

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and  
ERIC MADONNA,  
Complainants

v.

Docket NO. 09 NEM 02541

FALL RIVER  
POLICE DEPARTMENT,  
Respondent  
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Appearances: Kevin Powers, Esq. for Complainants  
John R. Mitchell, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 29, 2009, Eric Madonna (“Complainant”) filed charges of employment discrimination with the Massachusetts Commission Against Discrimination (“MCAD”) alleging discrimination based on a disability related to PTSD. A probable cause finding was issued on July 31, 2012. The case was certified to public hearing on March 11, 2013.

A public hearing was held on January 13, 14, 16, 17, 21, February 3 and 10, 2014. The parties submitted thirty-six (36) joint exhibits.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant Eric Madonna was hired as a Fall River police officer in 1996. During his police career, Complainant received numerous commendations. In 2007 he was named “Officer of the Year.” Transcript I at 39.
2. While employed as a Fall River police officer, Complainant volunteered for active duty with the Army and served in Iraq for one year. He returned to his Fall River police position in 2004. In 2005, he began a second tour of duty in Iraq for eighteen months. Transcript I at 41, 44. Complainant returned to the Fall River Police Department in June of 2006.
3. On September 24, 2006, Complainant was involved in a high speed chase of a suspect from Fall River to Brockton which led to the arrest of the suspect. Transcript I at 47, 50. Complainant testified that he did not fire his service revolver but that a passenger in the car he was chasing fired on him. Transcript I at 48. Following the arrest, Complainant was taken “off the streets” for an investigation of the incident. Transcript I at 52. After approximately two weeks, Complainant returned to his regular tour of duty on the night shift. Transcript I at 53, 57.
4. Patrol Officer/Union President Mike Pereira<sup>1</sup> testified that following the 2006 incident, Chief Souza (retired) sometimes referred to Complainant as “crazy Madonna” and that Chief Souza and Deputy Chief Morrissette (retired) said that Complainant couldn’t “work the streets” because he was “crazy,” “nuts,” a “kook,” and a “loose cannon” due to Post-Traumatic Stress Disorder (“PTSD”). Transcript IV at 11, 13-14, 36. Deputy Chief Morrissette testified that he doesn’t recall making any

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<sup>1</sup> Pereira’s term as union president began in January of 2007 but he assumed the responsibilities of president immediately after the November, 2006 election. Transcript IV at 56; VII at 104.

demeaning remarks about Complainant, but he recalls that Chief Souza from time to time used the terms “kook” and “crazy” in regard to Complainant. Transcript V at 16, 58. Sgt. Mauretti testified credibly that he had, on occasion, heard then-Chief Souza refer to Complainant as “crazy” and that Deputy Chief Morrissette had used derogatory terms in reference to Complainant’s sanity. Transcript III at 167. Chief Souza acknowledged that he “probably” called Complainant a “loose cannon” and “crazy.” Transcript VII at 91. Complainant testified that some fellow officers also referred to him as a “loose cannon.” Transcript I at 45. I credit that Chief Souza, Deputy Chief Morrissette, and some fellow officers used derogatory epithets in referring to Complainant’s emotional state.

5. In December of 2006, Complainant started treatment with the Providence Veterans Administration Hospital for nightmares, sleep problems, depression, and drinking. Transcript I at 59.
6. In 2008, Complainant received a commendation for his actions in regard to the 2006 pursuit and arrest. Transcript I at 57. There was no awards ceremony during 2007 because of labor/management disputes.
7. In 2008, Complainant worked the night shift. Transcript I at 65. The night shift consists of working midnight to eight a.m. and 4:00 p.m. to midnight.
8. In 2008, Complainant began to drink heavily and have suicidal ideation. He made three suicide attempts in July of 2008. Joint Exhibit 3. Complainant began treating with Licensed Independent Clinical Social Worker (“LICSW”) Paula Smith in May of 2008.<sup>2</sup> Transcript I at 59; II at 62. She evaluated him on September 16, 2008 as

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<sup>2</sup> Smith received a Master’s Degree in Social Work from Boston University School of Social Work in 1989. Transcript II at 57. She was deployed as an army officer in a combat stress control unit in Iraq in 2003. Id.

presenting with symptoms of PTSD including intrusive thoughts, sleep maintenance problems, difficulties concentrating, irritability, near-continuous panic, and social isolation. Joint Exhibit 4. Complainant entered a three-month PTSD residential treatment program at Coatesville, PA operated by the Veterans Administration (“VA”). Transcript I at 60; II at 65. Between September and November of 2008, Complainant remained out of work on sick leave. Transcript I at 146.

