

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and ANTHONY LUSTER,
Complainants

v.

Docket No. 07 SEM 00149

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearances: Karen L. Stern, Esq., for Complainant
Carol Colby, Esq. and James F. Kavanaugh, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 24, 2007, Anthony Luster (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Massachusetts Department of Correction (“Respondent”) discriminated against him on the basis of disability. The Complainant asserted that the Respondent’s conduct violated M.G.L. c. 151B, section 4(16) and the Americans With Disabilities Act (“ADA”).

The MCAD issued a probable cause finding on October 9, 2007 and certified the case for public hearing on December 8, 2008.

A public hearing was conducted on June 8, 9 10, 11 12, and August 7, 2009. The parties introduced fifty-eight (58) joint exhibits into evidence. Complainant introduced five (5) additional exhibits, and Respondent introduced nineteen (19) additional exhibits.

The Complainant testified on his own behalf. Testifying for Respondent were: Paul Broskie, Mary Greene, Mary Ellen Robinson, Thomas Quinlivan, Desiree Monaco, Stephen Carrier, Michael Thompson, and Bruce Gelb.

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.

II. FINDINGS OF FACT

1. Complainant Anthony Luster (DOB: 4/5/63) was a Correction Officer I with Respondent Massachusetts Department of Correction from September of 1991 until September 14, 2007. As a Correction Officer I, Complainant was a member of the Massachusetts Correction Officers Federated Union ("MCOFU"). Complainant worked at the Massachusetts Correction Institution-Shirley ("MCI-Shirley"), a medium-security correctional institution with approximately 1,100 inmates. From 1999 to his termination, Complainant worked the 7:00 a.m. to 3:00 p.m. shift at MCI-Shirley. Complainant is an insulin-dependent diabetic.
2. Complainant's disciplinary history consists of a five-day suspension in 1993 for sleeping on duty; a letter of reprimand in 1993 for abuse of attendance; a one-day suspension in 1993 for abuse of attendance; a three-day suspension in 1993 for failure to report a car accident; a letter of reprimand in 1995 for tardiness; a letter of reprimand in 1997 for abuse of attendance; a ten-day suspension in 1998 for an incident in which an inmate pushed a civilian; a one-day suspension in 1999 for

sleeping on duty; a letter of reprimand for verbal provocation; a letter of reprimand in 1999 for unauthorized leave; a letter of reprimand in 2000 for absence from duty without permission; a one-day suspension in 2002 in regard to inmate allegations; a letter of reprimand in 2004 for tardiness; a one-day suspension in 2004 for continued tardiness and failure to submit satisfactory medical documentation; a three-day suspension in 2005 for tardiness; and a letter of reprimand in 2006 for going home sick following an assignment to the pedestrian trap. Respondent's Exhibit 1.

3. Respondent Massachusetts Department of Correction ("DOC") is the Massachusetts agency responsible for the care and custody of adult individuals sentenced to facilities within the Commonwealth's correctional system. Respondent operates MCI-Shirley among other correctional institutions.
4. The primary duty of a Correction Officer I is the care and custody of inmates. Respondent Exhibit 2 at p. 4. According to Respondent's Office of Affirmative Action, there are seven essential functions of Correction Officers I – III: 1) escorting inmates, patrolling facilities, making head counts and security checks; guarding and directing inmates during work assignments; 2) preventing violence, escapes and suicides; 3) searching for contraband; 4) referring inmates to supportive services; 5) making reports; 6) responding to emergencies with firearms, restraints, and first aid; and 7) screening visitors, operating equipment, and serving food. Joint Exhibit 47.
5. In 2003, Complainant began to experience pain in his feet and ankles. Complainant's medical care providers attributed the pain to diabetic neuropathy,

inflamed toe joints, osteoarthritis of the feet, fallen arches, calluses, bunions, fallen arches, and hammertoes, the latter two conditions possibly aggravated by the requirement that correction officers wear military-style boots at work and by the walking and standing requirements of the job. Respondent's Exhibit 3.

According to Independent Medical Examiner ("IME") Dr. Hyman Glick, a Board Certified Orthopedic Surgeon who examined Complainant on July 14, 2006, Complainant has hammertoes and mild to moderate flattening of his arches. Dr. Glick attributed Complainant's hammertoes and flattened arches to hereditary factors rather than to work-related factors or to work-required footwear.

Respondent's Exhibit 3, Glick report at 8. While Dr. Glick rejected the possibility that wearing properly-fitted military boots aggravated Complainant's pre-existing foot problems, he speculated that improperly-fitting footwear and/or prolonged standing, walking, and stair climbing could have contributed to Complainant's impairment. Dr. Glick described Complainant's subjective impairment as "vastly out of proportion" to the actual severity of Complainant's deformities. Id. Dr. Glick expressed the opinion that with proper orthotic management and shoes, "there is no objective support for the notion that [Complainant] would be totally disabled from the usual and customary activities of a Correctional Officer." Id. at 8-9. I consider Dr. Glick's analysis to be more persuasive than that offered by Orthopedic Surgeon Dr. Roland R. Caron, hired by Complainant in regard to an industrial accident claim in 2005. According to Dr. Caron, Complainant was incapacitated from performing as a correction officer

as a result of wearing military-style boots at work. Respondent's Exhibit 3, Caron report at 2.

6. Respondent has a Temporary Modified Work Program ("TMWP") policy, also known as "light" or "modified" duty. Respondent's Exhibit 5; Complainant's Exhibit 4, Article 28. The policy allows employees to return to work on a temporary, modified-duty basis following a work-related injury, if the employee submits a medical report documenting the need for a modified work schedule for a period not to exceed 120 days, with a possible 60-day extension. In order to qualify for the policy, an employee must be capable of incidental contact with inmates. Id. The designated modified-duty posts at MCI-Shirley consist of the pedestrian trap, the SMU Control Room, and the facility's towers. Employees assigned to tower positions make observations of activities below while sitting or standing; employees assigned to the pedestrian trap ensure that people passing through the trap have appropriate credentials; and employees assigned to the SMU control room hand out equipment. Control room work may be performed while sitting, although employees assigned to the control room must ascend and descend stairs to access the room.
7. If sufficient light-duty positions are available, the positions are also made available to employees with non-work-related injuries of a temporary nature who are capable of performing restricted work, provided, however, that light duty assignments for non-work-related injuries are rescinded if the assignments are needed for employees with work-related injuries. Respondent's Exhibit 5. Respondent's Workers' compensation Division handles requests for TMWP

assignments under the supervision of Paul Broskie, Respondent's Workers' compensation Supervisor at MCI-Shirley.

