

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and GARY R. SROKA,
Complainants

v.

Docket No. 07 SEM 03324

CHICOPEE SCHOOL DEPARTMENT,
Respondent

Appearances: Matthew D. Jones, Esq., for Complainant
Gordon Quinn, Esq. and John Talbot Jr., Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 17, 2007, Gary R. Sroka (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Chicopee School Department (“Respondent”) discriminated against him on the basis of disability, i.e., Bi-Polar II Disorder, in violation of G.L.c.151B, sec. 4(16) when it subjected him to unreasonable treatment on May 22 and 23, 2007, denied him a reasonable accommodation, and terminated his employment on June 21, 2007.

On May 8, 2008, the MCAD issued a probable cause finding and on August 13, 2009, certified the case for public hearing.

A public hearing was conducted on April 26 and 27, 2010. The parties introduced twenty-two (22) joint exhibits into evidence. Complainant introduced one (1) exhibit and Respondent introduced one (1) additional exhibit and a CD containing video material.

The following individuals testified at the public hearing: Complainant, Donna Sroka,

Frederick M. Doherty, Dr. Bennett Gaev, Robb Strycharz, Roland Joyal, and Stephen Nembirkow.

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 was hired by Principal Roland Joyal as a full-time teacher at Chicopee High School in the fall of 2000 to teach special education. Complainant taught in that capacity for one year. After his first year teaching, Complainant requested and Joyal granted him a transfer into the Social Studies Department. Complainant has bachelor's and master's degrees in education. He is certified to teach social studies in grades 9 through 12 and is licensed in moderate special needs for grades 5 through 12.
2. At the end of the 2004-2005 school year, Complainant sought and was granted a six or seven week medical leave of absence following a disciplinary incident which led to his transfer back to a special education class. Transcript I, p. 171; Joint Exhibit 16 (letter of November 5, 2007). Complainant testified that he asked for the leave in order to obtain treatment for depression. During the leave, Complainant was prescribed Prozac by his primary care physician for the treatment of depressive symptoms. Transcript I, pp. 43, 81-82, 172.

3. Complainant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in 1997. Transcript I, pp. 43-44; Joint Exhibit 19. As an accommodation for this condition, Complainant requested and was granted an extra day each semester to prepare grades. Transcript I, p. 46, 81; Joint Exhibits 19 & 20. Complainant also requested more frequent formal performance evaluations by his Department Supervisor. Transcript I, p. 46; Joint Exhibit 19. That request was denied, but Principal Joyal stated that the Department Supervisor would meet with Complainant on a more frequent but informal basis to discuss performance. Transcript I, pp. 46, 169; Exhibit 20.
4. In mid-May of 2007, Chicopee High School announced that it was going to sponsor a military career day on Monday, May 21, 2007. Originally, students and faculty were required to attend, but the mandatory attendance policy was changed to a voluntary attendance policy before the event took place. Transcript II, p. 74. Complainant testified that several days prior to the event, he felt an “urgent” need to make known his dissatisfaction with the event and to engage students and other faculty in a discussion about the event. Transcript I, p. 49. Complainant suggested that students and faculty wear black on May 21st in order to “make a statement.” Transcript I, p. 51.
5. On Friday, May 18, 2007, Complainant spoke to students about protesting the military career day. Over the ensuing weekend, he thought about how to protest the career fair. Complainant and a friend, Rob Strycharz, emailed the Mayor’s office, Chicopee High School Principal Roland Joyal, the Superintendent, and other individuals to express dissatisfaction with the upcoming event and to ask that

it be cancelled. Transcript I, pp. 53, 61. Complainant described his energy level that weekend as increasing “exponentially.” Id. Complainant described himself as manic, very agitated, unable to sleep, and unable to eat. Transcript I, p. 54, 56. Strycharz testified that he joked over that weekend that Complainant sounded like a manic depressive in a manic state. Transcript II, p. 63.

