifford's telephone number from a Registry employee. Transcript I at 138-139. Complainant called Clifford and left a voicemail message which Clifford returned the following day. Transcript I at 93; II at 21. Complainant told Clifford that he had been cleared to return to work with no restrictions by his doctor. He was informed by Clifford that he had been terminated for being a "no show," and had been replaced. Transcript I at 94; II at 22. Complainant described himself as "flabbergasted." Transcript I at 95, 97. Complainant called Briggs on June 20, 2007 and said that he wanted his job back. Joint Exhibit 10. Briggs spoke to Clifford and made the following notation after their conversation: "Spoke to Tom Clifford and he said stands as a no call no show." Id.

34. Complainant was initially replaced by Robert Doulette, the Company "floater" who filled in part time to cover some of Complainant's duties between April 5, 2007 and June 1, 2007. Joint Exhibit 9. Subsequently, Complainant was replaced by Lillian Haskell on June 1, 2007. Transcript II at 28, 140. Ms. Haskell's date of birth is December 14, 1939. Joint Exhibit 9. The record does not indicate whether Lillian Haskell is related to William Haskell.

35. Complainant testified that when he realized he was not going to get his job back, he felt "disappointed and lost, because it's been my life for 20 years going to work and working from five to nine and so forth. And now I didn't have anything." Transcript II at 199. Complainant testified that he had intended to

work another five years until 2012. Transcript I at 99-100. After he lost his job, Complaint didn't do "much of anything." He testified that he was "alone" after he lost his job because his wife had died three years earlier. Transcript II at 200. When Complainant stopped working, he had to use his savings to pay his bills. Following his job loss, he limited himself to two meals a day. Transcript II at 201. Complainant didn't apply for unemployment insurance at first because he expected to get his job back and later because he didn't think he was entitled to "much of anything" since he only earned $200.00 as a part-time maintenance employee. Transcript I at 135. Complainant looked in newspapers for work with similar hours, but never found an advertisement for a job that he wanted to pursue. Transcript I at 162-163. Complainant owns a house "free and clear" on which he pays taxes but he doesn't live there because his furnace broke causing pipes to burst and leaving him with no heat or hot water. Transcript I at 20-21, 62. Complainant lives at the home of his son James and his daughter-in-law Suzanne which is approximately five minutes from the Registry of Motor Vehicles in Brockton. Id.

III. CONCLUSIONS OF LAW

A. Age Discrimination

M.G.L. c. 151B, sec. 4(1C) makes it unlawful "[f]or an employer . . . because of the age of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification." The statute protects persons of age forty and over.

Under the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976), in order to establish a *prima facie* case of age

discrimination, Complainant must demonstrate that he is a member of a protected class, i.e., over forty years of age; was adequately performing the responsibilities of his position; was terminated; and was replaced by similarly or less qualified person who is substantially younger. See Knight v. Avon Products, Inc., 38 Mass. 413 (2003) (substantially younger defined as someone at least five years younger unless there is other evidence of disparate treatment that would raise a reasonable inference of unlawful age discrimination); Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000); Murphy v. Pub Ventures, 15 MDLR 1098, 110-11 (1993).

Complainant, born in 1932, was seventy-four years old when terminated in 2007, and, thus, a member of a protected class. There is no dispute that Complainant was a good employee. Complainant's personnel file does not contain any warnings, reprimands, disciplinary notes, or records of tardiness or absenteeism. Clifford testified that Complainant did a "good job" for Respondent.

After he was fired, Complainant's duties were initially assumed on a temporary basis by Robert Doulette, who was sixty years old, and subsequently assumed on a permanent basis by Lillian Haskell, who was sixty-seven years old. Joint Exhibits 9 & 13. Both of these individuals are more than five years younger than Complainant. These factors are sufficient to establish a *prima facie* case.

Once Complainant has established a *prima facie* case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). Respondent fulfills this burden by relying on the fact that Complainant left work on March 30, 2009

and did not return until May 7, 2007. During the interim period, Complainant did not call Munies or Clifford. For the purposes of the inferential framework, these factors support a legitimate, nondiscriminatory reason for Complainant's termination, i.e., being "no call, no show," although it fails to withstand scrutiny at stage three for the reasons set forth below.

At stage three, Complainant must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. If the Complainant presents such evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Respondent's asserted reason for discharging Complainant, i.e., being "no call, no show" fails to withstand scrutiny at stage three because the credible evidence establishes that when Complainant missed work because of pneumonia and a heart attack, his daughter-in-law reported his absences to co-worker William Haskell, who passed the information along to supervisor Russell Munies. Suzanne Glynn went to the Registry during the week following March 30, 2009 to inform Haskell that Complainant was in the hospital with pneumonia and went again to the Registry on April 9, 2007 to inform Haskell that Complainant had been re-admitted to the hospital with a heart attack.