8. Complainant was granted a light-duty assignment for 120 days (May 14, 2003 until September 14, 2003) based on medical information supplied by Complainant's primary care physician, Dr. Michael Sheehy, MD. Dr. Sheehy asserted that Complainant had developed problems with his feet related to diabetes. Joint Exhibit 3. Complainant's temporary assignment limited his standing to not more than 4 ½ hours per day and his inmate interaction to "incidental" inmate contact. Id.
9. Complainant was granted a second light-duty assignment for 120 days (December 10, 2003 until April 10, 2004) based on medical information supplied by Dr. Sheehy. Joint Exhibit 4. The second temporary modified duty assignment provided for incidental inmate contact and standing or walking limited to one hour a day. Id.
10. Dr. Sheehy drafted a statement on or about January 30, 2005 which notified Respondent that Complainant was suffering from "worsening" diabetes which he described as a "chronic condition." Dr. Sheehy notified Respondent that Complainant would need a reasonable accommodation allowing him to attend medical appointments. Joint Exhibit 7. Respondent granted Complainant intermittent leave under the Family and Medical Leave Act (FMLA) and a related state policy (the Massachusetts Enhanced Family Friendly Policies and Benefits) for up to two absences per month over a six-month period (February 4, 2005 through August 3, 2005) in order to obtain medical treatment but specified that

Complainant had to make “appropriate notification to your facility” when taking intermittent medical leave. Joint Exhibit 8.

11. Under the Commonwealth’s Enhanced Family Friendly Policy, a state employee may be eligible for extended FMLA leave for up to fifty-two weeks per year. Such leave may be granted for personal incapacity, caretaking responsibilities, or for medical appointments provided that: 1) an employee taking intermittent medical leave identifies the absence as FMLA leave; 2) the absence is consistent with the purpose for which the FMLA has been granted; and 3) the employee provides advance notice of medical appointments to ensure proper shift coverage. Joint Exhibits 8 and 30.
12. On or around May 17, 2005, Complainant submitted a note from Wachusett Emergency Physicians which stated, “No work x 2 days, then light duty x 1 week. No prolonged standing. No heavy lifting greater than 20 lbs. No bending for 1 week or at least until pain free. Also excuse 5/15” Joint Exhibit 57.
13. Paul Broskie testified that he left Complainant several voicemail messages, including one on May 20, 2005, in which he informed Complainant that the Wachusett note did not satisfy the requirements for TMWP.
14. Complainant testified that he obtained a second medical note dated May 25, 2005 from podiatrist Kevin Moran, D.P.M., regarding the need for light duty for 120 days and incidental inmate contact. Complainant’s Exhibit 1.¹ Complainant testified that he turned in the note to the Superintendent’s office. The note was not present in Complainant’s personnel file during discovery. The

¹ At the public hearing, the note was marked for identification but excluded as an exhibit. After due consideration, I have decided that the document should be included in the record.

Superintendent's assistant, Desiree Monaco, testified that she may have mistakenly stapled the note to another document.

15. Complainant testified that he went to MCI-Shirley on May 30, 2005 to inquire about his eligibility for light duty. According to Complainant, Captain Quinlivan told him that he had not received a TMWP agreement from the Superintendent's office but nevertheless ordered Complainant to work a modified-duty assignment in the Special Management Unit ("SMU") Control Room that day. Contrary to Complainant's version of this event, Captain Quinlivan testified that Complainant came to work on May 30, 2005, claimed that he had been approved for light duty, and sought to perform a light-duty assignment. Captain Quinlivan testified that he allowed Complainant to work a light-duty assignment in the SMU Control Room on May 30, 2005 based on Complainant's representation that he had been approved for light duty and the impossibility of verifying Complainant's status on Memorial Day. Captain Quinlivan testified that Paul Broskie subsequently told him that Complainant had not been approved for light duty. I credit Captain Quinlivan's version of the events of May 30, 2005 over that of Complainant's version.

16. On the following day, Complainant again came to work and asked to be assigned to a tower position because his feet hurt. Respondent's Exhibit 13. Captain Quinlivan refused to assign Complainant to a tower position since the SMU Control Room position was also considered a light-duty post. Id. Complainant reported to the SMU Control Room but shortly thereafter went home sick. Id.

17. Complainant claims that he sustained a work-related injury on May 31, 2005 consisting of “Lost arch on both feet from wearing boots – ankles swelled up.” Joint Exhibit 1. Complainant did not return to work for five months, until November 1, 2005. Respondent’s Exhibit 7 at p. 9. Complainant’s claim for Workers’ compensation for the five-month period from May 31, 2005 to November 1, 2005 was initially denied by the Massachusetts Human Resource Division, but the parties subsequently executed an agreement to cover Complainant’s absence during this period pursuant to a decision by the Department of Industrial Accidents. Joint Exhibit 12; Respondent’s Exhibit 7 at p. 9.
18. Paul Broskie wrote Complainant on June 14, 2005 stating that Complainant had failed to submit adequate paperwork to qualify for a TMWP assignment because the note he submitted failed to specify how long Complainant would need modified duty and failed to state whether Complainant could have incidental inmate contact. Broskie asked for another note addressing these matters and informed Complainant that he could not return to work via modified duty until approved by the facility. Joint Exhibit 9.
19. Complainant submitted a note from his primary care physician on August 26, 2005 asking that he be allowed to wear alternative footwear rather than Department-issued boots because of diabetes, neuropathy, and foot pain. Joint Exhibit 13.
20. On or about August 29, 2005, Complainant submitted a medical document from his primary care physician stating that he was experiencing bilateral foot pain due

to diabetes, was unable to stand for “periods of time,” needed to work intermittently for an “unknown duration of time,” required weekly physical therapy, and was limited in his ability to stand. Joint Exhibit 14. In response, Karen Hetherson, Respondent’s Director of Division of Human Resources, approved thirty days of FMLA leave from August 29, 2005 through September 28, 2005. Joint Exhibit 15.