6. Complainant went to an Army Navy store on Saturday, May 19, 2007 to purchase a uniform to wear at the career day for “comic relief.” Transcript I, p. 55. On Sunday, May 20, 2007, he made signs for a demonstration. Transcript I, p. 174.
7. Complainant’s wife testified that over the weekend, Complainant did not sleep, talked in a “racing” and argumentative manner, displayed high energy, and didn’t listen to other perspectives. Transcript I, pp. 220, 254.
8. When Complainant went to school on Monday, May 21, 2007, he discovered that someone had defaced the school with graffiti. The graffiti was described by Principal Roland Joyal as circling the entire building. It included antimilitary and antiwar signs in red and black paint. Transcript II, pp. 99-100.
9. Complainant was suspicious that the culprit was a Holyoke Community College student, Barry Scott, with whom he had conferred over the weekend.
10. During first period, Complainant attended a meeting with Principal Joyal and others about the graffiti. Transcript I, pp. 59, 175. Joyal testified that earlier that morning, he had received an email from Complainant expressing his opposition to the military career day. As a result, Joyal wanted to ask Complainant about the anti-military graffiti. Transcript II, p. 102. The meeting started around 8:00 a.m., just before the start of the military career day fair. Transcript II, p. 101.

According to Joyal, he told Complainant that if he didn't want to go to the career fair, he didn't have to go and that someone else would take those students in his classes who wanted to go. Transcript II, p. 105, 108. Joyal testified that Complainant described his activities over the previous weekend and said that he intended to "perform guerilla theater" at the military career day. Transcript II, p. 107. According to Joyal, Complainant also said that he was disappointed at the graffiti, that he might know who did it, and that he offered a few names which Joyal turned over to the police. Transcript II, p. 109. One of the names was Barry Scott, who subsequently admitted responsibility for the graffiti.

11. As Complainant exited the meeting, he saw his wife, Donna Sroka, in the school lobby. Transcript I, p. 64. She encouraged him to go home, but Complainant refused to leave. Id. He returned to his second period class.
12. Complainant's wife testified that early Monday morning, Complainant called her from school to say that there was an emergency. She drove to Chicopee High School instead of going to work. Transcript I, p. 221. She sat in the front office until Complainant came out of the Principal's office. Complainant told her that everything was "okay." She asked him to go home, but Complainant chose to stay at work. Mrs. Sroka left the school. Transcript I, p. 222.
13. According to Complainant, by the time he reached his second period class, his students had already left for the career day event. Complainant went to his car, got his signs, and proceeded to the event. Complainant testified that he started to chant anti-war slogans very loudly for about fifteen or twenty minutes until Principal Joyal told him to go back to class. Transcript I, pp. 65-66.

14. Principal Joyal testified that within an hour of meeting with Complainant, he learned that Complainant was outside screaming, talking loudly, and using obscenities in addressing military personnel from the Army, Navy, Air Force, and Marines. Transcript II, p. 112. Joyal said that teachers, administrators, and students were getting upset at the way that Complainant was acting. Joyal testified that he “let him [Complainant] go on because ... [w]e understand people have free speech. ... But at some point it just got to be, you know, too much.” Id. According to Joyal, Complainant was wearing a military-styled coat and hat that he had purchased at an Army Navy store. Transcript II, p. 182. When Complainant took out a bongo drum, Joyal told Complainant that he was “done” and it was time to return to class, which Complainant did. Transcript II, p. 113. Before Complainant returned to the building, he took off his military-styled coat and hat and put them in his car. Transcript II, p. 182.
15. According to Complainant, when he returned to his classroom, his students were still outside except for a single student who sought academic help. Complainant testified that he tutored the student for the rest of the period. Transcript I, p. 67.
16. Complainant testified that by the end of the second period, he started to feel “extremely anxious.” Transcript I, p. 68. He called the office to say that he needed to go home. Transcript I, pp. 68, 177. According to Complainant, he was told by an office secretary that someone would be sent to cover his class so he could leave. Id.; Transcript II, p.115.