Haskell claims to have withheld this information from Munies because he viewed Complainant as a friend, not an employee, and because it never occurred to him to be concerned that Complainant could lose his job. These reasons are patently unbelievable, particularly since Munies asked Haskell about Complainant every time he visited the Registry.

The fact that Complainant's illnesses were made known to a co-worker such as Haskell rather than a supervisor does not protect Respondent from liability in light of the credible evidence that Complainant and Suzanne Glynn both asked Haskell to report the reasons for Complainant's absence to Munies and were told by Haskell that he would comply with their requests. Haskell denies doing so, but his denial is not credible, nor is the assertion by Munies that he was unaware of Complainant's medical condition in April of 2007.

Even if the reason for Complainant's absence had not been reported to Respondent, it defies credulity that neither Munies nor Clifford would have attempted to find out what happened to a twenty-year employee with a perfect attendance record who simply stopped coming to work. Prior to the incident in question, Complainant never called in sick or missed work because of illness. Respondent notes that its Human Resource Department oversees more than 800 employees in thirteen subsidiaries of Massasoit Greyhound Association, Inc and cannot be expected to reach out to all absent individuals. Such a workload might explain why Lesa Briggs and her assistant failed to call Complainant, but it doesn't explain why Clifford or Munies failed to determine the whereabouts of one of their seventeen-member staff, especially one with long tenure and a reliable record. Their cavalier attitude about terminating Complainant flies in the face

of the policy, articulated in Respondent's Employee Handbook, that management will not to discharge an employee without giving the decision "a great deal of consideration." I conclude that Munies and Clifford were informed of the reason for Complainant's absence and that their characterization of Complainant as "no-call, no show" was pretextual.

Notwithstanding the foregoing, an inference of age discrimination must be reconciled with the maturity of Respondent's outside maintenance staff. Complainant's permanent replacement was sixty-seven years old, eleven of Complainant's co-workers were over age sixty, and several members of the outside maintenance staff were in their late sixties and early seventies. The workforce was, on average, sixty years old. Such factors do not suggest an environment hostile to senior workers.

While these circumstances do not support a conclusion of widespread age-based animus, neither do they negate the possibility that Respondent terminated Complainant's employment based on a combination of concerns about his age and his health. It is noteworthy Complainant was the oldest member of Respondent's outside maintenance staff. Complainant's supervisors may have believed that mature individuals could perform maintenance duties up to a point, but the evidence establishes that they drew the line at an individual in his mid-seventies who was confronting sequential health issues. The difference in age between Complainant and his permanent replacement, Lillian Haskell, was seven years. Such a difference constitutes a significant age disparity. See Knight v. Avon Products, 438 Mass. 413 (2003) (age difference of five years or over establishes a substantial disparity that supports a prima facie case of age discrimination). This disparity, together with Respondent's lack of candor in explaining its discharge of

Complainant, leads to an inescapable inference that age was a determinative factor in Respondent's termination decision.

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, has a record of 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.

The MCAD has traditionally interpreted the term "handicap" broadly in order to effectuate the protections of Chapter 151B. See G. L. ch. 151B, sec. 9 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof…"); Dahill v. Police Department of Boston, 434 Mass. 233, 240 (2001) (declining to accept federal limitations on disability status resulting from the correction of impairments by medication or devices). This liberal interpretation of Chapter 151B is consistent with Congress's 2008 amendments to the ADA. 29 CFR 1630 (Fed. Reg. 9/23/09, Vol. 74, No. 183). Pursuant to the 2008 amendments, "the definition of disability … shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA [which does not require] an impairment [to] render an employee completely incapable of performing major life activities." Bragdon v. Abbott, 524 U.S. 624, 641 (1998).

Once a prima facie case is established, the burden of proof shifts to Respondent 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 Respondent succeeds in offering such a reason, the burden then 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. At stage three, Complainant has the burden of establishing that Respondent's reason for firing him was not the real reason but, rather, a pretext for discrimination. Complainant may carry this burden of persuasion with circumstantial evidence that the proffered reason is pretextual and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment decision. See Lipchitz v. Raytheon Co., 434 Mass 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, a finding of discrimination is not mandatory in the absence of discriminatory intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 117-118 (2000).

As far as Complainant's handicap status is concerned, Complainant had two temporary, albeit serious, illnesses in April of 2007, neither of which rendered him incapable of working after a five-week recuperation. Following his recovery, Complainant's doctor cleared him to return to work without restriction. See Dartt v. Browning Ferris Industries Inc., 427 Mass. 1, 16-17 (1998); Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686 (1996), (short-term medical conditions with no significant long-term effects do not constitute handicaps under chapter 151B).