21. Despite the FMLA-approved leave, Superintendent Michael Thompson wrote Complainant that the medical evidence he submitted on August 26, 2005 for absences from June 26, 2005 through September 8, 2005 was unacceptable for failure to state that he was personally examined, for failing to provide a prognosis for return to work, and for providing illegible information. Joint Exhibit 16.
22. Complainant submitted a second note from his primary care physician on October 20, 2005 asking that Complainant be allowed to wear comfortable shoes, i.e., sneakers at work and not be required to stand for more than four hours daily because of diabetic peripheral neuropathy. Joint Exhibit 19.
23. On October 21, 2005, Respondent issued Complainant a “Confirmation of Disabled Status” certification verifying that Complainant had self-identified as an individual with a disability. Joint Exhibits 21, 24.
24. Complainant was given another four-month TMWP assignment from November 1, 2005 through March 1, 2006, with a possible one-time extension of 60 days. Joint Exhibit 22. The parties agreed that Complainant’s modified-duty post would be based on the operational needs of the facility, that Complainant would only have incidental inmate contact, that Complainant would have no prolonged

- standing or walking, that Complainant's use of stairs would be limited, and that Complainant would provide updated medical reports every thirty days. Id.; Joint Exhibit 27. Complainant was assigned to the SMU Control Room.
25. On Complainant's first day back to work, he received notice that Captain Stephen Carrier was going to conduct an investigatory interview about the events of May 30, 2005. Joint Exhibit 23. The hearing was scheduled for November 8, 2005. The Complainant testified that the hearing consisted of his giving Captain Carrier the May 25, 2005 letter from Dr. Moran. Captain Carrier testified that the hearing never took place because Complainant left MCI-Shirley on November 8, 2005, claiming sickness. Captain Carrier denies that Complainant presented a May 25, 2005 letter from Dr. Moran. Joint Exhibit 23. I believe Captain Carrier's version of the events which took place on November 8, 2005 because of his credibility as a witness and because of evidence that Complainant took 7.75 hours of sick/personal time on that day. Respondent's Exhibit 9.
26. On November 17, 2005, MCI-Shirley Superintendent Michael Thompson wrote to Complainant for clarification as to whether Complainant's need to wear athletic shoes was temporary or permanent. Joint Exhibits 13, 19 and 25. Complainant subsequently submitted another note from Dr. Sheehy dated December 19, 2005 stating that Complainant needed to wear tennis or running shoes "permanently." Complainant's Exhibit 2.
27. On January 9, 2006, Complainant was approved to wear alternative footwear. Complainant was also permitted, on a temporary basis, to refrain from standing for more than four hours daily. Joint Exhibit 27.

28. On January 18, 2006, then-CO II Mary Ellen Robinson unsuccessfully attempted to gain access to the SMU Control Room by pushing an intercom button to notify Complainant to open the exterior door. Respondent's Exhibit 12. According to Robinson, she was not admitted by Complainant, who was assigned to the room, despite pushing the button several times during a ten-minute period, making a radio transmission to announce her presence, and observing an inmate worker through the window motioning Complainant to open the door. Robinson did not receive a message from Complainant via intercom, radio transmission, or other means that the door was malfunctioning. Robinson testified that she observed two correction officers exiting the SMU Control Room by opening the exterior door shortly after she was unsuccessful in gaining admittance. Complainant testified that shortly before Lt. Robinson appeared at the SMU Control Room door, there was an electrical outage which caused the SMU exterior door and intercom to malfunction. Complainant asserts that he telephoned Sergeant Moran to report that the door was not working and to ask Sergeant Moran to notify Lt. Robinson about the problem with the door. Complainant did not draft an incident report about the alleged failure of the door to open or about the alleged loss of power at the institution. Both Captain Quinlivan and Captain Carrier consulted MCI-Shirley's maintenance reports for January 18, 2006 and determined that there were no maintenance reports concerning any power problems at the institution on that day. I do not find Complainant's version of the incident to be credible and find, instead, that it was Sergeant Moran who called Complainant to

inform him that Lt. Robinson was waiting at the door and that Complainant used an electrical problem as an excuse for deliberately failing to open the door.

29. After learning about the January 18, 2006 incident from Lt. Robinson, Captain Quinlivan, the Shift Commander on duty, telephoned Complainant in the SMU Control Room to find out what had occurred. According to the credible testimony of Captain Quinlivan and documentary evidence pertaining thereto, Complainant told the Captain to “stop harassing me” and hung up the phone. Respondent’s Exhibit 14. Captain Quinlivan attempted to call Complainant again, but Complainant refused to pick up the telephone. Id. Complainant does not dispute that he hung up the phone on Captain Quinlivan. Captain Quinlivan instructed SMU Supervisor Sergeant Moran to have Complainant report to the Captain’s Office. Captain Quinlivan then assigned Complainant for the remainder of the shift to the pedestrian trap, an assignment deemed to be a modified-duty post at MCI-Shirley. There are one or more chairs in the pedestrian trap. The assignment involves checking the credentials of individuals passing through the area. Complainant responded by going home “sick.” Id.
30. Complainant testified that he went home “sick” after notifying Sergeant Moran, early on January 18, 2006, that his feet were “killing him” and that he intended to leave work early using intermittent FMLA. Complainant’s assertion is not corroborated by Sergeant Moran. I do not credit Complainant’s allegation that he went home sick because of pain in his feet.
31. Respondent issued Complainant an “Attachment D” in regard to leaving the institution on January 18, 2006. Joint Exhibit 28. If the Department has probable

cause to believe that sick leave is being abused, the Department issues an “Attachment D” which requires that a correction officer produce medical documentation to substantiate the sick leave absence. Respondent’s Exhibits 10 and 11. One example of probable cause consists of “the use of sick leave immediately following a dispute between [a correction officer] and a supervisor.” Respondent’s Exhibit 11 at 8, 19. Complainant failed to provide any medical documentation to justify his January 18, 2006 sick leave. Joint Exhibit 31. Superintendent Michael Thompson issued Complainant a letter of reprimand in regard to the incident. Id.

32. On February 7, 2006, Complainant had two doctors’ appointments in Worcester concerning his feet. One appointment was at Fallon Clinic and the other was with New England Orthotic & Prosthetic Systems, LLC. Complainant provided notice to the facility that he was going to be using intermittent FMLA leave for his medical appointments and that he intended to return when his appointments were over. When he returned, he was handed an “Attachment A” by Captain Quinlivan for having more than five unsubstantiated sick leave absences during the first part of calendar year 2006. Joint Exhibit 29. An Attachment A requires satisfactory medical evidence for absences during a six-month period following its issuance. Captain Quinlivan testified that according to his personal calendars, Complainant had unsubstantiated absences on January 3, 7, 17, 18, 21, 30, and 31, 2006, but he acknowledged that if Complainant had identified the absences as intermittent FMLA leave, they would not have been deemed unsubstantiated.

