

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

WILLIAM A. ANDERSON, JR. AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 08-SEM-00376

UNITED PARCEL SERVICE,

Respondent

Appearances: Maurice M. Cahillane, Esq., for Complainant Anderson
Michael C. Harrington, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 21, 2008, William Anderson (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that he was subjected to discrimination by Respondent, including constructive discharge, on the basis of handicap.

The MCAD issued a probable cause finding and certified the case for public

hearing on April 1, 2009. A public hearing was held on November 6, 9, and 10, 2009. The Complainant testified on her own behalf as did Dr. Kenneth Jaffe, M.D. and Sandra Anderson. Testifying for Respondent were: Margaret Niedbalski, Valerie Ballowe, Donald Richardson, and Diane Hagi. The parties submitted thirty (30) joint exhibits. Complainant submitted an additional seven (7) exhibits, and Respondents submitted one (1) additional exhibit. The parties submitted post-hearing briefs dated January 8, 2010.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. To the extent the testimony of various witnesses is not in accord with or 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 William A. Anderson Jr. resides in West Springfield, Massachusetts. He began working for Respondent, United Parcel Service ("UPS"), in 1986. He performed the following assignments during his career at UPS: loader/unloader, car washer, driver, "on-car" supervisor, pre-load supervisor, human resource supervisor, employee service supervisor, comprehensive health and safety process (CHSP) supervisor and CHSP manager. Complainant testified that he moved from one job assignment to another at the behest of management and that it was the culture of the company to transfer employees into a variety of positions in order for them to gain broad experience within the company. Transcript, Vol. II, p. 178. Complainant was promoted on several occasions, including promotions from driver to on-car supervisor and from CHSP supervisor to CHSP manager.

Transcript, Vol. 1, p. 31. Managerial positions are higher positions than supervisory positions, with more responsibility, stress, and compensation.

Transcript, Vol. 1 at p. 172. Throughout his career at UPS, Complainant worked in the South New England District of the Respondent's Northeast region.

2. Respondent United Parcel Service operates a time-sensitive package delivery business with offices throughout the United States. It has over 5,000 employees in southern New England. Transcript, Vol. II, p.261. Packages are sorted and trucks are unloaded and reloaded at night. Transcript, Vol. II, p. 190. The “pre-load” process begins nightly at approximately 11:00 p.m. *Id.* at 191. Drivers generally leave UPS facilities beginning at 8:15 a.m. Transcript, Vol. II, p. 186. They are out all day, delivering packages and simultaneously picking up packages to bring back to distribution centers. While package vehicles are out on the road, various tasks are performed at company facilities such as tracking vehicles and making changes to truck routes, but the facilities are less busy during the day than at night. Transcript, Vol. II, p. 189-190. The Human Resource (“HR”) Department is responsible for recruiting, training, and orienting Respondent's workers. During months when seasonal employees are hired, HR employees work at night, performing training and orientations tasks. At non-peak times of the year, HR employees may be asked to perform assignments in other sectors of the company. Transcript, Vol. II, p. 198.
3. In 2005, Complainant was diagnosed with bipolar illness. The diagnosis was changed in 2007 to bipolar depression and anxiety disorder. Joint Exhibit 14; Transcript, Vol. I, p. 82. Complainant was hospitalized twice in 2005 because of

his condition and several additional times between 2005 and 2007 for severe depression. Transcript, Vol. 1, pp. 33, 84-86; Vol. II, p. 245; Joint Exhibit 14. In 2005, Complainant began treating with Dr. Kenneth Jaffe, a psychiatrist, and Dr. Richard Schwartz, a therapist. Complainant received electroconvulsive therapy (“ECT” or “shock treatment”) on several occasions for severe episodes of depression and was prescribed multiple medications, including: Lamictal, Wellbutrin, Lexapro, Klonopin, Ativan, and, possibly, Seroquel and Lithium. Transcript, Vol. I, p. 39. Complainant took a medical leave from his job for approximately seven months in 2005. He received short-term disability benefits during his leave.

4. Following his medical leave, Complainant was assigned to Hartford, Connecticut from January 26, 2006 to January, 2007, first as a pre-load manager and then as a hub manager. The pre-load and hub manager positions are responsible for the unloading, sorting, and reloading of packages for daily delivery out of Respondent’s distribution centers. During 2006, Complainant had to take another leave because of his illness and was again hospitalized. Transcript, Vol. 1, p. 35; Vol. II, p. 245.
5. In January of 2007, Complainant was assigned to the night shift in Springfield, Massachusetts as the pre-load manager. In Springfield, Complainant was responsible for the entire pre-load operation, in contrast to his responsibilities as hub manager in Hartford where he worked alongside another manager and several other supervisors. Transcript, Vol. 1 p. 36. Complainant worked about 55 to 60 hours a week in the Springfield position. He reported to Division Manager Don

