

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
JOSEPH SANTAGATE,
Complainants

v.

DOCKET NO. 10-BEM00144

FGS, LLC.,
Respondent

Appearances:

Michael R. Castano, Esquire for Joseph Santagate
J. Mark Dickison, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 20, 2010, Joseph Santagate filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap and perceived handicap, in violation of M.G. L. c. 151B s. 4(16). Specifically, Complainant alleges that Respondent terminated his employment during a leave of absence, notwithstanding that he would have been able to return to his job without restrictions in a matter of weeks after his termination. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on August 29, 2013. After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent FGS, located in the Chicago area, is the parent company of Emco, a commercial printing company that offers mailing services, inventory management and storage of printed materials. Emco was located in Everett, Massachusetts at the time of Complainant's employment and relocated to Braintree in 2008. In 2009 Rich Malacina was the owner of FGS and Michael Corrado was its president and was in charge of Emco.

2. Complainant Joseph Santagate resides in Everett, MA. In 2005, Complainant learned of an opening at Respondent's subsidiary Emco through a friend, Kevin Murphy, Emco's general manager, who ran the production floor.¹ After interviewing with Murphy and shipping manager Ed Kolczewski, Complainant was hired as a shipper and receiver in April 2005. Complainant's main duties were loading and unloading trucks containing shipments of paper and printed materials.

3. Complainant has a vascular disease and blood clotting disorder that require him to take blood thinners in order to prevent blood clots.

4. Kevin Murphy and Ed Kolczewski, Complainant's immediate supervisor, both testified that Complainant was a good worker. (Testimony of Murphy; Testimony of Kolczewski)

5. Nancy Connelly was Respondent's V.P. of operations. She reported to Michael Corrado and was responsible for human resources matters, payroll, benefit information, hiring and firing and worker's compensation in the Everett location. (Testimony of Connelly)

6. Cindi Karstens worked at Respondent's Chicago location and handled human resources and payroll, accounts payable and receivable and Respondent's disability and dental plans.

¹ Murphy was the original owner of EMCO, which was bought out by Respondent.

7. On October 30, 2008, Complainant arrived early at work and, entering through a side door, he accidentally stepped through a skid that was in the middle of the floor and injured his left knee. The following day Complainant's calf was discolored and severely swollen. An ultrasound showed he had developed a deep vein thrombosis (blood clot) in his left leg from the injury. He was treated with injections of an anti-coagulant and oral blood thinning medications. Complainant remained out of work for three weeks, but when he tried to come back his leg swelled up again. His primary care physician referred him to a vascular surgeon, who ordered a CAT scan that revealed a blocked artery in Complainant's left leg. (Testimony of Complainant, Ex. 6)

8. Because of the complexity of Complainant's clotting disorder, the vascular surgeon referred Complainant to Dr. Frank Pomposelli, a highly respected vascular surgeon at Beth Israel Deaconess Medical Center. Complainant remained out of work until his first scheduled appointment with Dr. Pomposelli on January 20, 2009. (Testimony of Complainant; Ex. 1)

9. From the time of his injury in October 2008 until he returned to work in late January 2009, Complainant received workers compensation benefits. With respect to these benefits, Complainant communicated with Nancy Connelly, who handled the paperwork for workers compensation claims. (Testimony of Connelly; Testimony of Complainant)

10. On January 20, 2009, Dr. Pomposelli advised Complainant that the blocked artery in his left leg would require surgery, which could not safely be performed until the blood clot had completely dissolved, which would take approximately six months. Complainant's next scheduled appointment with Dr. Pomposelli was July 30, 2009. (Testimony of Complainant; Ex. 6)

11. Dr. Pomposelli cleared Complainant to return to work without restriction in late January, 2009. Upon returning to work, Complainant advised Murphy that he would likely need surgery in six months. (Testimony of Complainant)

12. Complainant worked from January 31, 2009 until September 1, 2009 without incident. (Testimony of Complainant)

13. On July 30, 2009, Dr. Pomposelli determined that the clot in Complainant's left leg was sufficiently dissolved and scheduled Complainant for surgery on September 8, 2009. (Testimony of Complainant)

14. On July 31, 2009, Complainant advised Murphy that he was scheduled for surgery. Murphy in turn, told Connelly of the impending surgery. Connelly instructed Murphy that Complainant should deal with Cindi Karstens with respect to matters concerning the surgery and Murphy so advised Complainant. (Testimony of Murphy; Testimony of Complainant)