17. Principal Joyal was with the Mayor at the military fair when Complainant left school on Monday, May 21, 2007. According to Joyal, Complainant had some “choice words” for the Mayor and then left for the day. Transcript II, p. 118.
18. Complainant arrived home on Monday, May 21, 2007 at around 10:30 a.m. He testified that he encouraged Barry Scott, the individual who defaced the school, to turn himself in. Before Complainant went to bed, he notified Chicopee High School that he intended to be absent the following day. Transcript I, p. 179.
19. Complainant’s wife testified that Complainant was “really anxious,” agitated, distressed, and exhausted on Monday night but also “hyper.” Transcript I, pp. 223, 253, 256.
20. Principal Joyal testified that when he arrived at school on Tuesday, May 22, 2007, Complainant’s name appeared on the absentee list. The list indicated that Complainant had reported that he would be absent on Tuesday at 8:57 p.m. the previous night. The reason he gave was personal illness. Transcript II, p. 121.
21. During the early morning of Tuesday, May 22, 2007, Barry Scott went to Complainant’s house prior to his arraignment. Complainant decided to go to the court proceeding. When he arrived at court and saw the news media, he decided to get a sign from his car and start protesting. Complainant testified that he walked back and forth for approximately an hour, gave an interview to the press, and went inside the court for about twenty minutes. Transcript I, pp. 74-77, 180.
22. When Principal Joyal learned that Complainant was marching outside the courthouse, he drove to the court. At the court house, Joyal saw Complainant marching with a sign displaying an anti-military message and giving an interview

to the media. Transcript II, p. 123. Joyal testified that he did not consider that marching outside a courthouse and attending a legal proceeding to be a valid use of a sick day. Transcript II, p. 124.

23. Complainant testified that after he left the courthouse, he returned home, felt anxious, and alternated between periods of relaxation and agitation. Transcript I, p. 182.
24. On Wednesday morning, May 23, 2007, Complainant initially thought he would not go to school but then decided to do so. Transcript I, pp. 80-81, 184. When he arrived at school at approximately 7:00 a.m., he walked up to Principal Joyal, stood at attention, saluted and said, "Gary Sroka reporting for duty, sir" and clicked his heels. Transcript I, p. 83; Transcript II, pp. 126, 131. Complainant described himself as in a "euphoric" state. Transcript I, p. 84. Joyal described Complainant's behavior as "nothing outrageous" [just] looking for a rise out of people." Transcript II, p. 127.
25. On Wednesday, May 23, 2007, tenth graders arrived early for MCAS testing but the other classes did not arrive until later. At the start of the school day, Complainant was on hall duty. Complainant testified that while he was on hall duty, he stood in the lobby and passed out T-shirts to people coming into the high school. He then proceeded to his freshman homeroom. According to Complainant, a few teachers mentioned seeing a newspaper article that morning about Complainant's courthouse protest on the previous day. Transcript I, p. 90.
26. According to Joyal, at approximately 7:15 a.m., he received calls that Complainant was at Exit D handing out T-shirts to students, screaming at a ROTC student for

wearing his uniform, showing teachers the newspaper article from the previous day, and thanking teachers and students alike for wearing black. Transcript II, pp. 128-129, 132-133.

27. Principal Joyal hand-delivered to Complainant a letter about an investigation into Complainant's use of a sick day on May 22, 2007. Joint Exhibit 1. Joyal told Complainant that a meeting would be scheduled about the matter. Joyal asked Complainant to keep his voice down and not to bother people, but he allowed Complainant to continue to hand out T-shirts for a few minutes. Transcript II, p. 129. At approximately 7:25 a.m., Joyal told Complainant that it was time to go to his classroom. Complainant complied with Joyal's directive to return to his classroom.
28. When Complainant arrived in his classroom, he noticed that his computer was gone. Transcript I, p. 85. Principal Joyal had arranged for its removal in conjunction with investigating the graffiti incident. Transcript II, pp. 134-135.
29. Complainant testified that he had forgotten to take attendance earlier that morning, but even if he had remembered, he could not have done so without his computer. Transcript I, p. 98. After Complainant began teaching a freshman history class, the office called to ask Complainant for his attendance record. When he failed to send the office a handwritten attendance record, Social Studies Department Supervisor Kris Theriault appeared in Complainant's classroom to ask Complainant to recall, to the best of his ability, who was absent from class during first period. Transcript II, p. 138-139. Complainant characterized Theriault's comments as "badgering" him. Id. Instead of writing-up an attendance record,

Complainant wrote a note saying, among other things, that he could not remember who was in his first period class, that his computer had been stolen, that someone should call the police, and that Complainant would “forgive” and “pray for you all!” Id.; Joint Exhibit 4. Complainant testified that he did not really believe that his computer had been stolen but, rather, that the administration had taken it. Transcript I, p. 190.