33. On February 10, 2006, Respondent issued a letter retroactively approving Complainant for intermittent FMLA medical leave from January 6, 2006 through July 5, 2006. Joint Exhibit 30. Complainant was informed that he could use medical leave to attend monthly appointments for treatment of his medical condition and for periods of incapacity related to his condition but was instructed to submit, in advance, a schedule of appointments to his supervisor, if known, to ensure proper shift coverage and to make “appropriate notification to your facility” when absent from work and “state specifically that it is intermittent FMLA leave that you are using.” Id. Neither Complainant nor Captain Quinlivan knew about the intermittent FMLA approval until February 10, 2006.
34. Complainant’s modified-duty assignment ended on March 2, 2006. On March 6, 2006, Captain Quinlivan notified Complainant that he would need to resume his normal duties. Complainant went home “sick” and filed an industrial accident claim on the following day. Respondent’s Exhibit 15. The last day that Complainant physically reported to work at the DOC was March 6, 2006.
35. During the next fifteen months, Complainant was granted fifty-two weeks of medical leave under the Commonwealth’s Enhanced Family Friendly Benefits (March 6, 2006 through March 6, 2007) and an additional twelve weeks of FMLA leave (April 1, 2007 through June 6, 2007).
36. Complainant had surgery on his left foot on April 19, 2006. Complainant provided Respondent with a May 4, 2006 note from podiatrist Dr. John Pizzuto of Merrimack Valley Podiatry regarding the surgery. The note projected a recovery period of four to six weeks. Joint Exhibit 33. On June 27, 2006, Superintendent

Thompson reminded Complainant that he had neither returned to work nor submitted a request for a leave extension. Joint Exhibit 34. Complainant subsequently submitted an extension request but Respondent deemed it incomplete. Joint Exhibit 35. Complainant was sent notice by Respondent that his leave was being converted to sick leave and would be subject to the requirement of providing medical documentation every thirty days. Joint Exhibit 36. Complainant subsequently submitted information about his surgery in the form of a "Certification of Health Care Provider" from Merrimack Valley Podiatry dated August 11, 2006. Based on the Certification, Respondent approved Complainant's extension request for the period from August 21, 2006 through September 7, 2006. Joint Exhibit 37.

37. Complainant next submitted a request for FMLA from September 6, 2006 through March 6, 2007 relative to surgery on his right foot. The leave request was initially rejected on September 15, 2006 for omitting the anticipated surgery date and the expected period of incapacity. Joint Exhibit 38. The leave was subsequently approved for a four-month period from September 7, 2006 through January 4, 2007 after Complainant submitted additional medical information from Dr. Pizzuto identifying Complainant's surgery date as October 5, 2006 and stating that Complainant would be incapacitated for approximately three to four months. Joint Exhibits 39, 40. On October 18, 2006, Superintendent Thompson notified Complainant that he would be required to submit documentation every thirty days from his physician, but there is no evidence that Complainant did so. Superintendent Thompson testified that the request was sent in error because the

- Department had already approved the FMLA leave through January 4, 2007.
- Joint Exhibit 41. On January 11, 2007, Complainant's medical leave was extended from January 5, 2007 through March 31, 2007. Joint Exhibit 42.
38. While Complainant was on medical leave, he was observed smoking outside his residence by a private investigator. His pay was suspended for thirty days for using a tobacco product.
39. On or around April 18, 2007, Complainant's medical leave under the FMLA and the Enhanced Family Friendly Benefits Act was extended for the last time from April 1, 2007 through June 6, 2007. Joint Exhibit 52.
40. On May 7, 2007, Complainant submitted a request for an accommodation supported by medical documentation from Dr. Pizzuto dated May 7, 2007. Joint Exhibit. Dr. Pizzuto determined that Complainant could return to duty on June 6, 2007 with the following work restrictions: no inmate contact, no repetitive ambulation or stair usage during the day, and no "control post" assignments. Dr. Pizzuto recommended either a stationary tower or perimeter driving position. Joint Exhibits 46-48, 58.
41. On May 16, 2007, Respondent wrote to Complainant's attorney to inform her that Dr. Pizzuto's May 7, 2007 letter did not meet the criteria for light ("TMWP") duty because of the requirement of no inmate contact and a "lack of an estimated TMWP duration." Joint Exhibits 46, 52.
42. On May 31, 2007, Dr. Pizzuto wrote a revised letter stating that Complainant could return to work on June 6, 2007 with restrictions consisting of permanent,

- limited repetitive ambulation and stair usage and recommended a stationary tower position or a perimeter driving position. Respondent's Exhibit 17.
43. On June 6, 2007, Complainant's medical leave expired. Joint Exhibits 44, 52. Respondent informed Complainant that he had to return to full duty or face separation from service or retirement unless he could perform "alternatives" to his work duties as a reasonable accommodation authorized by Respondent's Office of Affirmative Action. Joint Exhibit 45.
44. On or around August 9, 2007, Dr. Pizzuto wrote two letters on behalf of Complainant. One stated that Complainant needed "limited repetitive ambulation" and "incidental inmate contact" for 60 days and recommended that he be assigned a stationary tower position or a perimeter driving position. Joint Exhibit 55. The other version of the letter stated that Complainant needed "limited repetitive ambulation and incidental inmate contact for 120 days" and recommended that he be assigned a stationary tower position or a perimeter driving position. Respondent's Exhibit 19.
45. The Union and MCI-Shirley Deputy Superintendent for Operations/Security Alvin Notice agreed that Complainant could be accommodated with a TMWP for 60 days in the Control Room or in one of three tower posts. Joint Exhibit 50; Complainant's Exhibit 5.
46. Despite the agreement of the Union and Notice about granting Complainant additional TMWP, Associate Commissioner Ronald Duval denied Complainant's request for a 60-day modified duty assignment based on the recommendation of Respondent's Workers' compensation Division. Joint Exhibit 51; Testimony of