15. At Murphy's direction, Complainant began communicating with Karstens, who assisted him in completing short-term disability forms. (Testimony of Complainant)

16. On September 1, 2009, Complainant went on leave. He did not seek workers compensation for this leave because his vascular condition was not work-related. After using his remaining vacation and sick leave, he began to receive short-term disability benefits. (Testimony of Complainant)

17. On September 4, 2009, Complainant underwent an angiogram in order to pinpoint the location of the blockage in his left leg in preparation for surgery. During the angiogram, a cyst was discovered in Complainant's right leg. Dr. Pomposelli advised Complainant that removal of the cyst in his right leg required immediate surgery. (Testimony of Complainant)

18. On September 8, 2009, Complainant underwent surgery to remove the cyst on his right leg, remained hospitalized for four days and received in-home care from visiting nurses and physical therapists. (Testimony of Complainant)

19. Connelly stated that she learned that Complainant needed time off and discussed the matter with Corrado who told her to give Complainant the time he needed. She later learned that Complainant needed an extended leave. Connelly could not recall the dates involved. (Testimony of Connelly)

20. Connelly testified that on September 15, 2009, she completed a form entitled "Employer Response to Employee Request for Family or Medical Leave." Connelly wrote on the form that Complainant was on leave from September 14, 2009 until October 9, 2009. She testified that she sent that form along with a flyer entitled, "Your Rights under the Family and Medical Leave Act" to Complainant via FEDEX. (Ex. 11; Ex. 12)

21. Connelly testified that she used the forms as a guideline and sent them to Complainant as a "courtesy," even though she believed that Respondent was not subject to the Family and Medical Leave Act ("FMLA") because it did not have the requisite number of employees. Complainant denied ever receiving the information. (Ex. 11; Ex. 12) I need not resolve the dispute as to whether Complainant received this information as it not a material to the outcome of this case.

22. Complainant underwent surgery to his left leg on October 6, 2009, spent four days in the hospital and thereafter, underwent rehabilitation with visiting nurses and physical therapy in his home. (Testimony of Complainant; Ex. 6)

23. Complainant testified credibly that the first week in November, he was surprised to receive an application for long-term disability from Karstens and called her for an explanation.

Karstens advised Complainant that he would be eligible for long-term disability when his short-term disability ran out and to return the completed forms right away to prevent a gap in coverage. (Testimony of Complainant; Ex. 16)

24. On November 30, 2009, Complainant had a follow-up appointment with Dr. Pomposelli, who was pleased with the speed of Complainant's recovery and wrote a note clearing him to return to work without restrictions on January 4, 2010. (Testimony of Complainant; Ex. 7) Complainant provided all the necessary information to Karstens and the insurance company, including his return to work date. (Testimony of Complainant)

25. Immediately after receiving the note, Complainant called Kolczewski to state that he would be returning to work on January 4, 2010. (Testimony of Complainant)

26. Complainant testified that subsequent to his visit on November 30, 2009 he called Dr. Pomposelli to say that he felt well enough to return to work on December 21, 2009. Complainant testified that Pomposelli orally agreed to the earlier return to work. However, Complainant did not have a chance to obtain Pomposelli's written authorization for earlier return to work.

27. In early December, Complainant told Kolczewski and Murphy that he intended to return to work on December 21, 2009. (Testimony of Complainant; testimony of Kolczewski; testimony of Murphy) Murphy reacted positively and testified that he advised Complainant to inform Nancy Connelly.

28. Kolczewski and Murphy testified that Complainant was in frequent contact with them during his leave and that when Complainant discussed medical and leave issues with them they often told him to speak to Connelly. Complainant denied that Murphy and Kolczewski ever told him to contact Connelly during his leave. He stated that if they had, he would have asked to

transfer his call to Connelly. Complainant never called Nancy Connelly during his leave and she never contacted him. I credit Complainant's testimony that he was not told to contact Connelly during this leave, as Connelly had stated to Murphy that Complainant was to contact Karstens instead of her.