30. Complainant taught half of a history class prior to his lunch period. Transcript I, p. 191.

31. Complainant described his mood during his lunch period as “anxious” and “very agitated.” Transcript I, p. 104. He exited the school through the custodial room. Once outside, Complainant took off his shoes and proceeded to walk around the school barefoot. Transcript I, p. 109. According to Complainant, some students commented, yelled, and cheered. Transcript I, p. 108. Complainant testified that he attempted to return to the building without his shoes but was stopped by Vice Principal Chapdelaine and Social Studies Supervisor Therault. Transcript I, p. 110. Chapdelaine asked about the location of Complainant’s shoes and Complainant responded, “it’s a secret.” Id. Chapdelaine instructed Complainant to enter a door near the office, but Complainant decided leave. Transcript I, p. 114.

32. Just before the end of his lunch period, Complainant went to his car where he donned his military jacket and cap and retrieved a sign and a bongo drum. Complainant started to walk around slowly banging the drum. He admits to walking off the job. Transcript I, p. 192.

33. Principal Joyal described Complainant as wearing a green Army coat, an Army hat, wearing no socks or shoes, wearing rolled-up pants, and beating bongo drums in a slow, methodical rhythm while walking. Joyal testified that he walked with Complainant “quite a ways” down a hill, tried to coax Complainant to return to his classroom, and warned Complainant that he would be considered insubordinate and subject to disciplinary action if he refused. Transcript II, pp. 146-147. Complainant responded by saying, “I’m not Gary, I’m Sergeant Pepper.” Transcript I, pp. 117, 194. Complainant did not follow the Principal’s directive and continued to walk down the hill in front of the school.
34. According to Principal Joyal, in his twenty years as an educator, it “doesn’t happen often where somebody walks off the job, ever, in my twenty years.” Transcript II, pp. 148-149. Joyal testified that on Wednesday, May 23, 2007, Complainant had a room full of students waiting for him and classes scheduled for the rest of the day. Transcript II, p. 151.
35. Complainant proceeded to cross the street while he pounded on drums. He headed to downtown Chicopee on Front Street. Transcript I, p. 201. Complainant walked about two blocks. A police officer tried to engage Complainant in conversation, but Complainant did not want to talk to him. Transcript I, p. 121. Several other police cars approached Complainant, but after the officers conversed with each other, they drove away. Complainant intended to walk home but after walking approximately a half mile, his feet were bleeding and sore. A student pulled up in a car and gave Complainant a lift home. Transcript I, p. 123.

36. After Complainant started to walk downtown, Principal Joyal called Complainant's wife to inform her about her husband's actions. Transcript I, p. 224. Mrs. Sroka came to the school where she picked up Complainant's briefcase and other personal items. Transcript II pp. 152-153.
37. According to Mrs. Sroka, when she arrived home, her husband was there. He appeared to be confused, upset, and despondent. Transcript I, p. 226. She called Principal Joyal to report that her husband was home and to say that she would take him to the doctor on the following day. Id.
38. Complainant refused to go to the doctor on the following day so Mrs. Sroka rescheduled his appointment. Mrs. Sroka described her husband as becoming more depressed and less talkative over the course of May 23, 2007. Transcript I, p. 232.
39. Complainant received two letters from school administrators on the afternoon of Wednesday, May 23, 2007. The first was a letter from Principal Joyal. It addressed Complainant's use of a sick day on May 22, 2007. Joint Exhibit 1. The letter requested Complainant to schedule a meeting about the incident. The second letter was from the Director of Budget and Finance/Human Resources of the Chicopee Public Schools, Stephen Nembirkow. It addressed Complainant's behavior on May 23, 2007. Joint Exhibit 2. The letter placed Complainant on paid administrative leave, required an examination by an appropriate specialist to determine whether Complainant was fit to return to the classroom, and announced an inquiry into his refusal to obey an order to return to his classroom. Joint Exhibit 2.