9. After being released from the Coatesville facility on November 4, 2008, Complainant called Sgt. Thomas Mauretti to say that he had been released from in-patient treatment for PTSD. Transcript I at 143, 147; III at 133. Sgt. Mauretti, the highest ranking person in Respondent’s Internal Affairs Unit, conferred with Chief Souza and told Complainant that he would have to provide a doctor’s note clearing him to return to work. Transcript I at 64. According to Sgt. Mauretti, the Fall River Police Department requests treating therapists to furnish clearance letters whenever an officer goes out on leave for stress or depression. Transcript III at 156-157.
10. On December 4, 2008, LICSW Smith spoke to Sgt. Mauretti on the phone about the documentation needed for Complainant’s return to work. Joint Exhibit 7. Complainant and Smith agreed that Complainant’s return to work should be predicated upon an accommodation limiting him to the day shift. Transcript I at 65, 137-138; II at 72; Joint Exhibit 8 (11/21/08 & 12/4/08).
11. Complainant submitted a note dated December 8, 2008 co-signed by LICSW Smith and Complainant’s V.A. psychiatrist, Dr. Landis Mitchner, M.D. Joint Exhibit 7<sup>3</sup>.

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Smith has counseled veterans since 1999 when she began working for the Veterans Administration and has received training by the military in the treatment of veterans with PTSD. Transcript II at 60.

<sup>3</sup> A second letter containing the same contents as Joint Exhibit 7 was generated on Dr. Mitchner’s own V.A. stationary. Joint Exhibit 10.

The note states that Complainant could return to work as a police officer “with accommodation” for his disability and that Complainant posed no threat to himself or others. Id. The note references the telephone conversation between Sgt. Mauretti and Smith during which they discussed an accommodation for Complainant’s disability but does not specify the nature of the accommodation. Id. Smith testified that the discussion between herself and Sgt. Mauretti referenced Complainant’s sleep issues on the swing shift<sup>4</sup> and Complainant’s request that he return to work on the day shift. Transcript II at 71-72. Sgt. Mauretti concurred that Complainant sought to avoid working nights and that Smith stated that it was not a good idea for Complainant to return to a night position. Transcript III at 138, 157. According to Sgt. Mauretti, Complainant didn’t want to go back to working the night shift as a patrol officer and said that he would retire if he were given that assignment. Transcript IV at 142-145. Sgt. Mauretti testified that Complainant did not have sufficient seniority to work as a patrol officer on the day shift absent an accommodation. Transcript IV at 145.

12. Chief Souza testified that he was informed by Sgt. Mauretti that Complainant sought to avoid working in public, not that Complainant sought to avoid working nights. Transcript VII at 68, 117, 120. According to Chief Souza, had Sgt. Mauretti said that Complainant only sought to avoid working nights, the Chief would have permitted Complainant to work in public on the day shift regardless of his seniority because he believed that an accommodation trumped seniority. Transcript VII at 154. I do not credit Chief Souza’s testimony. I credit, instead, the testimony of LICSW Smith and Sgt. Mauretti that Complainant sought an accommodation to not work the night shift

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<sup>4</sup> The “swing” and the “night” shifts are both part of the same schedule. Transcript III at 138-140.

and that it was Chief Souza who did not believe it was prudent to put Complainant in contact with the public. This finding is corroborated by the testimony of Union President Pereira that Chief Souza and Deputy Chief Morrissette expressed the view that Complainant couldn't function as a police officer on the street because of his PTSD. Transcript IV at 93-96.

13. Complainant asserts that Sgt. Mauretti suggested that he (Complainant) become the Department's "detail officer," overseeing the assignment of paid details. Transcript I at 66, 149. I do not credit this testimony and find, instead, that it was Complainant who initiated the proposal and that it was rejected by the Chief as unnecessary and costly. Transcript III at 146, 149.

14. Complainant testified that after Chief Souza rejected the "detail officer" position, he was put into the Identification Unit as a fourth detective<sup>5</sup> with the sole restriction that he not accept detail assignments at bars serving alcoholic beverages. Transcript I at 71, 154, 156, 158, 190; II at 30. I do not credit this testimony and find, instead, that Sgt. Mauretti offered Complainant the opportunity to fill a newly-created "evidence custodian" position<sup>6</sup> to purge and organize the evidence room and manage the collection, cataloging, and storage of evidence. Transcript IV at 111-112; Joint Exhibit 8 (12/8/08 entry); Transcript I at 182; II at 114; VI at 10, 92. The evidence custodian position was designed to have daytime hours (8:00 a.m. to 4:00 p.m.) and a

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<sup>5</sup> A detective position consists of going to the scene of a crime and investigating it by taking photographs, fingerprints, and DNA evidence. The position requires a detective to be on call for one week out of the month in order to go to crime scenes during weekends and at night. Transcript I at 91, 159; II at 34-35; IV at 98, 113-114; VI at 92.