- Paul Broskie. Complainant was informed of the denial per letter of September 14, 2007. Id.
47. Complainant received \$6,500.00 in assistance from the City of Leominster Department of Veterans' Services for the period from November of 2006 through June of 2007, but the benefits were subject to reimbursement. Joint Exhibit 59.
48. While Complainant was out on medical leave in February of 2007, Respondent applied to the State Board of Retirement for Complainant to receive an Involuntary Accidental Disability Retirement.
49. On October 9, 2007, Respondent notified Complainant that it was convening a Commissioner's hearing to pursue Complainant's separation from service for inability to perform the essential job functions. Joint Exhibit 52.
50. On January 30, 2008, the State Board of Retirement approved Complainant for an ordinary disability retirement but disapproved him for accidental disability retirement. Respondent's Exhibit 3. Prior to his retirement, Complainant received gross bi-weekly base pay of \$2,319.33 (\$60,302.59 per year), per diem roll-call pay of \$7.25 (\$1,885.00 per year), and longevity pay of \$728.00 per year. Joint Exhibit 59.
51. Complainant received gross retirement benefits in 2008 of \$48,129.39. Joint Exhibit 59. In 2009, Complainant received gross retirement benefits through July of 2009 in the amount of \$19,075.88 with a 3% COLA of \$2,400.04, which translates into annual gross retirement benefits of approximately \$33,000.00. Joint Exhibit 59.

52. Complainant's claim for industrial accident leave benefits arising out of his alleged May 31, 2005 injury was decided by an Administrative Judge of the Department of Industrial Accidents on April 15, 2008. Respondent's Exhibit 7. The Administrative Judge concluded that Complainant had developed painful calluses as a result of wearing improperly fitting footwear, that by May 31, 2005 he was disabled from performing his regular job duties, and that his medical disability was "sufficiently identified with his employment" to justify an award for periods in 2006 and 2007 until the commencement of his ordinary disability pension at 50% of his average weekly wage per G.L. c. 32, section 6.
53. Complainant obtained mental health treatment from the Department of Veterans' Affairs Medical Center between January of 2006 and April of 2008. Complainant's Exhibit 3. The treatment notes discuss work-related issues as well as domestic matters. Id. Complainant's treatment notes indicate that in the latter part of 2007, he recommenced psychiatric and psychotherapeutic treatment which he had terminated in early 2007. Id. In October of 2007, Complainant described himself as "anxious" and "irritable," as "yelling at his son and then feeling bad," as having sleep difficulties, and as experiencing "feelings of anger and rage toward his ... employer." Id. In November of 2007, Complainant was evaluated by psychiatrist Michael Krieger, M.D. for a major depressive disorder. Id. At that time, Complainant described himself as "more mellow and happier than before" and as "empowered" as a result of receiving a probable cause ruling on his discrimination claim. Id. Complainant's medications at the time included Fluoxetine, Bupropion, and Trazodone for depression and insomnia. Id. On

November 26, 2007, Complainant's therapy notes record Complainant as being "upset" and "angry" with Respondent but also talking about his "struggles" with his teenage son. Id. A subsequent note by Dr. Krieger dated April 11, 2008 references an improvement in Complainant's situation as a result of being on paid retirement but also references Complainant's ongoing problems with his son, his impatience regarding the outcome of his litigation against Respondent, his depressive symptoms, and his trouble sleeping.

54. Complainant first began to look for alternative employment in January of 2009. He testified that he did not submit any job applications before January of 2009 because he "had other things going on -- personal things -- things with my son" and needed "to get [my] life together." Between January of 2009 and the beginning of the public hearing in June of 2009, Complainant applied for "one or two" jobs, including one at Eliot Community Human Services, Inc. where he was hired to work with juveniles, forty hours per week, at \$11.83 per hour. Complainant earned \$14, 272.00 from the commencement of his employment until a "final paycheck" on July 31, 2009 when he was presumably laid off. Joint Exhibit 59, Affidavit of Anthony Luster, Exhibit C. Dr. Krieger quotes Complainant in a medical note of April 11, 2008 as acknowledging that he had other job opportunities which he did not act on because of the pendency of his Workers' Compensation and MCAD cases. Id.

III. CONCLUSIONS OF LAW

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 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.

There is undisputed evidence that Complainant is impaired in the major activity of walking due to chronic pain in both feet caused as a result of diabetic neuropathy complicated by one or more of the following factors: fallen arches, calluses, bunions, hammertoes, the extensive walking and standing requirements of his job, and the requirement of wearing military-style boots at work. On October 31, 2005, Respondent issued a document attesting to Complainant’s disabled status and granting Complainant “affirmative action protected status.” Joint Exhibit 21.² In 2006, Complainant’s foot pain became so intense that he had surgeries on both feet to relieve his symptoms. While the surgeries do not appear to have alleviated his pain, the fact that Complainant sought such treatment attests to the veracity of his symptoms. Complainant’s chronic pain limits his ability to engage in the major life activity of walking. See Shedlock v. Department of Correction, 442 Mass. 844, 849-852 (2004) (jury could conclude that inmate who used a cane to walk and experienced chronic pain was disabled with respect to the major life activity of walking); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (recognizing as major life activities such basic abilities as walking, seeing, hearing, and, in dicta, working in a broad range of jobs); Sleeper v. New England Mutual

² That portion of Respondent’s brief which asserts that Complainant is not disabled because he is capable of working in other jobs appears to contradict its 2005 issuance of the self-described “Confirmation of Disabled Status.”

Life Insurance Company, Inc., 24 MDLR 55 (2002) (complainant considered to be handicapped where suffering from chronic, debilitating pain for which she was taking pain and anti-inflammation medication); Kane v. Suffolk County Sheriff's Department, 20 MDLR 221 (1998) (correction officer with orthopedic impairment causing constant pain and limiting his ability to work an entire class of jobs is considered handicapped).