40. Following May 23, 2007, Complainant continued to protest for a period of several days by walking back and forth in front of the high school at the end of the school day. Transcript I, pp. 197-198, 267; Transcript II, p. 155. There were people with him carrying signs and handing out pamphlets. Transcript II, p. 155. He arranged for his friend Rob Strycharz to film the protest with a video camera. Complainant gave an interview to a reporter from a television station and to a print reporter. Transcript II, p. 159. In a May 23, 2007 newspaper article, writer Patrick Johnson quoted Complainant as saying, “If you’re a big fan of the theater of the absurd, this is prime stuff.” Transcript I, p. 201.
41. The City arranged for a trespass notice to issue prohibiting Complainant from attending the school graduation’s at Szot Park and from protesting on Chicopee High School property.
42. Complainant went to Baystate Medical Practice on May 25, 2007 and May 30, 2007. At the first appointment, Complainant’s wife asked for a referral to a psychiatrist. Transcript I, p. 229. After the second appointment, Complainant’s internist, Dr. Marcie Yoss, drafted two letters, dated May 30th and June 8th. The first stated that Complainant was unable to work “at this time” and was being referred to a mental health professional. Joint Exhibit 7. The second letter stated that Complainant was being treated for depression and anxiety, was taking Fluoxetine (Prozac) and Lorazepam, and was being referred to a “psychiatric prescriber” for further evaluation and treatment. Joint Exhibit 8.

43. On May 31, 2007, Stephen Nembirkow wrote Complainant that an investigative meeting would be conducted on June 6, 2007 about his use of paid sick leave on May 22, 2007 and his conduct on May 23, 2007. Joint Exhibit 3.
44. Complainant saw psychiatrist Dr. Bennett Gaev, M.D. on June 5, 7, and 12, 2007 and continued to see him, less frequently for the next two years. Transcript I, p. 139. Dr. Gaev is board certified in psychiatry. After the June 7, 2007 meeting, Dr. Gaev diagnosed Complainant as having Bipolar II Disorder. Dr. Gaev adhered to the definition of Bipolar II Disorder set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) published by the American Psychiatric Association, to wit: the occurrence of major depressive episodes with at least one hypomanic episode. Joint Exhibit 17. Dr. Gaev described Bipolar II Disorder as a less severe form of bipolar illness than Bipolar I, without delusions or loss of reality. Transcript II, p. 45-46. Dr. Gaev described hypomania as impairing judgment and depriving individuals of an understanding of the consequences of their behavior. Transcript, Vol. II, p. 26. He defined hypomania by reference to its DSM-IV definition of a “a distinct period of persistently elevated, expansive or irritable mood, lasting throughout at least four days that is clearly different from the usual non-depressed mood” and three or more of the following symptoms: grandiosity, decreased sleep, talkativeness, racing thoughts, distractibility, increased goal-directed activity, and excessive involvement in pleasurable activities without considering potential, painful consequences. Joint Exhibit 17. Dr. Gaev testified that untreated Bipolar II Disorder could lead to job loss, broken relationships, financial problems, and failure academically. Transcript II, pp. 57-

58. According to Dr. Gaev, rapid mood swings are consistent with a clinical diagnosis of hypomania. Transcript, Vol. II, p. 26. Dr. Gaev testified that sleep is very important for people with Bipolar I and II disorders because lack of sleep can “kick” such an individual into a manic episode. Id.
45. Dr. Gaev took Complainant off antidepressant medication based on his opinion that antidepressants such as Prozac can accentuate mood swings of people with bipolar tendencies. He placed Complainant on the mood-stabilizing medication, Lamictal. Transcript, Vol. II, pp. 22-23. Joint Exhibit 9. Over a three-week period, Complainant built up to 150 milligrams per day. The Lamictal helped to alleviate Complainant’s depression and increase his emotional stability. Transcript, Vol. II, pp. 30-31.
46. According to Complainant, he began to feel “more balanced.” Transcript, p. 139. Complainant’s wife testified that he was in “much better shape that I’ve ever seen him in our whole life.” Transcript, p. 237. She testified that the mood swings were gone. Id.
47. On June 15, 2007, Principal Joyal wrote a letter stating that he intended to terminate Complainant, effective June 21, 2007, for abusing sick leave on May 22, 2007 and for refusing to comply with a directive to return to class on May 23, 2007. Joint Exhibit 5. The letter notified Complainant that he would have a pre-termination hearing on June 20, 2007. The hearing ultimately took place on June 22, 2007. Id. The notice of intent to terminate stated that Complainant’s conduct on May 22 and 23, 2007 was being considered in conjunction with Complainant’s prior disciplinary record, including: 1) a June of 2004 letter of reprimand