29. On or about December 8, 2009, Connelly sent Complainant a letter informing him that he was terminated under the FMLA because he had "passed the 12 week deadline" and Respondent had "decided to exercise [its] right to terminate [his] employment at FGS effective 12/8/09." Complainant received the letter on December 9, 2009. (Ex. 14)

30. Complainant testified that he knew nothing about the FMLA leave and called Murphy to inquire about his termination. Murphy was surprised to learn of the termination and told Complainant that he would discuss the matter with Connelly. (Testimony of Complainant; Testimony of Murphy)

31. Kolczewski was also surprised to learn of Complainant's termination. He testified credibly that he would have preferred to have Complainant return to his job because he was a better worker than the man who replaced him. (Testimony of Kolczewski)

32. Murphy went to Connelly to inquire about the termination letter. Connelly told Murphy that she had been instructed to terminate Complainant, although she did not tell Murphy who had instructed her to do so. (Testimony of Murphy)

33. After talking to Connelly, Murphy called Complainant, expressed his apology and told him that the matter was out of his hands. (Testimony of Complainant)

34. On December 11, 2009, a representative of Sun Life Financial wrote to Complainant, "As we discussed, you plan on returning to full-time work on January 4, 2010" and informed him

that he would receive long-term disability insurance benefits from December 9, 2009 through January 3, 2010. (Ex. 17)

35. Connelly testified that Karstens notified her that Complainant was receiving long-term disability payments. Connelly believed these benefits were "open-ended." She stated that she did not know when or if Complainant would return to work and never heard from Complainant that that he was returning to work. She acknowledged that she never contacted Complainant during his leave to determine whether he was returning to work. (Testimony of Connelly)

36. Connelly testified that she explained to Corrado that Complainant's FMLA had expired, that Complainant had filed for long-term disability, and she was not sure he was returning to work. Corrado directed her to terminate Complainant's employment. (Testimony of Connelly)

37. Kolczewski told Connelly that Complainant had called him about his termination. Connelly told Kolczewski to have Complainant call her in order to work it out. (Testimony of Connelly)

38. Complainant testified that he called Connelly to ask why he was terminated and she responded that he had "run out of time" and she was told to let him go. Connelly testified that Complainant told her he did not yet have a doctor's written permission to return to work and she advised him that, when he obtained a doctor's note, to discuss his potential re-hire with Kenny McGowan, who was assuming Connelly's responsibilities. At the time of Complainant's termination, Connelly was closing the human resources department at Everett and was herself going to be laid off. She left Respondent in May 2010 and was not involved in any further hiring

or firing at Respondent. Complainant denied that Connelly ever told him to re-apply for his job. I credit his testimony.

39. Connelly testified that around the time of Complainant's termination, Respondent had laid off some employees and others had taken a pay cut and it was more economical for Respondent to hire per diem employees than to hire full time workers. Murphy testified that there were company lay-offs and a company-wide pay cut of 15% that had affected him and Complainant in the time period 2008-2009. However, Murphy testified there were no lay-offs in the shipping and receiving unit. (Testimony of Connelly; Testimony of Murphy) I do not credit Connelly's testimony that there was an economic reason for laying off Complainant, as it is contrary to the credible testimony of Murphy that there were no lay-offs in shipping/receiving and Complainant was replaced by a full-time permanent employee.

40. Murphy testified credibly that during Complainant's leave, his position was filled by relatives of co-workers until October when a former bindery worker called Murphy and asked to return to work. Murphy agreed to hire him as a shipper/receiver on a temporary basis until Complainant returned from his leave. In February 2010, the former employee was made a full-time permanent worker. (Testimony of Murphy)

41. Murphy and Kolczewski testified credibly that there was no hardship involved in filling Complainant's position on a temporary basis.

42. Dr. Alan Barron, who has been Complainant's primary care physician since October 2011, testified that when he began seeing Complainant, Complainant was very anxious, suffered from insomnia and was distraught, frustrated, and despondent over his inability to find work. Dr. Barron testified that he treated Complainant with a high dosage of Ativan, an anti-anxiety medication. He stated that Complainant lacked executive function, but could carry out a job

where he had specific instructions and duties and was capable of performing his shipping and receiving job. While Complainant was always an anxious person, according to Dr. Barron, after his termination, Complainant reported his anxiety increased. (Testimony of Dr. Barron) I credit his testimony.