- Richardson. Complainant informed Richardson about his bipolar condition.
6. The stress of Complainant's position as pre-load manager on the night shift in Springfield exacerbated his bipolar condition. Transcript, Vol. 1, p. 37.
Complainant had difficulty working at night and sleeping during the day. He became forgetful, withdrawn, tired, and lethargic. Complainant began to experience performance problems for the first time in his career. Transcript, Vol. 1, p. 31. Packages were left in the building, there were safety concerns, and the facility was not reaching its production goals.
 7. In his medical notes, Dr. Jaffe described Complainant in March of 2007 as having, "a very hard time -- Has completed three ECT treatments in the past week . . . unfortunately little benefit so far. Remains moderate to severely depressed with poor energy, poor sleep, poor concentration, fleeting suicidal ideation, denies intent." Transcript, Vol. I, pp. 87-88. 2007. Dr. Jaffe subsequently described Complainant as, "tired, depressed, with decreased motivation, decreased concentration, and very discouraged." Id. at 88. According to Dr. Jaffe, when Complainant experienced a flare-up of his bipolar illness, he had difficulty concentrating, increased anxiety, occasional panic attacks, decreased energy, fatigue, difficulty sleeping, and, on occasion, suicidal feelings. Transcript, Vol. I, p. 93.
 8. Dr. Jaffe testified that sleep is a "big issue" for people with bipolar illness and that working nights "tends to wreak havoc on people with bipolar illness." Transcript, Vol. I, p. 89. According to Dr. Jaffe, interrupted sleep destabilizes bipolar illness and causes people with the disease to be much more likely to go into episodes of

- mania or severe depression. He testified that for people like Complainant, whose bipolar illness is difficult to control, proper sleep is important. Transcript. Vol. I, p. 90. Dr. Jaffe testified that because of Complainant's bipolar illness, he should not work more than 45 hours a week, 9 hours a day, and should not work nights. Transcript, Vol. I, pp. 89-90.
9. During the beginning the 2007, one of Complainant's subordinates, Rob Parker, showed Division Manager Don Richardson photographs he took of Complainant sleeping at work and of Complainant's car after an accident.
 10. Complainant met with Richardson and Marge Niedbalski, then-HR Manager for the South New England District on March 6, 2007 to discuss performance issues. Complainant explained that the car accident occurred on an icy road and that the picture of him "sleeping" at work was taken during his meal break. Transcript, Vol. 1, p. 39.
 11. On April 30, 2007, Complainant wrote to Richardson to say that he was seeking to step down as pre-load manager due to chronic bipolar illness and the stress of managing pre-load duties. Joint Exhibit 1. Complainant testified that the following day, Richardson asked him to remove from his letter the reference to his bipolar diagnosis. Transcript, Vol. 1, p. 42.
 12. On May 2, 2007, Complainant went to a hospital emergency room and was diagnosed as having a panic attack. Complainant thought he was having a heart attack. At the time, Complainant was working 60 hours a week.
 13. Complainant attended a second meeting with Richardson and Niedbalski on May 8, 2007. Niedbalski told him she would provide him ADA paperwork in response

- to his request for an accommodation but that she didn't want to discuss his bipolar condition because a company review committee had the responsibility for determining if employees met the requirements for a recognized disability under the ADA. Niedbalski and Richardson continued to discuss the need for Complainant to improve his job performance. Transcript, Vol. II, pp. 271-271.
14. On May 8, 2007, the same day as the meeting, Complainant wrote to Richardson reiterating that he wanted to step down as pre-load manager and wanted to be transferred to a daytime supervisory position, "preferably non-operations" as an accommodation for his disability. Joint Exhibit 2. Complainant's primary goal was to reduce his job stress. Transcript, Vol. II, p. 231.
15. According to Complainant's best recollection, the last day he went to work was May 8, 2007. Transcript, Vol. II p. 204. On May 14, 2007, Complainant began a personal, unpaid leave of absence from his job as pre-load manager. Joint Exhibit 15. Pursuant to UPS policy, supervisory/managerial employees may take up to twelve months of unpaid leave because of a medical condition.
16. Around the same time that Complainant stopped working in May of 2007, L. Renee Solomon,¹ Respondent's Occupational Health Nurse Supervisor for the North and South New England Districts, mailed Complainant a "Request for Medical Information" form (i.e., the "medical questionnaire") to be completed by Complainant's physician and an "Authorization for Release of Health Information" form to be signed by Complainant. Joint Exhibit 4. The medical

¹ Solomon assumed responsibility for the ADA process in the South New England District after Wendy Marshall, who was formerly the South New England District nurse, became the metro New York District nurse. Joint Exhibit 27 at p. 25. Prior to the public hearing, Solomon had never met Complainant in person. Joint Exhibit 27 at p. 22.

questionnaire requested identification of essential job function(s) of the pre-load manager job that Complainant was unable to perform because of his disability and the major life activities affected by Complainant's diagnosis or condition. Joint Exhibit 4; Joint Exhibit 27 at p. 31.

17. Dr. Jaffe did not respond to specific questions on Respondent's medical questionnaire, but on May 14, 2007, he wrote to Complainant's supervisor Don Richardson stating that Complainant was under his treatment for bipolar depression and that Complainant required an immediate medical leave of absence. Joint Exhibit 5. On May 17, 2007, Dr. Jaffe wrote a handwritten letter to "Director Dept. of Human Resources – UPS" stating that Complainant had become increasingly anxious and depressed related to working twelve-hour days as a manager and that in order to return to work, he required the following "reasonable accommodations:" to step down from his position as a manager, to work no more than 9 hours a day, 5 days a week, absent unusual or extraordinary situations, and to not work nights except on a "rare intermittent basis." Joint Exhibit 6; Transcript, Vol. I, p. 91. On May 18, 2007, Dr. Jaffe typed and re-sent the same letter he sent the previous day with the added proviso that he had reviewed the list of essential job functions for supervisors/managers and believed that Complainant would be able to perform the essential job functions with the requested accommodations. Joint Exhibit 7. Dr. Jaffe testified that he did not fill out the medical questionnaire because Complainant had no job-related restrictions other than the need to step down from a manager's position, to work no more than 9 hours a day, 5 days a week, and to not work nights except on a "rare intermittent

basis.” Transcript, Vol. I, p. 95.