concerning the use of inappropriate language while talking to another faculty member; 2) a three-day suspension in June of 2005 for classroom profanity;¹ and a 3) a five-day suspension in April of 2007, reduced on appeal to three days, for classroom profanity.² Respondent's Exhibit 1. Some of Complainant's prior discipline stemmed from complaints by students that Complainant directed profanity towards them and belittled them during class. Transcript II, pp. 90, 94. In the notice of five-day suspension which Complainant received in April of 2007, he was informed that "any further inappropriate actions by you will subject yourself to severe disciplinary action including but not limited to discharge from employment." Respondent's Exhibit 1.

48. Complainant submitted his diagnosis of Bipolar II Disorder and Hypomania to officials at the pre-termination hearing. Transcript II, p. 144. School officials were previously unaware of the Bipolar II diagnosis, although the diagnosis of ADHD was known. Transcript II, pp. 207-208. Complainant's counsel requested that Complainant be granted a leave of absence at the pre-termination hearing. Transcript II, p. 213.

49. Principal Joyal testified that he upheld Complainant's termination because he believed that Complainant had planned his actions in late-May of 2007 and knew what he was doing, notwithstanding his diagnosis of Bipolar II disorder, when he was insubordinate, walked off the job, inappropriately used sick leave and

¹ Following the discipline in June of 2005, Complainant was transferred to a special education class. In response to this incident, Complainant experienced an episode of depression which rendered him unable to work for approximately two months. Joint Exhibit 16 (letter of November 5, 2007).

² In conjunction with the discipline imposed on or around April of 2007, the School Department notified Complainant that it had approved his transfer request to Chicopee Comprehensive High School for the 2007-2008 school year and that he was being assigned a mentor for the 2007-2008 school year. Respondent's Exhibit 1; Transcript II p. 97.

committed past indiscretions. Transcript II, pp. 167, 174. Joyal testified that in twenty years as an educator, he never before had anyone refuse a direct order to return to class. Transcript II, p. 226. According to Joyal, the fact that he evaluated Complainant as being in the bottom ten percent of teachers at Chicopee High School in terms of teaching performance was not a factor in his dismissal because Complainant was on a remediation plan to improve his teaching and was showing improvement at the time of his dismissal. Transcript II, pp. 224-225.

50. Director of Budget and Finance/Human Resources Stephen Nembirkow testified that he is not aware of any other teacher walking off the job between 1999, when he began to work for the school system, and May of 2007. Transcript II, p. 190. Nembirkow characterized insubordination as a serious offense that can lead to discharge under the Education Reform Law but stated that he was unaware of any Chicopee teacher ever being terminated for that or any other reason. Transcript II, pp. 208, 216. According to Nembirkow, there has never been a case of insubordination other than this case. Transcript II, p. 217.
51. Complainant testified that when he learned that he was dismissed, he felt devastated, ashamed, thought he had let down his family and was concerned that he had “blown” his career. Transcript, p. 146. Physically, however, he felt better as a result of his new medication. Id.
52. Complainant’s wife testified that it was “very, very hard” for her husband to lose his job. Transcript, p. 238. She described him as not sleeping. Transcript, p. 239. She said that it felt like the rug had been pulled out from underneath them. Mrs. Sroka said that it was difficult to manage economically on one paycheck and that

they had to refinance their house. She described their situation as “hell.”

Transcript, p. 240.

53. At the time of Complainant’s dismissal by the Chicopee School System, he earned “in the low 60 range.” Transcript, p. 162. He was a member of the Massachusetts Teachers’ Retirement System and was planning to continue working as a teacher for twenty years, until he was sixty-seven (67) years old. Transcript II, p. 163.

54. On August 27, 2007, Dr. Gaev wrote a note stating that Complainant was able to resume the responsibilities of a teacher. Joint Exhibit 21.