Complainant, moreover, received Workers' Compensation as a result of his foot pain, followed by accidental disability retirement in 2008. As a recipient of disability payments, Complainant is entitled to a rebuttable presumption of qualified handicapped status under G.L.c.152, section 75B (1).³ See Gilman v. C&S Wholesale Grocers, Inc., 170 F.Supp.2d 77, 84 (D. Mass. 2001) (individuals suffering work-related injuries deemed qualified handicapped persons under chapter 151B for as long as their status under Workers' Compensation law influences their treatment by others); Patel v. Everett Industries, 18 MDLR 26,28 (1996) (complainant who sustained injury for which she received Workers' Compensation is presumed to be handicapped pursuant to c. 152, sec. 75B); Joubert v. United Parcel Service, Inc., 22 MDLR 253 (2000) (Workers' Compensation settlement entitles Complainant to presumption of qualified handicap status under chapter 152); but see Hatch v. Townsend Oil Co. Inc., 2009 WL 637243 (Mass. Super. Jan. 16, 2009) (Workers' Compensation claimants should have their claims

³ The receipt of disability benefits does not preclude Complainant from raising the issue of handicap discrimination because the purpose and standards of the applicable laws are different. See Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 798 (1999) (applying for and receiving disability benefits does not automatically prevent the recipient from proving a claim of disability discrimination under the ADA); Russell v. Cooly Dickinson Hospital, 437 Mass 443 (2002) (pursuit and receipt of disability benefits based on assertion of total disability does not automatically estop plaintiff from pursuing an action for employment discrimination); Labonte v. Hutchins and Wheeler, 424 Mass. 813, 819-20 (1996) (application and receipt of long-term disability benefits is not per se bar to claim for handicap discrimination). The laws and regulations governing Workers' Compensation and other disability benefits determine whether a claimant is disabled for the purposes of those laws, but they do not address whether the employee could work with a reasonable accommodation. Id. at 803.

under the Massachusetts discrimination statute analyzed in the same manner as other claimants). In sum, Complainant's chronic foot pain, which compromises his ability to walk and work and resulted in two surgeries in 2006, is sufficient to render him a handicapped individual.

Complainant asserts that, notwithstanding his chronic foot pain, he would have been able to perform the essential functions of a correction officer position if granted the reasonable accommodation of an ongoing light-duty assignment with limitations on walking, standing, and inmate contact, and with time off for regular medical appointments. In support of this assertion, Complainant points to his long career with the DOC prior to the onset of debilitating foot pain in 2005. I accept this assertion for the purpose of analyzing Complainant's claims that he was denied reasonable accommodations, harassed with repetitious demands for medical documentation, and terminated from his employment on account of his handicapped status.

To state a case of discrimination based on a failure to accommodate, Complainant must prove that he is a qualified handicapped person capable of performing the essential functions of his job, that he requested a reasonable accommodation, and that he was prevented from performing his job because his employer failed to reasonably accommodate the limitations associated with his handicap. See Fiumara v. Harvard University, 526 F. Supp. 2d 150 (D. Mass. 2007), *aff'd* May 1, 2009 (unpublished); 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); Kane v Suffolk County Sheriff's Department, 20 MDLR 221 (1998). 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). An employer need not make an accommodation if it would impose an undue hardship on the operation of its business, such as an action requiring significant difficulty or expense when considered in light of the financial resources of the employer. See Mazeikus, 22 MDLR at 68. It is the employer who bears the burden of persuasion on whether a proposed accommodation would impose an undue hardship. See id.

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 20 MDLR Appendix (1998); Mammone v. President & Fellows of Harvard College, 446 Mass. 657, 670 n.25 (2006); Shedlock v. Department of Correction, 442 Mass. 844, 856 n. 8 (2004); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 644 (2004). Complainant made repeated requests for modified duty, self-identifying as an individual with a chronic disability and describing his difficulties walking and standing. Complainant and his doctors requested that Complainant be indefinitely excused from inmate contact, walking, and stair usage. See e.g., Joint 7; Joint Exhibit 26 (attachment); Exhibit 58. Complainant and his doctors also requested modified duty for specific periods of time in an attempt to respond to the TMWP programmatic requirements imposed by Respondent. Compare Joint Exhibit 55 with Joint Exhibits 3, 49, 58.

The interactive process requires that an employee inform the employer of his/her qualified handicap and make a request for a reasonable accommodation. Once that obligation is fulfilled, the interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee. It is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). A unilateral decision to cease accommodating an employee's disability has been held to be discriminatory. See MBTA v. MCAD, 450 Mass. 327, 341-342, n.16 (2008) *citing* Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648-649 (2004). Notwithstanding these requirements, Associate Commissioner Ronald Duval denied Complainant's request for an extension of modified duty on September 14, 2007, even though Deputy Superintendent Alvin Notice determined that MCI Shirley could accommodate Complainant for an additional TMWP in the control room or in a tower post.

An employer is not obligated to accommodate a handicapped employee by transferring the employee to a new or different position, by providing an indefinite medical leave, or by offering an accommodation that is inconsistent with the contractual rights of other workers under a collective bargaining agreement. See Fiumara v. Harvard University, 526 F. Supp. 2d 150 (D. Mass. 2007) *aff'd* May 1, 2009 (unpublished). In Fiumara, the court rejected the claim that a reasonable accommodation consisted of allowing an injured bus driver employed by Harvard University to drive a van. It did so on the basis that the van position was different from the employee's former bus driver position insofar as the latter position required a CDL license whereas the former did not,

that Harvard was not required to provide an accommodation that would undermine the contractual rights of other workers, and that Harvard was under no obligation to provide an open-ended or indefinite extension of medical leave. See also Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443, 454-456 (2002) (employer need not create a new job or grant an indefinite medical leave as an accommodation).

Applying the foregoing analysis to the present case is complicated by the fact that the position of correction officer encompasses a variety of assignments and posts. In a prior case where the DOC refused to accommodate a disabled correction counselor by transferring her from an assignment in one location where she had inmate contact to a different assignment in another location where she could perform clerical work without inmate contact, the Appeals Court remanded the case for an evidentiary proceeding relative to whether the positions were sufficiently similar to require the transfer as an accommodation. See Johansson v. MCAD, Appeals Court, No. 2005-P-1367, p.7 (2007), Rescript Judgment per Rule 1:28 reversing Superior Court and remanding case to MCAD) *citing Kane v. Suffolk County Sheriff's Dept.*, 20 MDLR 135, 143 (1998) (recognizing that job duties of correction officer are flexible and varied enough to find modified duty assignment for disabled officer who required little to no inmate contact).

The credible evidence produced at public hearing in this case indicates that most correction officer positions involve inmate contact, walking, and standing but that these attributes are not the primary features of each and every correction officer assignment. Correction officer assignments to the SMU control room, the towers, and the perimeter are designated as light duty positions involving less walking and standing than other correction officer assignments. It is possible that an interactive process might have

uncovered an assignment with limited walking and inmate contact to which Complainant could have been indefinitely assigned. See D'Ambrosio v. MBTA, 23 MDLR 81 (2001) *citing Mazeikis v. Northwest Airlines*, 22 MDLR 63, 68-69 (2000) (interactive process involves discussion of nature and scope of requested accommodation and an assessment of its feasibility).