43. In February 2012, Dr. Barron wrote that Complainant's "work-related injuries, subsequent vascular surgery and loss of job are the direct cause of his present and prolonged problems of anxiety and depression." (Ex. 8)

44. Complainant testified credibly that he loved his job and his co-workers, that he got along well with everyone and hoped to retire from Respondent. He also testified that when he learned of his termination he was incredulous and still cannot believe that he is not working. Complainant testified that he is always anxious and stressed. He wakes up in the middle of the night unable to control the thoughts crowding his head. He currently takes lorazepam for anxiety, as well as blood thinners. He testified that his life has been terrible since his termination. He does not go out and he does not date because he is unemployed. I credit his testimony.

45. At the time of his termination, Complainant was earning \$13.00 per hour and worked a 40-hour work week, plus overtime. In 2008, Complainant earned \$29,501. In 2009, Complainant earned \$20,385.00. In 2010, Complainant's sole income was \$15,914.00 from unemployment benefits. In 2011, Complainant received \$9,024.00 from unemployment benefits. Complainant has had no income since 2011 and lives with his father. In 2010, his lost wages were \$13,587; in 2011, his lost wages were \$20,477; in 2012, his lost wages were \$29,501, and from January 1, 2013 to the date of the hearing on August 29, 2013, his lost wages were

approximately \$19,667.33 ($\$29,501 \times 2/3$). Complainant's lost wages total \$83,232.33 (\$13,587+\$20,477+ 29501+ \$19,667.33) (Testimony of Complainant; Ex.9)

46. Complainant testified credibly that he has applied extensively for shipping and receiving jobs, on a daily basis, via the websites Monster.com and Jobs.com. He also goes directly to workplaces to drop off his resume and he has had about 15 interviews, but has not been had any success securing employment.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent unlawfully terminated his employment because of his disability, a blood disorder. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) that he is a "handicapped person within the meaning of the statute;" (2) that he is a "qualified handicapped person" capable of performing the essential functions of his job; (3) that he needed a reasonable accommodation to perform his job; (4) that Respondent was aware of his handicap and the need for a reasonable accommodation; (5) that Respondent was, or through reasonable investigation could have become, aware of a means to reasonably accommodate his handicap and; (6) that Respondent failed to provide Complainant the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, aff'd, 26 MDLR 216 (2004); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX (A) (3) 20 MDLR Supplement (1998) Once Complainant has identified his disability and requested an accommodation from his employer, it is incumbent on the employer to engage in an interactive dialogue with Complainant and to determine if the accommodations sought are reasonable. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) A leave of absence may be

a reasonable accommodation under some circumstances, if it does not create an undue hardship for the employer. Thibeault v. Verizon New England, Inc., 33 MDLR 39, 47 (2011) While there may be circumstances where an extended leave of absence is an appropriate or reasonable accommodation, including a request for a limited extension, which sets a definite time for the employee's return, each case must be evaluated on the circumstances. Russell v. Cooley Dickinson Hospital, Inc., 437 Mass 443 (2002) *citing* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 1st Cir. 2000) (under the circumstances requested two-month extension was reasonable); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA III-23("Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disabilities....where this will not cause an undue hardship.") MCAD Handicap Guidelines, p. 36 20 MDLR (1998) However, open-ended and indefinite leave requests are generally not reasonable under c. 151B. Russell at 455.

The factors in determining undue hardship include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (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 Guidelines: Employment Discrimination on the Basis of Handicap, at II, B. (1998)

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

In order to establish that he is a qualified handicapped person, Complainant must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. I conclude that Complainant has established that he is a handicapped person. Complainant suffers from a blood disorder that causes clotting and blockages in his vascular system. This disorder required Complainant to undergo life-saving surgery to both legs in 2009. Complainant must remain on blood thinning medications for the rest of his life, and must undergo frequent blood tests to ensure that the medication remains at the appropriate levels. During the surgery and recovery period, Complainant was unable to perform his job and for three months and Respondent granted him a medical leave of absence during which he used his sick and vacation time, as well as short-term and long-term disability benefits. Complainant's employment was arbitrarily terminated after 12 weeks of leave, notwithstanding that Complainant would have been able to return to work, without any restrictions, two to four weeks later. Respondent argues that Complainant is not a qualified handicapped individual because he was incapable of performing his job because of his physical illness and anxiety. With respect to Complainant's vascular condition, the substantial medical evidence supports the conclusion that Complainant would have been able to physically perform his job without restrictions no later than January 4, 2010. Respondent offers no contrary evidence and merely states the obvious; that Complainant could not perform his job while recovering from his surgery.