<sup>6</sup> Sgt. Mauretti describes the position as that of "ID" officer but it is functionally the same as that of evidence custodian. Transcript III at 151, 158-159.

weekday schedule, with no weekends or holiday work. Transcript III at 160; IV at 112.

15. Complainant accepted the evidence custodian position and returned to work on December 9, 2008 in that capacity. He was assigned to the evidence area consisting of multiple rooms and was given the task of processing evidence that the crime scene investigators brought in. Transcript I at 87. At that time, the evidence area housed three detectives who worked in the Identification (“ID”) Unit of the Major Crimes Division. Lt. Tetrault was in charge of the ID Unit. Transcript V at 48. One of the detectives was Patrol Officer Tim Albin. Albin was not a superior officer to Complainant. Transcript V at 49; VI at 15; VI at 96, 99; VII at 62.
16. Complainant testified that he was assigned to work inside the evidence vault, that the maintenance crew moved a desk inside the vault for him to use, and that the door to the vault was supposed to remain closed and locked for security. Transcript I at 79, 83. I do not credit this testimony. Instead, I credit the testimony of witnesses Tetrault, Racine, and Souza that Complainant was allowed to work wherever he wanted inside the evidence area, that he chose to work inside the evidence vault because it was convenient, and that the door to the vault did not have to be closed. Transcript I at 177, 179; VI at 13-14, 94-95, 105-106, 115-116, VII at 61. Complainant’s successor in the position, Aaron LaPage, did not sit inside the vault. Transcript III at 203. It was Complainant who took the initiative to wire the vault for computers.
17. Complainant thanked Chief Souza for the evidence custodian position at Respondent’s 2008 Christmas party. LICSW Smith’s office note of December 23,

2008 states that Complainant liked his job. Joint Exhibit 8. Her office note of January 6, 2009 states that Complainant felt “encouraged” by Captain Racine telling him that he had done a great job organizing the evidence room. Joint Exhibit 8. Complainant testified that he enjoyed performing his job. Transcript I at 181.

18. Complainant’s father died on January 9, 2009. Complainant requested that Respondent provide an honor guard at his father’s funeral. The request was denied because honor guards are only available for police officers, not family members. Transcript V at 19; VII at 66.

19. Complainant alleges that Sgt. Arthur Silva and other co-workers belittled him for working inside the evidence area and wrote him anonymous notes containing the word “kook.” Transcript I at 96; II at 78-79; III at 117, 119. I credit that Complainant saw at least one note on his car that said “kook” and that Sgt. Silva and some other police officers expressed the view that he should be back on patrol, i.e., “on the streets.” Transcript II at 75, 117; III at 119; Joint Exhibit 8 (12/08/08; 12/23/08; 12/30/08).

20. At some point between December 9, 2008, when Complainant became evidence custodian and January 27, 2009, when Complainant stopped serving in that capacity, he raised the issue of not getting detail work and overtime. Transcript I at 95, 98-99; II at 75-76; VI at 122; VII at 67; VII at 68. Chief Souza sought an opinion from the City’s Law Department about whether Complainant qualified for detail work. Transcript III at 165; VII at 68. Chief Souza made the request because he deemed Complainant to be filling the evidence officer position on a light-duty basis<sup>7</sup> and

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<sup>7</sup> According to Deputy Chief Morrissette, light and restricted duty are “pretty much synonymous.” Transcript V at 60.

because he deemed Complainant's accommodation to restrict his contact with the public. Transcript VII at 72, 126.

21. Respondent's Paid Details and Secondary Outside Employment Policy prohibits officers on restricted duty, light duty, sick leave, and other specified leaves from working paid details. Joint Exhibit 26, p.4; Transcript V at 40. Chief Racine testified that if police officers are restricted from their regular duties, they should be restricted from performing details. Transcript VI at 48.
22. On January 27, 2009, Lt. Tetrault informed Complainant that he could not work details. Transcript I at 101-102. Complainant testified that he became "stressed out" and "physically shaken up inside" and felt like his head "was going to explode." Transcript I at 102. Complainant left the police station to meet with LISCW Smith in Brockton. Transcript I at 104, 193-194. Complainant did not have clearance to leave the station and he did not tell his supervisors that he was leaving. Sgt. Mauretti called Complainant as he was on route to or at Smith's office. Sgt. Mauretti asked Complainant if he felt like he was going to hurt himself and Complainant said no. Transcript III at 171.
23. Sgt. Mauretti, after speaking with Complainant, had a telephone conversation with Complainant's brother on January 27, 2009 during which Complainant's brother told Mauretti about Sgt. Silvia's criticism of Complainant and the note on Complainant's car saying "kook." Transcript IV at 121. Complainant subsequently confirmed these matters to Sgt. Mauretti, but he did not file an official report. Transcript IV at 121.
24. Union President Mike Pereira spoke to Lt. Tetrault several times on January 27, 2009. Tetrault stated that Complainant's accommodations "didn't allow him to work the