55. Complainant started looking for other teaching jobs by sending out resumes and going to a career fair in Springfield, MA. He pursued, unsuccessfully, a position as a long-term substitute in Palmer, a position at Springfield Technical Community College, a vocational counseling position, and a special education position at a middle school, and positions at Holyoke Community College. Transcript II, p. 148, 159-160. In October of 2007, Complainant found employment with Valet Park of America driving a van and serving as a booth attendant. Transcript II, pp. 150-151. He earned \$10.00 per hour the first year and \$11.00 per hour the second year and worked between twenty to twenty-five hours a week. He worked there from October of 2007 until April of 2009. Transcript II, p. 152. Complainant then obtained a census job at \$14.50 per hour for three weeks, followed by a position as a supervising youth employment counselor from May of 2009 through September of 2009. Transcript II, pp. 154-155. Complainant earned approximately \$525.00 per week. In February of 2010, Complainant returned to performing census work on a sporadic basis for

approximately twenty hours per week earning \$14.15. He also recorded books on tape for several weeks earning \$19.00 per hour. Transcript II, p. 158. From October of 2009 until the date of public hearing, Complainant earned \$329.00 weekly in unemployment benefits except during weeks when he earned income from part-time jobs.

56. On September 22, 2008, Arbitrator James S. Cooper issued a decision in Chicopee Education Association and Chicopee School Committee (AAA # 11 390 01730 07) which concluded that the Chicopee School Committee did not have just cause to discharge Complainant under the parties' collective bargaining agreement and ordered the School Committee to reinstate Complainant to his former position and make him whole for loss of pay and benefits from November 5, 2007 to the date of reinstatement. Complainant's Exhibit 1. No evidence was presented at the MCAD public hearing about implementation of the decision.

III. CONCLUSIONS OF LAW

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.

Complainant was diagnosed with Attention Deficit Hyperactivity Disorder around 1996 or 1997 and was subsequently diagnosed with chronic depression and anxiety in 2005 or 2006. During the events at issue, he was treated with Fluoxetine (Prozac) and Lorazepam for depression and anxiety. Immediately following the incident which led to his dismissal, Complainant's diagnosis was revised by psychiatrist Dr. Bennett Gaev to Bipolar II Disorder. Dr. Gaev instituted a new drug regimen consisting of Lamictal.

The depressive aspect of Complainant's condition causes him to become fatigued, to have decreased energy, and to have difficulty concentrating. The hypomanic aspect of Complainant's condition causes him to talk in a "racing" manner, become agitated and distressed, display high energy, be argumentative, refuse to listen to the perspectives of others, and to fail to eat and sleep adequately. These behaviors are of central importance to Complainant's daily existence, adversely affecting major life activities such as cognition, eating, sleeping, and interacting with others. See Toyota Motor Manufacturing Kentucky Inc. v. Williams, 534 U.S. 184 (2002). They also limit his ability to work, as evidenced by the fact that at the end of the 2004-2005 school year, Complainant was granted a six or seven week medical leave of absence for the treatment of depression; in May of 2007, he walked off his job; and at the end of May/beginning of June of 2007, he was described by his treating internist as unable to work. Based on the foregoing, I conclude that Complainant's illness constitutes an impairment which substantially limits one or more major life activities and renders him handicapped.

Although impaired by his psychiatric condition, Complainant claims to have been a "qualified" handicapped individual in May of 2007, who was capable of performing the essential functions of his job. Neither the evidence nor the law supports this assertion. In

Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 666-667 (2006), the Court determined that an employee cannot be deemed “qualified” if the employee engages in “egregious workplace misconduct” described as “so inimical to an employer’s interest that any employee would be fired for the same acts.” Mammone, 657 Mass. at 659. I conclude that Complainant’s workplace misconduct was egregious under the Mammone standard because it would have resulted in dismissal if committed by a teacher without a psychiatric disorder.