With respect to Complainant's anxiety, Respondent cites Dr. Barron's statements that Complainant was the most anxious person he had ever treated, lacked executive function and was totally disabled from his blood clotting disorder, a lifelong issue and that physical tasks posed a severe threat to his life. However, Respondent mischaracterizes the testimony of Dr. Barron, who testified that Complainant was *not* totally disabled, and stated that while

Complainant should probably not climb a ladder, he was capable of performing his shipping/receiving job, which did not involve climbing. Dr. Barron also stated that Complainant was capable of performing the shipping receiving job, with its specific limitations and specific supervisory instruction and that it would not require executive function.

Respondent is substituting its own judgment for medical evidence when it suggests that Complainant's condition poses a threat to his own safety, by referencing an earlier on-the-job injury when Complainant cut his finger on a saw that lacked a safety mechanism and which was replaced after Complainant's accident. While safety in the workplace poses a legitimate concern for employers, Respondent has produced no medical evidence whatsoever that Complainant's condition posed a risk to himself or others. Complainant has presented evidence from his vascular surgeon and primary care physician stating that he could return to work without limitation.

Thus, I conclude that Complainant is a qualified handicapped person within the meaning of the statute, as he was at all times subsequent to his medical leave of absence able to perform the essential functions of his job without an accommodation.

Respondent asserts that Complainant's failure to communicate directly with Nancy Connelly during his leave demonstrates his failure to engage in an interactive dialogue. I find this assertion disingenuous. The evidence showed that Connelly's instructions to Complainant were to communicate with Karstens in Chicago regarding his benefits and Connelly was aware of Complainant's status through communication with Karstens. Regardless of whether Connelly was directly aware of the details of Complainant's medical condition, I conclude that knowledge of Complainant's status was imputed to Respondent through Complainant's frequent communication with his direct supervisors and Respondent's human resources representative in

Chicago. Complainant was also in contact with Respondent's insurance carriers and provided them with medical documentation. By late November, Complainant knew that he would be returning to work no later than January 4, 2010 and so informed his supervisors and Respondent's insurance carrier. Complainant dutifully reported his status to Respondent's human resources person in Chicago as instructed by Connelly. Thus I conclude that he met his obligation to engage in an interactive dialogue.

I conclude that a leave of absence was a reasonable accommodation in this case. During Complainant's leave, Respondent filled his position with temporary employees at no hardship whatsoever to Respondent and his supervisors had made provisions for and intended to continue doing so until Complainant's return from leave. Complainant's request for leave was not open-ended or indefinite. Therefore, I conclude that to extend Complainant's leave of absence until December or early January was a reasonable accommodation. However, rather than engage in an interactive dialogue about the feasibility of extending the leave for a few more weeks, Respondent arbitrarily terminated Complainant's employment on December 7, 2009.

Respondent's reliance upon the FMLA as "guidance" in terminating Complainant's employment after 12 weeks of leave is puzzling, particularly in view of Connelly's testimony that she did not believe that Respondent was subject to the FMLA.² Nonetheless, it is not within this Commission's purview to rule on FMLA matters and Respondent's reliance upon that statute in terminating Complainant's employment is of little relevance to this matter and the Commission's interpretation and application of c. 151B to the facts at hand.

² The FMLA provides coverage for short-term injuries or illnesses that may not rise to the level of a "handicap" as that term is defined in G.L. c151B. The FMLA covers only employers with fifty or more employees. In addition, to be eligible, an employee must have been employed by the employer for a year; must have worked 1,250 hours in the prior twelve months; and must work at a worksite with fifty or more employees within a seventy-five-mile radius.

Handicap cases are by nature “difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes,” requiring employers to make an individualized analysis of whether an employee’s accommodation is reasonable. Garcia-Alaya v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) Employer leave policies must be sufficiently flexible to anticipate the facts of each individual claim. Id. at 650. When Respondent terminated Complainant’s employment, his leave was not open-ended as Respondent claimed. At most he would have remained out of work for four more weeks. Complainant had already informed Respondent’s insurance carrier that he planned to return to work on January 4, 2009, he had in hand a letter from his vascular surgeon in support of his return to full-time work and he had informed his supervisors that he could return to the job. Given these circumstances, I conclude that Respondent violated M.G.L. c.151B 4(16) by arbitrarily terminating Complainant’s employment after 12 weeks of medical leave and unreasonably refusing to extend his medical leave for a brief period of time as a reasonable accommodation.