18. Complainant testified that, notwithstanding his bipolar illness, he could have continued to work for Respondent in any of the following non-managerial positions: on-road supervisor, health and safety supervisor, CHSP supervisor, HR representative, employment supervisor (i.e., workforce planning supervisor), and training supervisor. Joint Exhibit 26; Transcript, Vol. I, pp. 57, 66-67; Vol. II, p. 218. Complainant believed he could have performed successfully in those positions because he had already worked as an on-road supervisor, CHSP supervisor, HR representative, and workforce planning supervisor. Transcript, Vol. I, pp. 26-27; 57, 70. Complainant described the stress level in supervisory positions as “way down” from that of managerial positions because “the entire operation isn’t on your shoulders.” Id. at 231-232.
19. HR manager Niedbalski testified that the positions which Complainant sought to fill did not meet his needs. She described the job of HR representative as requiring night work a minimum of 2 days a week in order to interview and orient people on evening shifts and a weekly schedule of 55 hours, consisting of 10-hour days. Transcript, Vol. II, pp. 304, 307. She described the position of CHSP supervisor as involving safety audits during which the supervisor enters a facility at noon, interviews employees until 10:00 p.m., and returns the next morning at 5:00 a.m. Id. at 308. She described the average work week of a safety supervisor as requiring a minimum of 55 hours. She testified that on-road supervisors perform three-day performance reviews and have rotating responsibility for closing centers. Id. at 309, 311. Niedbalski acknowledged on cross-examination

- that nobody discussed alternative positions with Complainant, asked Complainant whether he might sometimes be able to work 10 or 11 hours a day, asked him whether he could sometimes work nights, or inquired about whether Complainant had any flexibility with respect to his accommodation requests.
20. Complainant testified that although on-road supervisors monitor drivers during an entire work day, the requirement was weekly, not daily. Id. Complainant acknowledged that most of Respondent's supervisory positions are 50 hours a week and that they involve extra hours during peak times. However, Complainant testified that such demands would not have presented a problem for him because the jobs, in their totality, are less stressful than his position as pre-load manager. Transcript, Vol. 1, p. 71.
21. On May 29, 2007, Occupational Health Nurse Supervisor Solomon, who reported to Northeast Regional Occupational Health Manager Valerie Ballowe, sent Complainant a reminder to complete the medical questionnaire. Joint Exhibits 3 & 8. Dr. Jaffe testified that he may have faxed his letter of May 18, 2007 to Solomon on May 29, 2007, in response to the reminder. Transcript, Vol. I, pp. 122-123.
22. Complainant began to look for another job at some point after May of 2007. He applied, on-line, to some big box stores such as Costco, Sears, Lowes, and Best Buy. He applied for several human resource positions in northern Connecticut and Massachusetts. Complainant was not able to obtain other employment in 2007. Transcript, Vol. I, p. 63.
23. Complainant filed for unemployment but he did not receive unemployment

because he was considered to be still employed by Respondent. Transcript, Vol. 1 p. 62.

24. On June 1, 2007, Dr. Jaffe supplied Aetna Insurance with medical information in support of Complainant's application for short-term disability payments. The claim was denied. Transcript, Vol. II, p. 358..

25. On June 12, 2007, Complainant's attorney, Edward McDonough Jr., wrote to Occupational Health Nurse Supervisor Solomon to reiterate that Dr. Jaffe had provided information about Complainant's bipolar illness and to state that Dr. Jaffe could be contacted to discuss the information. McDonough enclosed a copy of Dr. Jaffe's May 18, 2007 letter concerning the essential job functions which Complainant could perform. Complainant's Exhibit 1. McDonough wrote a subsequent letter dated June 28, 2007 to Respondent's attorney Michael Harrington describing specific positions which Complainant could perform with his disability, including safety supervisor, CHSP supervisor, employee services supervisor, workforce planning supervisor, and training supervisor. Complainant's Exhibit 2. None of Respondent's representatives contacted attorney McDonough about the letter. Transcript, Vol. II, p. 230.

26. On or around July 6, 2007, Occupational Health Nurse Supervisor Solomon called Dr. Jaffe to inquire about whether he was going to complete the medical questionnaire. Dr. Jaffe asserted that his May 18, 2007 letter made the questionnaire unnecessary. Joint Exhibit 27, p. 39. Solomon responded that the letter was insufficient and that the form had to be completed. Dr. Jaffe refused to fill out the questionnaire on the basis that it was inapplicable to Complainant's

situation and that his letter of May 18, 2007 provided all the information that Respondent needed. Id. at 39-40; Transcript, Vol. I, pp. 96-98.