Complainant attempts to clothe his May, 2007 conduct with the protective garb of free speech and political expression but the evidence indicates that Complainant disregarded his job responsibilities and abandoned his students in an unreasonable, unprofessional, and insubordinate manner. Complainant had every right to protest a mandatory career day on the grounds of Chicopee High School involving the military recruitment of impressionable teenagers. On Sunday, May 20, 2007, he expressed such views in an email to Chicopee Mayor Richard Rege objecting to the administration making school children “easy prey for the military,” allowing military recruiters to bribe young people with “trinkets,” and forcing teachers such as himself to assist in such “diabolical” matters. On the following day, he addressed military personnel on the grounds of Chicopee High School in a loud and allegedly profane manner. That these passionate sentiments resulted in no adverse reaction by the administration supports Respondent’s assertion that the School Department did not seek to deprive Complainant of his free speech rights.

In contrast to the valid exercise of free speech rights, the refusal to fulfill teaching obligations in order to engage in political protest does not involve protected activity.

This dereliction of duty occurred on May 22, 2007, when Complainant reported that he would be absent due to illness, but attended a court session involving the arraignment of his friend, walked back and forth in front of the courthouse for approximately an hour, gave an interview to the press, and went inside the court for about twenty minutes.

Principal Joyal testified persuasively that he did not consider marching outside a courthouse, attending a legal proceeding, and giving an interview to the media to be a valid use of a sick day.

Similarly, Complainant's actions on the following day, May 23, 2007, constituted a dereliction of duty and insubordination. On that day, Complainant mocked the efforts of the Social Studies Department Supervisor to obtain an attendance report that Complainant had neglected to record, marched around the school in a military uniform beating a bongo drum rather than obey an order from Principal Joyal to return to class, and walked off the job. Principal Joyal testified credibly that he tried, unsuccessfully, to get Complainant to return to his classroom in order to resume his teaching responsibilities. Joyal warned Complainant that he would be considered insubordinate and subject to disciplinary action if he refused. According to the Principal, in his twenty years of being an educator, he never before had a teacher refuse a direct order to go back to a class.

In addition to Complainant's insubordinate conduct in May of 2007, his prior disciplinary record played a role in the discharge decision. Prior discipline included: 1) a June of 2004 letter of reprimand concerning the use of inappropriate language while talking to another faculty member; 2) a three-day suspension in June of 2005 for classroom profanity; and 3) a five-day suspension in April of 2007 (reduced on appeal to

three days) for classroom profanity. Just weeks prior to his termination, Complainant was warned, in conjunction with the April of 2007 suspension, that further inappropriate action could result in discharge.

The matters for which Complainant received prior discipline are not identical to the misconduct which resulted in his termination, but they share common elements such as lack of judgment and lack of self-control. Some of the prior discipline stemmed from complaints by students that Complainant directed profanity towards them and belittled them during class. Other matters related to offensive interactions with faculty. Complainant's disciplinary history indicates that the discharge decision was the culmination of ongoing concern about Complainant's inability to behave in a professional manner.

Complainant focuses on the denial of his accommodation request made in June of 2007, after the events at issue, but the denial of the June of 2007 accommodation request cannot alter the outcome of this case. Had Complainant sought a leave of absence for the treatment of his Bipolar II Disorder prior to May 22 and 23, 2007, the request would have been a relevant factor. Since the request was made on June 22, 2007 at Complainant's pre-termination hearing, however, it has no bearing on the egregiousness of Complainant's misconduct. See Mammone, 446 Mass. at 668-669 (declining to consider whether a handicapped individual could, in the future, perform in a satisfactory manner with a reasonable accommodation). Thus, to the extent that Complainant claims disability discrimination based on the denial of a reasonable accommodation, the claim must be rejected as untimely.

Regarding Arbitrator Cooper's decision overturning Complainant's discharge, his conclusion that Respondent lacked just cause does not control the outcome here. Arbitrator Cooper's analysis may be correct under G. L. ch. 71. sec. 42 and under the parties' collective bargaining agreement, but such analysis does not resolve a handicap discrimination claim under G. L. ch. 151B, sec. 4(16). Under chapter 151B, the question does not depend on the severity of the penalty or conformity to principles of progressive discipline, but whether the discharge decision was motivated by Complainant's disability, a question which I answer in the negative. As long as the evidence indicates that Principal Joyal would have similarly disciplined a teacher without a psychiatric disability who had the same record of past infractions and engaged in the same misconduct as Complainant, the disability discrimination claim must fail.

IV. ORDER

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

So ordered this 23rd day of July, 2010.

Betty E. Waxman, Hearing Officer