Respondent advances additional arguments in support of its termination of Complainant: that Respondent’s business was adversely affected by the recession of 2009; that warehouse work was significantly slower and the financial condition of the company was so dire that there were lay-offs and pay-cuts; and that in such climate, it was economically more feasible to use per diem workers to perform the shipping/receiving tasks. This assertion, however, is not borne out by the facts with respect to Complainant’s job. While Respondent’s business declined, lay-offs had largely occurred prior to Complainant’s leave, and Complainant was one of the employees who had already been subject to the across the board pay cut. More importantly, no lay-offs occurred in the shipping and receiving department and, in fact, Complainant’s temporary replacement in the shipping receiving position was made a full-time, permanent employee two

months after his termination. Thus, I conclude that, Respondent's economic status is an ex post facto justification for terminating Complainant's employment, raised for the first time at the public hearing, and that this reason is a pretext for handicap discrimination.

For the reasons stated above, I conclude that Respondent engaged in unlawful discrimination on the basis of handicap in violation of M.G.L. c. 151B, s. 4(16) by failing to reasonably accommodate Complainant by extending his leave of absence and terminating his employment.³

IV. REMEDY

Pursuant to M.G.L. c. 151B s. 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." In addition, complainants must show a sufficient causal connection between the respondent's unlawful act

³ Whether Complainant could have returned to work in late December or early January does not have any bearing on the outcome of the case. In either scenario, a leave of absence was a reasonable accommodation and posed no undue hardship on Respondent.

and the complainant's emotional distress. Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549 (2004). "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id.

Based on Complainant's credible testimony, I am persuaded that he suffered emotional distress as a direct result of Respondent's unlawful termination of his employment.

Complainant testified credibly that he loved his job and co-workers and hoped to remain at the job until his retirement. He was shocked and angered to learn that his employment had been terminated because of his disability, suffered from increased anxiety and insomnia and stopped going out and did not date because he did not have a job.

Dr. Alan Barron, Complainant's primary care physician, testified credibly that Complainant was very anxious, suffered from insomnia and was distraught, frustrated, and despondent over his inability to find work. While Complainant had a history of anxiety, according to Dr. Barron, Complainant's anxiety increased after his termination and Dr. Barron prescribed a stronger anti-anxiety medication. While Complainant's illness and surgery were also sources of anxiety to him, and there was some evidence that family issues were at times a source of stress, I conclude that his unlawful termination and subsequent unsuccessful search for work have been significant sources of Complainant's increased anxiety that continued up until the time of the public hearing. I conclude that Complainant is entitled to an award of \$50,000 for the emotional distress he suffered as a result of Respondent's unlawful termination.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. The evidentiary burden is on the Respondent to show that the

Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Complainant testified credibly that he has searched for jobs daily by applying on websites and visiting potential employers in person. Despite receiving a number of interviews he has been unsuccessful in securing employment as of the time of hearing. Respondent did not submit evidence of available jobs for which Complainant was qualified and did not apply and its argument that Complainant would not have continued to work for Respondent after it moved to Braintree is highly speculative and unconvincing. Complainant had some income from unemployment compensation, but has had no income since 2011 and lives with his father.

I conclude that given his efforts and demonstrated willingness to work, Complainant has met his duty to mitigate his back pay damages and I conclude that he is entitled to lost wages from the time he was able to return to work on January 4, 2010 until the time of the public hearing. Pursuant to my detailed earlier findings, his total lost wages for that period of time are \$83,232.33.

I conclude that Complainant is entitled to \$83,232.33 in lost wages to compensate him for amounts he would have had earned, had he not been terminated from the date of his planned return to work on January 4, 2010 until the date of the public hearing.

V. ORDER

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

1) Respondent immediately cease and desist from discriminating on the basis of handicap in the arbitrary application of a twelve week rule for medical leaves or by enforcing a policy that

limits medical leaves absent an interactive dialogue and individual assessment regarding reasonable accommodation.

2) Respondent pay to Complainant the sum of \$50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3) Respondent pay to Complainant the sum of \$83,232.33 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 6th day of January, 2014

JUDITH E. KAPLAN,
Hearing Officer