27. Medical questionnaires are reviewed by regional committees consisting of a Regional Occupational Health Manager and a Regional Work Force Planning Manager. The regional committee determines whether disability status will be recognized and accommodations provided. Joint Exhibit 25. In Complainant's case, the Northeast Regional Occupational Health Manager was Valerie Ballowe and the Northeast Regional Work Force Planning Manager was Kevin Quinn. Ballowe testified that the members of regional committees do not talk to employees seeking accommodations or to their doctors. After Complainant requested an accommodation, Ballowe did not explore whether there was a job that Complainant could have performed with his medical restrictions. She acknowledged at the public hearing that there were daytime positions which could have been performed on a nine-hour per day, five-day a week basis. Transcript, Vol. II, p. 332.
28. On July 10, 2007, Dr. Jaffe sent Solomon the medical authorizations signed by Complainant for the release of his health information. Dr. Jaffe requested that Solomon process Complainant's ADA accommodation ASAP so that Complainant could return to work. Joint Exhibit 10.
29. On July 13, 2007, Dr. Jaffe faxed his office notes of Complainant's 5/21/07 visit to a psychologist, Dr. Mendelsohn, at Aetna Insurance. Dr. Jaffe requested that Aetna expedite consideration of Complainant's application for short-term disability benefits in order to relieve Complainant's financial stress. Joint Exhibit

- 11.
30. Regional committee member Valerie Ballowe decided on July 23, 2007 that Complainant did not qualify as having a covered disability although she recognized that Complainant had bipolar illness. Transcript, Vol. II, p. 338. Ballowe arrived at this decision because Complainant could work 9 hours a day and 5 days a week. Id. at 340. Ballowe testified that in order for Complainant to qualify as disabled, his ability to work would have to be “limited.” Transcript, Vol. II, p. 341. Solomon informed Complainant of the Committee’s decision in a letter dated August 6, 2007. Joint Exhibit 12.
31. On August 17, 2007, Respondent’s Occupational Health Nurse Wendy Marshall wrote to Complainant to inform him that unless he supplied, within 72 hours, an updated medical certification supporting his absence from work, he would be terminated. Joint Exhibit 13. Dr. Jaffe responded to the letter on August 21, 2007. Joint Exhibit 14. He stated that he had provided UPS and Aetna with medical documentation of Complainant’s condition, faxed his office notes, and spoke to Dr. Mendelsohn, “at length.” Dr. Jaffe provided Complainant’s diagnosis (bipolar depression and an anxiety disorder); his history of hospitalizations; and a description of Complainant’s symptoms (crying spells, difficulty concentrating, poor sleep, low energy, irritability, and panic attacks). Id.
32. Complainant filed a complaint with the MCAD on February 1, 2008.
33. On February 11, 2008, Solomon wrote Complainant a so-called “nine-month letter” which noted that he had been out of work on a personal leave of absence since May 14, 2007, asked if Complainant was interested in again requesting an

- ADA accommodation, and stated that if he were interested, he should contact her. Joint Exhibit 15.
34. Complainant's attorney responded to Solomon's letter by sending a February 13, 2008 letter to Respondent's attorney about the possibility of the parties working out an accommodation for Complainant. Joint Exhibit 16.
35. Solomon responded to the letter of February 13, 2008 with a letter of February 21, 2008. She asserted that Dr. Jaffe had never completed Respondent's ADA paperwork, that Complainant had not authorized the release of his medical records (notwithstanding Dr. Jaffe's previous letter of July 10, 2007 which included Complainant's release), and that it had been previously determined that Complainant did not have an ADA-covered disability. Despite these assertions, Solomon sent Complainant second copies of the following forms: "Request for Medical Information" and "Authorization for Release of Health Information." Joint Exhibit 18. Solomon reminded Complainant in a follow-up letter dated March 25, 2008, that she had not received the completed medical forms. Joint Exhibit 19.
36. On March 27, 2008, Dr. Jaffe again wrote Solomon that Complainant was in treatment for bipolar illness and required the following accommodations: to step down from his position as a manager; to work no more than 9 hours a day, 5 days a week, absent unusual or extraordinary situation; and to refrain from working nights except on a "rare intermittent basis." Joint Exhibit 20. Rather than fill out the "Request for Medical Information" form, Dr. Jaffe wrote "See attached letter" on the form. He attached another signed "Authorization for Release of Health

Information” form. Id.

37. On May 22, 2008, Solomon wrote to Complainant to state that Dr. Jaffe had failed to detail what medications Complainant was taking. Solomon also inquired about the effect on major life activities of his not taking the medications. Joint Exhibit 21. Solomon enclosed another “Request for Medical Information” form, another “Authorization for Release of Health Information” form, and a third form entitled “Position -- “Operations Supervisors/Managers/unless otherwise listed Operations Supervisor/Manager” which listed essential job functions. Id. Included in the essential job functions was a statement that full-time hours were 9-10 hours per day, 5 days per week, with extended hours required on an as-needed basis. Id. Solomon sent a follow-up letter on June 13, 2008. Joint Exhibit 23.

38. In the late spring of 2008, Complainant obtained a seasonal, full-time position at Drewnowski Pool in Agawam. He performed sales functions, tested water, and stocked shelves. In September of 2008, he took a job at Rocky’s Ace Hardware Store in Hadley, Massachusetts as an assistant manager. As of the date of public hearing, Complainant was still employed at the hardware store. Complainant described the job as much less stressful than the positions he had at UPS.