street.” Transcript IV at 18, 64-66. According to Pereira, the issue of Complainant being denied details and overtime could have been grieved by the Union but Complainant did not choose to pursue it through the grievance process. Transcript IV at 83.

25. While meeting with Complainant on January 27, 2009, LISCW Smith spoke to Captain Racine over the phone. Transcript I at 106; II at 77; VI at 31. According to Captain Racine, he informed Smith that Complainant faced discipline for leaving the station without permission. Transcript IV at 31. Racine said that he expected Complainant back at work the next day. Id.
26. Complainant did not report to work on January 28, 2009. He called Lt. Tetrault to say that he would be absent due to “stress.” Transcript I at 106; II at 12, 80. Complainant remained home the entire day. Transcript II at 54.
27. When Chief Souza learned that Complainant had called to say that he was taking a sick day due to stress after the events of the previous day, Chief Souza instructed Sgt. Mauretti to obtain Complainant’s service revolver. Transcript III at 177; IV at 124.
28. At 10:30 a.m. on January 28, 2009, Chief Souza asked Sgt. Mauretti to obtain information about whether Complainant owned personal firearms in addition to his Departmental weapon. Transcript IV at 153. Sgt. Mauretti learned that Complainant owned personal weapons. Transcript IV at 153. The Chief instructed Sgt. Mauretti to have Complainant turn over his weapons. Transcript IV at 155.
29. Sgt. Mauretti called Complainant and told him to surrender all his firearms, his police ID card, his license to carry, and police station swipe card. Transcript I at 107; IV at 155. At the time, Complainant’s service weapon was in his locker at work.

- Transcript II at 14. Complainant testified that he was willing to return the Department's firearm but that in regard to his personal firearms (consisting of three to four shotguns, three to four rifles, several handguns, and ammunition), he told Sgt. Mauretti to "get a warrant" and hung up. Transcript I at 113; II at 14-15; IV at 156.
30. After speaking to Sgt. Mauretti, Complainant called LICSW Smith to tell her what was happening. Transcript I at 110; II at 80. According to Smith, Complainant was extremely distraught at being ordered to turn in his weapons. Transcript II at 80-81.
31. Chief Souza testified that he considered various ways of securing a return of the weapons, including use of the Department's SWAT team and the State Police SWAT team, but he did not pursue these options. Transcript VII at 76. Sgt. Mauretti expressed his opposition to the proposal. Transcript III at 190-191; VII at 140.
32. Sgt. Mauretti called LISCW Smith, Complainant's brother, and fellow officers Thorpe and Cordeiro, who were friends of Complainant, in an attempt to resolve the situation. Transcript III at 192; IV at 128. Complainant received calls from his brother, who advised him to turn in his weapons, from Thorpe, and from Union President Mike Perreira. Transcript I at 114; II at 20. Complainant describes himself as "suicidal" at the time, although he also testified that he would "never do it myself." Transcript I at 115.
33. The situation was resolved when Officer Cordeiro went to Complainant's house and obtained his ID card, access card, and his license to carry firearms. Transcript I at 117; III at 200. Officer Cordeiro brought Complainant the contents of his police locker (except for his department-issued firearm) which the Chief had ordered to be

cleaned out. Transcript I at 117; II at 18; III at 185. Complainant was permitted to transfer his personal weapons to a friend, Kenny Vieira. Transcript II at 25-26.