The possibility that Complainant could have successfully performed the duties of a correction officer for an indefinite period on a light-duty basis without undue hardship to Respondent was never explored, however. Instead of dialoguing with Complainant about such a possibility, Respondent simply provided Complainant with a series of temporary, modified work assignments ("TMWPs") which Respondent deemed to fulfill its obligations. Such assignments were designed to address short-term job modifications necessitated by industrial accidents whereas Complainant's foot problems were neither short-term nor caused by an industrial accident. The medical evidence establishes that Complainant's foot pain was chronic and, although wearing military-style boots may have exacerbated his condition, the primary sources of his pain were his diabetes and structural problems with his feet. Granting Complainant "TMWPs" only delayed confronting the fact that Complainant could not perform as a correction officer without an accommodation which indefinitely limited his walking, minimized his inmate contact, and provided for regular doctor visits.

Had the parties engaged in an interactive process, they would have been forced to confront the question of whether a light-duty assignment could have been fashioned for Complainant as an ongoing accommodation to his disability. In an organization with a unionized workforce, such a question frequently juxtaposes the needs of handicapped

individuals against the seniority rights of non-disabled employees. See Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443, 454 (2002). In this case, by contrast, some sedentary correction officer posts in the tower, control room, and perimeter are set aside for temporary light duty assignments and are acknowledged by applicable collective bargaining agreements as exempt from the seniority bids of rank and file union workers.

While the DOC grants employees with on-the-job injuries first priority for such assignments, they are provided, if available, to other temporarily disabled employees as well. Complainant benefitted from such light-duty posts between 2003 and 2006 but was denied light duty in 2007. The evidence indicates that the DOC stopped accommodating Complainant's chronic disability in 2007, not because of the operational needs of the facility, but because of its policy limiting light duty to 180 days plus a one-time 60-day extension.

In denying Complainant a light-duty post in 2007, the DOC failed to explain why such positions could not be used to satisfy the needs of permanently-disabled employees such as Complainant as well as employees sustaining temporary, on-the-job injuries. There may be valid reasons why Respondent could not accommodate Complainant, but the fact remains that Respondent engaged in no analysis about whether such an accommodation would have caused it undue hardship. The factors deemed relevant in determining undue hardship include: 1) the overall size of the employer's business as measured by the number of employees, number and type of facilities, and size of its budget; 2) the type of the employer's operation, including the composition and structure of the employer's workforce; and 3) the nature and costs of the accommodation needed. MCAD Handicap Guidelines at II B. There is no evidence in the record that these factors

were considered as part of Respondent's decision to cease accommodating Complainant's disability. Respondent failed to produce at public hearing any credible evidence of the number and type of light duty positions that were available at MCI-Shirley in 2007 or the number of injured and disabled employees who needed them. Without such evidence, there is no basis for concluding that Respondent would have sustained undue hardship had it granted Complainant an ongoing accommodation in 2007. The lack of such evidence undermines Respondent's position. See Gracia v. Northeastern University, 31 MDLR 1 (2009) *citing* Garcia-Alaya v. Lederle Parenterals, Inc., 212 F. 3d 638, 647 (1st Cir. 2000) (rigid six-month disability leave policy constitutes a "per se" policy which violates G.L. c. 151B sec. 4(16) because it lacks flexibility to respond to individual circumstances).

The DOC similarly fails to address the availability of its so-called "Superintendent-Pick Positions," also exempted from unionized bidding procedures and filled by facility heads on a discretionary basis. Complainant's Exhibit 4, p. 177. There is no evidence in the record which explains why a reasonable accommodation could not have been fashioned from this source without adversely impacting the seniority rights of union employee or those who sustained temporary injuries on the job.

Based on the foregoing analysis, I conclude that Complainant was a qualified handicapped person who was potentially capable of performing the essential functions of his job who was not given the opportunity to participate in an interactive process designed to fashion a reasonable accommodation. Instead, he was given light-duty positions for finite periods of time, premised on the erroneous assumption that he only had the rights of an employee who sustained a temporary, work-related injury. This

assumption denied Complainant the right to an interactive process which might have resulted in a reasonable accommodation assigning Complainant to a job he could have performed on an indefinite basis. The failure to do so denied Complainant a process to which he was entitled and effectively ended his career with the DOC.

Complainant also asserts that he was harassed by supervisors on account of his handicap insofar as they subjected him to persistent monitoring and repeated demands for medical documentation and gave him unwarranted discipline. The MCAD recognizes a cause of action for harassment based on handicap status. See Sleeper v. New England Mutual Life Insurance Company, 24 MDLR 55 (2002) (supervisor's demand that complainant document every minute away from her desk caused her anxiety and stress and constituted harassment based on handicap status in violation of G.L. c.151B).

The credible evidence in the record, to some extent, supports Complainant's contention that supervisors bombarded him with a barrage of repetitive inquiries about doctors' appointments, time off the job, and the need to wear sneakers; that administrators lost valuable paperwork related to Complainant's handicap status; and that supervisors imposed disciplinary status on Complainant for failing to conform to numerous administrative requirements. On the other hand, the evidence also shows that Respondent granted Complainant light duty on three occasions between May of 2003 and March of 2006 and allowed Complainant intermittent FMLA leave on five extended occasions between February of 2005 and June of 2007. To the extent that the parties presented different versions of the events leading to Complainant's discipline on two occasions, the credible evidence favors Respondent's versions of these events. Thus, the record is mixed with respect to Respondent's treatment of Complainant as he struggled to

deal with his physical challenges. In totality, the evidence provides an insufficient basis on which to conclude that Respondent harassed Complainant on the basis of his disabled status.