Transcript, Vol. II, p. 183.

39. On July 15, 2008, Complainant’s attorney sent to Respondent’s attorney another copy of Dr. Jaffe’s March 27, 2008 letter.

40. Complainant was terminated by Respondent on or around July 28, 2008, at which time Complainant’s second accommodation request was rejected on the basis of insufficient medical information. Joint Exhibit 22.

41. Until 2007, Complainant never had any job performance problems. Transcript, Vol. 1, p. 31. Complainant testified that the loss of his position at UPS was devastating because he had worked there for 21 years and was proud of his work history with the company. Complainant described himself as hurt, depressed, and disrespected. He felt like he had been “kicked to the curb.” Transcript, Vol. 1, pp. 78-79. According to Dr. Jaffe, Complainant’s bipolar condition was affected “in a major way” by what happened to him at UPS. Transcript, Vol. I, p.145.
42. Complainant’s wife, Sandra Anderson, testified that she has been married to Complainant since 1987. They have two children who were 15 and 19 years old as of the public hearing date. Complainant and his wife separated in late 2008. Mrs. Anderson testified that Complainant’s bipolar condition caused him to gain and lose 70 pounds on several occasions. She stated that Complainant’s bipolar condition has adversely affected his marriage, his career, and his self-esteem his ability to parent and to relate to his children, and his social relationships. She described Complainant as, at times, extremely depressed, lethargic, withdrawn, reserved, quick to anger, and impulsive. *Id.* at 246, 247. Mrs. Anderson testified that following Complainant’s promotion to pre-load manager in January of 2007, he began to struggle with the assignment and that he reverted to shock treatments at that time because of fear that he was going to spiral out of control. *Id.* at 248. She described Complainant, after he stopped working at UPS, as a “mess,” as “devastated” and lacking in self-esteem. Mrs. Anderson testified that [Complainant] “was quite proud of the fact that he had started from the bottom and worked his way up at UPS, and working is a big part of who you are. He was

struggling with who he was, with his illness, and I think it really was extremely difficult for him.” Complainant’s wife acknowledged that Complainant was already on a “downward spiral” in May of 2007, but she testified that he was “hopeful” for a call from UPS. Id. at 254.

43. Complainant testified that in his experience at UPS, when employees were moved to lower level positions, their salaries were not reduced. Id. at p. 155. I do not credit this testimony. Instead, I credit the testimony of Respondent’s South New England District Employee Relations Manager Diane Hagi that when employees go from a manager level to a supervisor level, their salaries are adjusted downward. Transcript, Vol. III p. 437. Hagi testified that the salary range for supervisory positions is between \$5,055.00 to \$7,065.00 a month and that the salary range for managerial positions is between \$6,100.00 to \$8,600.00 a month. Id. at. 436-437.

44. At the time that Complainant stopped working for Respondent, his annual salary was \$75,300.00 plus bonus, and his monthly gross pay was \$6,275.00. Joint Exhibit 30; Transcript, Vol. I, p. 155. Between January of 2007 and the last day he went to work for Respondent in May of 2007, Complainant earned \$37,524.00. Transcript, Vol. I, pp. 151-153. Respondent contributed monthly to Complainant’s 401(k) plan in the amount of \$188.25 until Respondent stopped making 401(k) matching contributions in February of 2009. Joint Exhibit 30. Complainant received family health and dental insurance from Respondent, for which he contributed a monthly fee in the amount of \$329.67 as of March of 2007. Joint Exhibit 30. After he lost his job, Complainant’s family received

health and dental insurance through his wife's job at a cost of \$2,927.08 for part of 2007, \$5,854.16 for all of 2008, and \$5,366.31 for eleven months in 2009 up to the date of public hearing. Id. at 158-159. In 2008, Complainant earned \$6,719.00 from Drewnoski Pools and \$8,615.00 from Rocky's Ace Hardware Store for a total income of \$15,334.00. Transcript, Vol. I, p. 154. As of 2009, Complainant's annual salary at Rocky's Ace Hardware Store was \$35,000.00 per year (\$2,916.00 per month).

45. Complainant was 49 years old at the public hearing. Complainant is vested in Respondent's retirement plan. Transcript, Vol. III, p. 444. Complainant plans to work until he retires.

III. CONCLUSIONS OF LAW

A. 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. Complainant suffers from bipolar depression and anxiety disorder. Complainant's condition causes panic attacks, fatigue, decreased energy, inability to concentrate, difficulty sleeping, and suicidal feelings. It has an adverse impact on his cognitive functions and on his interpersonal relationships. Complainant's disorder also impairs his ability to work, as evidenced by the fact that he

was forced to take a seven-month leave in 2005, another leave in 2006, and an ongoing leave from May of 2007 until his termination in 2008.

Complainant's condition restricts him from engaging in activities that are of central importance to his daily life. See Toyota Motor Manufacturing Kentucky Inc. v. Williams, 534 U.S. 184 (2002). Were it not for medications such as Lamictal, Wellbutrin, Lexapro, Klonopin, Ativan, Seroquel, and Lithium, there is every reason to believe that Complainant would be even more incapacitated than he was in 2007. Respondent focuses on the specific nature of the accommodation requested by Complainant -- a less stressful daytime position limited, for the most part, to nine hours a day, five days a week -- as evidence that Complainant is not disabled. However, Complainant's impairment substantially limits a number of major life activities, not just the ability to work. The fact that Complainant sought to continue working with an accommodation does not detract from the seriousness of his disorder or its impact on Complainant's life both inside and outside of work. According to 2008 amendments to the ADA, the term "disability" is to be construed in a manner that favors broad coverage and disfavors extensive analysis. See ADA Amendments Act of 2008, Public Law # 110-325, section 2 (b) (5). 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.