Nonetheless, as a result of having had pneumonia and a heart attack, Complainant had a record of impairment and/or was regarded as having an impairment. See Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56 (1994) (employee with known heart condition was perceived by employer to be handicapped); Auger v. Crown Cork & Seal, Inc., 28 MDLR 181(2006) (employee who had two heart attacks and underwent cardiac catheterization, angioplasty, and installation of a defibrillator deemed to have a record of impairment even if not actually impaired in a major life function at the time of termination); Keenan v Town of Weymouth Fire Department 28 MDLR 199 (2006) (disc injuries, chronic pain and addiction to prescription pain killers did not cause impairment in major life function but established a record and perception of impairment)**;** MCAD Guidelines.

Respondent claims that it was ignorant of Complainant's record of impairment, but I do not credit the claim that Munies was unaware of Complainant's medical problems when he discussed Complainant's absence with Clifford on or about April 27, 2007. Munies's failure to ask Complainant where he had been or to inquire about his health when Complainant returned to work with a doctor's note on May 7, 2006 suggests that Munies already knew the circumstances of Complainant's absence. Likewise, had Clifford been unaware of the reasons for Complainant's five-week absence, it stands to reason that he would have reversed his termination decision once he was informed of the relevant facts. In short, the circumstances support a *prima facie* case of handicap discrimination based on a record of impairment and/or a perception of impairment.

Having established a *prima facie* case, the burden of proof shifts to Respondent to articulate a legitimate, nondiscriminatory reason for terminating Complainant, supported

by credible evidence. Respondent attempts to fulfill this burden, as it does in response to the claim of age discrimination, by relying on the fact that Complainant left work on March 30, 2009, did not return until May 7, 2007, and failed to call Munies or Clifford during the interim. These assertions satisfy stage two but, for reasons already stated, fail to withstand scrutiny at stage three. See also Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56 (1994) (where employee's absence due to heart condition was reported by ex-wife, company's decision to replace him after three days for failing to contact employer regarding absence deemed to be discriminatory).

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Lost Wages

Complainant testified that he had intended to work another five years until 2012 in the part-time maintenance job he had held for twenty years. Given that he received a clean bill of health and returned to work without any restrictions, I find this assertion to be reasonable. When terminated in 2007 at age seventy-four, Complainant's likelihood of finding a comparable position was, at best, remote. Complainant testified that he looked in newspapers for alternate work with similar hours, but never found an advertisement for a job that he wanted to pursue. Based on these facts, I conclude that

Complainant is entitled to back and front pay from May 1, 2007 through May 1, 2012 in the sum of $55,650.00, consisting of lost income at the rate of $200.00 per week and a $10.00 per week contribution to his 401K retirement plan. See Haddad v. Wal-Mart, SJC – 10261 at p. 7 (February 5, 2009) (nineteen-year front pay award under G.L. c. 151B based on evidence that an employee would have continued to work for the same employer but for the discrimination and was unable to obtain comparable work elsewhere); Kelley v. Airborne Freight Corp., 140 F.3d 335, 355-356 (1st. Cir.), *cert. denied*, 525 U.S. 932 (1998) (million dollar front pay award granted under Massachusetts law for 46-year old plaintiff because his lack of education made comparable work difficult to obtain).

Emotional Distress Damages

Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on his testimony as to the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

In regard to the above-articulated standards, Complainant testified that when he realized he was not going to get his job back, he felt "disappointed and lost, because it's

been my life for 20 years going to work and working from five to nine and so forth. And now I didn't have anything." After he lost his job Complaint didn't do "much of anything." He testified that he was "alone" after he lost his job because his wife had died three years earlier. Although Complainant was terse in articulating his emotional distress, his pain was communicated by his demeanor as a witness which I found to be compelling. In light of the foregoing, I conclude that Complainant is entitled to $35,000.00 in emotional distress damages for the emotional distress he suffered as a direct result of Respondent's unlawful conduct.

V. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

(1) Cease and desist from engaging in discrimination based on age and handicap.

(2) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of $55,650.00 in lost income, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Pay to Complainant, within sixty (60) days of this decision, the sum of $35,000 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Conduct two training sessions concerning age and handicap discrimination for its supervisory staff, as follows:

a. An initial training session must be provided that is at least four (4) hours in length. All supervisors are required to attend. Respondent shall repeat the initial training at least one time for new supervisors who are hired or promoted after the date of the initial training session.

b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training. The training may be provided by the Commission, may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course, or may be provided by a trainer whose resume is approved by the Commission's Director of Training. The training shall take place within sixty (60) days of selection of a trainer.

c. At least thirty (30) days prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval and provide notice of the date and time of the training. If the Commission decides to send a representative to observe the training, Respondent will allow the Commission representative unfettered access.

d. Within thirty (30) days of completion of the training, Respondent must submit to the Commission's Director of Training the following information: the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of the training.

e. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

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 29th day of September, 2010.

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Betty E. Waxman, Esq.
Hearing Officer