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 suffered as a direct of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Lost Wages

According to MCAD records, Complainant filed his charge of discrimination on January 24, 2007. Pursuant to G.L. c. 151B, sec. 5, the Commission has jurisdiction over alleged acts of discrimination occurring 300 or less prior to the charge. During the 300 days prior to the filing of Complainant's charge, Complainant had surgeries on both feet and was out of work on Enhanced Family Friendly Leave. The facts do not support a claim for lost wages during this period because there is no credible evidence that Complainant was capable of performing the essential functions of Correction Officer I during this period of time. It was not until May 31, 2007 that Dr. Pizzuto wrote to the DOC on behalf of Complainant and stated that Complainant could return to work in June of 2007, provided he was given an assignment which limited his walking and stair usage such as a tower or perimeter driving position. Notwithstanding this letter, Complainant does not assert a lost wage claim prior to January 30, 2008, at which time he was approved for ordinary disability retirement by the State Board of Retirement. Even if he

had asserted a claim for wages prior to January 30, 2008, the evidence in the record is insufficient to determine Complainant's net loss of income between June of 2007 and January 30, 2008. See Joint Exhibit 59; Respondent Exhibits 6 and 7.

The eighteen-month period between Complainant's disability retirement on January 30, 2008 and the commencement of the public hearing on June 8, 2009 must also be examined in regard to a claim for back pay damages. See Stephen v. SPS New England, Inc., 27 MDLR 249, 250 (2005) (lost back pay runs to the date of the public hearing); Williams v. New Bedford Free Public Library, 24 MDLR 171, 172 (2002) (same). Complainant concedes that he made minimal efforts to obtain alternative employment after his retirement from the DOC, yet he was hired by the first employer to whom he submitted an application in January of 2009. Complainant remained at this job until July of 2009 when he was apparently laid off. Had Complainant made more energetic efforts to find other work prior to 2009, it appears that his income from such work, together with his disability retirement income, would have approximated what he earned as a correction officer. Based on the foregoing, I conclude that Complainant is not entitled to back pay damages because he did not fulfill his duty to mitigate damages by making reasonable efforts to secure other employment, but, rather, was recalcitrant in looking for other jobs. See Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 125-126 (2nd Cir. 1996) *quoting* Clarke v. Frank, 960 F 2d 1146, 1152 (2nd Cir. 1992) (plaintiff required to use "reasonable diligence" in finding suitable employment).

An award of front pay is similarly unwarranted because Complainant receives 50% of his former salary as retirement income and is capable of augmenting this sum with other employment. See Beaupre v. Smith and Assoc., 50 Mass. App. Ct 480 (2000)

(front pay based on ability to duplicate what was previously earned). Awards of front pay are speculative in nature and are generally granted only when the discriminatory act occurs near an individual's retirement date. See Fitzpatrick v. Boston Police Department, 18 MDLR 29, 30 (1996), but see Haddad v. Wal-Mart, SJC - 10261 (February 5, 2009) (recognizing the appropriateness of lengthy front pay awards under G. L. c. 151B where comparable employment is difficult to obtain). The discriminatory acts in this case occurred when Complainant was only forty-four years old and in his sixteenth year with the DOC. Under all the circumstances, Complainant has not made out a compelling case for front pay damages.

Emotional Distress Damages

An award of emotional distress damages 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 the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004).

Complainant testified sincerely and credibly about his emotional distress. According to Complainant, he became stressed-out and depressed as a result of what he perceived to be Respondent's ongoing harassment and as a result of Respondent's not allowing him to return to work in 2007. In regard to the first source of distress, Complainant is not entitled to compensation related to alleged harassment because he did not prevail on this claim. He is, however, entitled to compensation for emotional distress related to being denied the opportunity to return to work.

The evidence establishes that Complainant sought psychological counseling to cope with his anger and took prescription anti-depressants. Complainant sought treatment for sexual dysfunction which he asserts was caused by stress at the hands of the DOC. Complainant's treatment notes from the Department of Veterans' Affairs Medical Center indicate that in the latter part of 2007, he re-commenced psychiatric and psychotherapeutic treatment which he had terminated in early 2007. Complainant's Exhibit 3. Treatment notes from October of 2007 quote Complainant as feeling "anxious" and "irritable," as "yelling at his son and then feeling bad," as having sleep difficulties, and as experiencing "feelings of anger and rage toward his ... employer." Id. In November of 2007, Complainant was evaluated by psychiatrist Michael Krieger, M.D. for a major depressive disorder. Id. At that time, Complainant described himself as "empowered" as a result of receiving a probable cause ruling on his discrimination claim, but taking Fluoxetine, Bupropion, and Trazodone for depression and insomnia. Id. On November 26, 2007, Complainant's therapy notes record Complainant as being "upset" and "angry" with Respondent and as having "struggles" with his teenage son. Id. A subsequent note by Dr. Krieger dated April 11, 2008 references an improvement in Complainant's situation as a result of being on paid retirement but also references Complainant's ongoing problems with his son, Complainant's impatience regarding the outcome of his litigation against Respondent, Complainant's depressive symptoms, and his trouble sleeping.

Complainant's testimony and treatment notes establish that his emotional distress was real and debilitating, but that it derived, in large part, from his belief that he was the subject of harassment at the hands of Respondent, which I find to be factually and legally

unsustainable. Complainant also experienced emotional distress resulting from his unstable relationship with his son, who lived with Complainant for a period of time but thereafter returned to the custody of his mother. Although Complainant blames Respondent for the loss of custody over his son, I conclude that Complainant's anger over perceived harassment by Respondent and the loss of custody of his son are independent sources of emotional distress which must be distinguished from Respondent's failure to accommodate Complainant's disability. Based on the foregoing, I conclude that Complainant is entitled to \$40,000.00 in emotional distress damages.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to immediately cease and desist from further acts of discrimination. In addition, Respondent is ordered to:

- (1) pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$40,000.00 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; and
- (2) Within one hundred twenty (120) days of the receipt of this decision, Respondent shall conduct a training session concerning handicap discrimination for the following members of the DOC workforce employed at MCI-Shirley and Industries Drive, Norfolk, MA, 02056: 1) all supervisors, including, but not limited to, Shift Commanders, Captains, Lieutenants, Deputy Superintendent,

and Superintendent and 2) all administrators in Respondent's Human Resources Department, Workers Compensation Department, and Affirmative Action Department. Respondent shall use a trainer is provided by the Commission or a graduate of the MCAD's certified "Train the Trainer" course. Respondent shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training.

- (3) Respondent shall repeat the training session at least one time for any supervisors and administrators who fail to attend the original training and for new supervisors and administrators who are hired or promoted after the date of the initial training session.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. 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 1st day of February, 2010.

Betty E. Waxman, Esq.,
Hearing Officer