Insofar as Complainant claims to be a qualified handicapped individual, it is noteworthy that he could have performed the essential functions of various positions at UPS had his request for a shift change and the relinquishing of excessively stressful duties been granted. The alternative assignments sought by Complainant all fall under

the umbrella of Respondent's generic job description for managerial/supervisory positions. While the functions of the various positions under the generic job description are separate and distinct, Respondent's employees are routinely moved from one job to another at the discretion of management in order to address the company's operational needs and to give employees experience in different areas. Complainant himself has a history of such reassignments.

The transfer of an employee from one job to another might be an unreasonable accommodation under some circumstances but in this case the frequent and routine transfers of managerial and supervisory employees at the discretion of the company makes a job transfer to a daytime position with less stress and fewer hours a reasonable accommodation. Complainant's qualifications for the positions he sought were not at issue because he had already performed several of the jobs in a satisfactory manner. Complainant's situation contrasts with that in Fiumara v. Harvard University, 526 F. Supp. 2d 150 (D. Mass. 2007) *aff'd* May 1, 2009 where the court did not consider an injured bus driver's request to drive a van to be a reasonable accommodation on the basis that the bus and van positions required different training and qualifications. Unlike the situation in Fiumara, the requested transfers in this case were both feasible and reasonable. See Kane v. Suffolk County Sheriff's Dept., 20 MDLR 135, 143 (1998) (job duties of correction officer are varied enough to permit reassignment of disabled officer from a position with inmate contact to another with little or no inmate contact). Because the evidence indicates that Complainant had the necessary qualifications and could have functioned successfully in a variety of daytime supervisory positions, he is entitled to consideration as a qualified handicapped person at the time he requested an

accommodation.

To state a case of discrimination based on a failure to accommodate, Complainant must prove that, as a qualified handicapped person capable of performing the essential functions of his job, he requested a reasonable accommodation and was prevented from performing his job because his employer failed to reasonably accommodate the limitations associated with his handicap. See Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). As far as requesting a reasonable accommodation is concerned, Complainant made repeated requests for modified duty, self-identifying as an individual with a chronic disability.

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 15-16, 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). 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 MBTA v. MCAD, 450 Mass 327, 342 (2008); Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000); Daly v Codman & Shurtleff, Inc., ___ MDLR ___ (February 8, 2010).

Rather than engage in an "open" and "meaningful" communication with Complainant, Respondent insisted that Complainant's accommodation could only be evaluated after Dr. Jaffe filled out the company's medical questionnaire. The situation deteriorated into a contest over the company's insistence that Dr. Jaffe fill out its form and Dr. Jaffe's insistence that he could best address Complainant's disability and accommodations using a narrative format. The disagreement literally became a contest of form over substance. The parties' stand-off is illustrated by the fact that Respondent failed to respond in a substantive manner to correspondence from Complainant's attorney which stated that: 1) Dr. Jaffe had already provided information relative to Complainant's bipolar illness; 2) enclosed Dr. Jaffe's letter concerning the "essential job functions" which Complainant could perform with accommodations; 3) noted that Dr. Jaffe could be contacted to discuss the information; and 4) described specific positions which Complainant could perform, such as safety supervisor, CHSP supervisor, employee services supervisor, workforce planning supervisor, and training supervisor.

Respondent's Occupational Health Nurse Supervisor Renee Solomon responded that the letter was insufficient and insisted that the medical questionnaire had to be filled out.

Respondent's Regional Health Manager Valerie Ballowe acknowledged at the public hearing that there were positions which Complainant could have been performed on a 9-hour per day, 5-day a week basis. Nonetheless, Respondent's HR, operational, and medical staff failed to discuss these alternative positions with Complainant, failed to inquire whether Complainant might sometimes be able to work 10 or 11 hours a day, failed to ask Complainant whether he could sometimes work nights, and failed to determine whether Complainant had any flexibility with respect to his accommodation requests. Had Respondent done so, Complainant would have been able to clarify that his request for a supervisory position 9-hours a day, 5 days a week, did not preclude extended hours and/or nighttime work on a sporadic basis. Complainant made clear at public hearing that his primary goal was to diminish the stress associated with managerial responsibilities. In the absence of an interactive dialogue with Complainant, there was no basis for concluding that Respondent would have sustained undue hardship had it granted Complainant the accommodation he sought in 2007. Respondent's unduly strict standard for responding to accommodation requests is evidenced by Ballowe's inability to cite a single example of a workplace accommodation being given in response to the 80 to 100 annual requests for assistance.

Based on the foregoing analysis, I conclude that Complainant was a qualified handicapped person who was potentially capable of performing the essential functions of a number of supervisory positions and that such positions were available at the time he sought a reassignment. He was not given the opportunity to participate in an interactive

process designed to fashion a reasonable accommodation. See Johansson v. MCAD, Appeals Court, No. 2005-P-1367, p. 7 (2007), Rescript Judgment per Rule 1:28 (holding that employer required to participate in interactive accommodation process aimed at locating an alternative position and remanding case for evidentiary hearing on availability of such a position). Respondent's approach to the reasonable accommodation process was long on formality, short on meaningful communication. Complainant's sleep difficulties, cognitive problems, weight fluctuations, and hospitalizations were known to Respondent and, in two instances, recorded by subordinates in unauthorized photographs. Thus, the full measure of Complainant's condition was apparent in 2007 and cannot be characterized in Respondent's words as "late revealed evidence." Respondent's rigid and unyielding approach to the interactive process violates the premise that it should be a flexible dialogue designed to achieve a mutually beneficial goal. See Johansson, supra (recognizing duty to cooperatively explore issue of reasonable accommodation with disabled employee in order to determine if accommodation is feasible). Respondent was aware that Complainant's pre-existing psychiatric illness necessitated modifications to his job but declined to enter into a meaningful and flexible dialogue to explore ways in which Complainant could continue to work. Based on the foregoing, I conclude that Respondent failed to reasonably accommodate Complainant's handicap.

B. Constructive Discharge

In order to establish constructive discharge, Complainant must prove that his working conditions were so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995) (constructive discharge in sexual harassment context); Said v. Northeast Security, 18

MDLR 255, 259 (1996) (constructive discharge in racial discrimination context). See generally MCAD Sexual Harassment in the Workplace Guidelines, VIII - Constructive Discharge. Constructive discharge can occur even if the employer does not act with the specific intent of forcing an individual to resign. See Langford v. Division of Unemployment Assistance, 17 MDLR 1043, 1063 (1995), *aff'd*, 18 MDLR 36 (1996) (Full Comm'n). Adverse working conditions must be unusually “aggravated” or amount to a “continuous pattern” in order to be deemed “intolerable.” Id.; see also Robinson v. Hafner’s Service Stations, Inc., 23 MDLR 283 (2001) (no constructive discharge despite allegations of pornographic material in work area and sexually offensive behavior). In this case the intolerable conditions consisted of Respondent’s refusal to address, in a meaningful way, Complainant’s need for an accommodation necessitated by his handicap.

The medical evidence supports a conclusion that the job of pre-load manager on the night shift in Springfield, Massachusetts was unsustainable for an individual like Complainant with bipolar disorder and depression. There is convincing medical evidence that sleep disruption exacerbates bipolar symptoms. Working at night contributed to Complainant’s difficulty sleeping which caused him to become forgetful, withdrawn, tired, and lethargic. Dr. Jaffe testified that sleep is a “big issue” for people with bipolar illness and that working nights “tends to wreak havoc on people with bipolar illness.” According to Dr. Jaffe, interrupted sleep destabilizes bipolar illness and causes people with the disease to be much more likely to go into episodes of mania or severe depression. Dr. Jaffe testified that for people like Complainant, whose bipolar illness is difficult to control, proper sleep at night and in the proper amount, is an important

stabilizing factor.

As an individual with control bipolar symptoms that are difficult to control, Complainant was unable to work at night and to perform duties which he considered to be unacceptably stressful. He sought to modify his job responsibilities and his schedule so that his work would be more compatible with his medical condition. Although Respondent has a record of frequently moving supervisors and managers from one assignment to another, it declined to transfer Complainant from a night-time managerial position to a daytime supervisory position despite his long and satisfactory work history with the company, his repeated requests to step down, and his doctor's supporting documentation. Given Respondent's refusal to recognize Complainant's need for an accommodation and its insistence that his job performance improve, Complainant had no choice but to leave his job on or around May 8, 2007. Complainant's work environment was so detrimental to his health that he was forced to commence an unpaid leave of absence. This leave predates by over a year his official termination date of July 28, 2008. Based on these factors, I conclude that Complainant's departure from the company on a leave of absence, effective May of 2007, constituted a constructive discharge.

IV. REMEDIES AND DAMAGES

Back and Front Pay 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).

The period between Complainant's leave of absence in May of 2007 and the commencement of the public hearing must 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). Although Complainant was not terminated by Respondent until July 28, 2008, he ceased being paid by Respondent and began to look for alternative employment once he was compelled to take a leave of absence from his job in May of 2007. Complainant applied, on-line, to some big box stores such as Costco, Sears, Lowes, and Best Buy. He applied for several human resource positions in northern Connecticut and Massachusetts. Complainant was not able to obtain other employment in 2007. In the late spring of 2008, Complainant obtained a seasonal, full-time position at Drewnowski Pool in Agawam, Massachusetts. He performed sales functions, tested water, and stocked shelves. In September of 2008, he took a job at Rocky's Ace Hardware Store in Hadley, Massachusetts as an assistant manager. As of the date of public hearing, Complainant was still employed at the hardware store.

Based on the foregoing, I conclude that Complainant is entitled to back pay damages between May of 2007 and November of 2009, the date of public hearing. As far as 2007 is concerned, the evidence establishes that the average salary for Respondent's supervisors in or around May of 2007 was \$6,060.00 monthly. Thus, if Complainant had been permitted to work as a supervisor between May and December of 2007, he would have earned \$48,480.00. During that period, Complainant would, in addition, have received a matching contribution to his 401(K) retirement account in the amount of \$1,280.00, based on an estimated amount of \$160.00 monthly, somewhat less than the

\$188.25 matching amount that Complainant received as a manager. Altogether, Complainant would have earned \$49,760.00 more than the \$37,524.00 he actually earned between January of 2007 and the last day he went to work for Respondent in May of 2007.

Turning to 2008, if Complainant had been permitted to transfer into a daytime supervisory position, he would have earned \$72,720.00 plus \$1,920.00 in matching 401 (K) contributions. This amount is \$59,306.00 more than his actual 2008 income of \$15,334.00 from Drewnoski Pools and Rocky's Hardware. In 2009, from January to the date of public hearing, Complainant would have earned \$66,980.00 as a supervisor for Respondent, including two months of matching 401 (K) contributions. This estimated amount is \$34,904.00 more than the \$32,076.00 income he earned as assistant store manager at Rocky's Ace Hardware Store. Altogether, Complainant lost \$143,970.00 in back pay.

An award of front pay is similarly warranted. The Supreme Judicial Court recently upheld a 19-year front pay award under G.L. c. 151B where the evidence supported a finding that an employee would have continued to work for the same employer but for the discrimination and was unable to obtain comparable work elsewhere. See Haddad v. Wal-Mart, SJC – 10261 at p. 7 (February 5, 2009); but see Fitzpatrick v. Boston Police Department, 18 MDLR 29, 30 (1996) (awards of front pay are speculative and generally granted only when the discriminatory act occurs near an individual's retirement date). The discriminatory acts in this case occurred when Complainant was 49 years old and in his 21st year with the Respondent. Complainant had every intention of remaining employed at UPS until he retired. Because

Complainant's education is limited to high school, he testified credibly that his salary would be difficult to duplicate elsewhere. See Kelley v. Airborne Freight Corp., 140 F.3d 335, 355-356 (1st. Cir.), *cert. denied*, 525 U.S. 932 (1998) (million dollar front pay award granted under Massachusetts law for 46-year old plaintiff because his lack of education made comparable work difficult to obtain). Complainant anticipated having to work until he could afford to retire and therefore it is reasonable to use a projected retirement date of age 65. See Haddad, SJC - 10261 (February 5, 2009) at p. 7. Under these circumstances, Complainant is entitled to front pay based on the difference between the average salary of Respondent's supervisory positions as of May of 2007 and the salary Complainant earned at Rocky's Ace Hardware Store in 2008. The relevant time frame is the 16-year, 3-month period between the date of public hearing commencing in November of 2009 and February 13, 2025, when Complainant reaches age 65. I calculate this amount to be \$603,520.00.

In general, front pay damages are based on the present discounted value of the income stream. See Haddad, SJC - 10261 (February 5, 2009) at p. 6. In this case, however, the parties have presented no evidence pertaining to the size of the discount rate or the extent to which the discount rate would reduce the front pay damage award. Since it is Respondent's burden to establish mitigation, I conclude that the front pay award is entitled to stand in the absence of evidence allowing me to discount the award to its net present value.

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. The loss of his position at UPS was devastating because Complainant had worked there for 21 years and was proud of his work history with the company. Complainant described himself as hurt and disrespected. He felt like he had been “kicked to the curb.” As a non-college graduate working for Respondent in supervisory and managerial positions, Complainant took great pride in starting from the bottom and working his way up at UPS. Complainant’s wife described Complainant, after he stopped working at UPS, as a “mess,” as “devastated” and lacking in self-esteem. The couple separated in late 2008 after more than 20 years of marriage. Although Complainant’s underlying bipolar illness contributed to the separation, it is noteworthy that it took place after Complainant’s termination by Respondent, not before. Dr. Jaffe testified that Complainant’s condition was affected in a “major way” by what happened to him at UPS.

There is, to be sure, a complex interaction between Complainant’s previously-existing depression associated with his bipolar illness and anxiety disorder on the one hand and his emotional distress at being denied an accommodation, constructively discharged, and terminated on the other hand. It is not unusual for multiple sources of emotional distress to be present in a discrimination case. The presence of other significant stressors does not absolve an employer from liability for the emotional distress caused by its discriminatory actions. See Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) *citing* Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974,

975 (1988). After weighing all the factors contributing to Complainant's emotional distress, I conclude that Complainant is entitled to \$125,000.00 in emotional distress caused damages by Respondent's failure to accommodate his disability which, in turn, led to his constructive discharge and ultimately his official discharge.

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:

- (1) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$143,970.00 in back pay 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;
- (2) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$603,520.00 in front pay damages, without interest;
- (3) pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$125,000.00 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;
- (4) Within one hundred twenty (120) days of the receipt of this decision, Respondent shall conduct a training session concerning handicap discrimination

for supervisors and managers employed in the South Northeast District of Respondent's Northeast Region who exercise decision-making authority in regard to handicap discrimination determinations. Such individuals shall include, but not be limited to: Occupational Health Nurses, Occupational Health Nurse Supervisors, Occupational Health Managers, Regional Occupational Health Managers, Regional Work Force Planning Managers, Human Resource Managers, and Human Resource Supervisors. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination 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.

- (5) 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. The repeat training session shall be conducted within one year of the first session. Following the second training session, Respondent shall send to the Commission, the names of persons who attended the training.

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 16th day of March, 2010.

Betty E. Waxman, Esq.,
Hearing Officer