34. Around the same time that the transfer of firearms was taking place, Sgt. Mauretti spoke to LICSW Smith multiple times about Complainant's emotional state. Transcript III at 181, 192. In response to a request initiated by the Chief, Smith faxed Sgt. Mauretti a note saying that Complainant was "not in danger of harming self or others" and was "suitable to possess his own firearms [and] ... a license to carry firearms at this time and on this date." Joint Exhibit 9; Transcript II at 84; III at 182.
35. Sgt. Mauretti testified that it's a common practice for the Department to take possession of service weapons when officers "go out on stress." Transcript III at 187. Union President Pereira testified that Chief Souza sometimes, but not always, required service weapons to be turned in when officers went out on stress. Transcript IV at 69, 99-100.
36. Complainant did not return to work after January 28, 2009. On January 29<sup>th</sup> he went to the Brockton V.A. Medical Center, conferred with Dr. Mitchner, received medication, and received an evaluation stating that he was neither homicidal nor suicidal. Transcript II at 90-91.
37. At some point after January 28, 2009, Chief Souza issued a memo to the entire Police Department stating that Complainant was not allowed in the police building. Transcript IV at 22.
38. On February 10, 2009, LICSW Smith, in the presence of Complainant, spoke to Sgt. Mauretti. She learned that Complainant had not been fired and was on paid leave. Joint Exhibit 8 (2/10/09 entry); Transcript III at 17. Sgt. Mauretti said that the Police

Department was going to initiate a termination proceeding if Complainant didn't file for retirement. Transcript III at 24, 203.

39. Complainant was informed that a non-accidental disability retirement based on combat-related PTSD would only result in retirement payments of only 50% of his police salary whereas an accidental disability retirement based on "injures/hazards" sustained on the job would result in retirement payments of 72% of his income and would be tax free. Transcript III at 21-22. Complainant proceeded to meet with Smith and Union officials about processing an accidental disability retirement application. Transcript II at 131-133; IV at 75; Joint Exhibit 8 (2/10/09 entry).
40. Union President Perreira testified that he dealt with Deputy Chief Morrisette and Chief Souza regarding Complainant's application for retirement and that during these discussions they used the words "nut" and "kook." Transcript IV at 39-40.
41. Complainant's treating therapist and psychiatrist jointly signed a "To Whom It May Concern" letter dated May 4, 2009 stating that Complainant was currently under treatment and could not return to work. Joint Exhibit 11.
42. Complainant filed an accidental disability retirement application dated August 22, 2009. Joint Exhibit 24. The application cited the following matters as "injuries/hazards" allegedly sustained on the job which constituted the reason for his disability: 1) a December 27, 1998 shooting; 2) the prevention of a July 2000 suicide attempt; 3) a September 24, 2006 shooting and high speed pursuit; 4) eight years on a SWAT team; and 5) various matters including the Department's disbelief that Complainant was fired upon in 2006, the circulation of rumors that that he had mental disorders, the ridiculing of his military service, the restriction of his overtime and

details, his assignment to the vault, his assignment to a light-duty position, and the order that he turn in his equipment. Id. The application was denied on March 24, 2010 by the City of Fall River Retirement Board. Transcript III at 47. Complainant appealed but his appeal was denied on the basis that Complainant did not qualify for an accidental disability retirement. Transcript III at 48.

43. In March of 2010, Dan Racine became Fall River Police Chief. Chief Racine described his relationship with Complainant as “always friendly.” Transcript II at 170; IV at 61.
44. Chief Racine, on April 5, 2010, filed an application for Complainant to be involuntarily retired on a non-accidental, ordinary disability basis. Joint Exhibit 32: VI at 39. Chief Racine filed the involuntary application after Complainant’s application for accidental disability retirement was denied. Joint Exhibit 12; Transcript VI at 40-41. The involuntary application was never acted upon.
45. Complainant testified that after leaving active employment with the Fall River Police Department, he fell into a deep depression and gained almost a hundred pounds. Transcript I at 121; III at 117. He remained out of work for almost four years on paid injured-on-duty leave pursuant to G.L. c. 41, section 111F. Transcript III at 33. While out on injured-on-duty leave, Complainant graduated from Curry College, married, and fathered a child. Transcript II at 143, 151; III at 81.
46. Complainant testified that he believed by late 2011, he could work in a capacity other than that of a police officer. Transcript III at 67.
47. In January of 2012, while still out of work on injured-on-duty leave and receiving Chapter 41, section 111F benefits, Complainant began employment with the U.S.

Navy in Newport, Rhode Island as a “security assistant” performing background checks and issuing badges. Transcript II at 143; III at 98. He did not inform his supervisors in the Department or his union that he was working. Transcript III at 34-35; IV at 42.

48. In April of 2012, Complainant left the Navy and took a job with Homeland Security preparing cases for the Fugitive Apprehension Unit. Transcript III at 36-37, 98. Complainant did not inform Respondent of his job change. Transcript III at 37. Complainant continued to receive section 111F payments while he worked for the U.S. Navy and for Homeland Security.
49. Respondent’s Leave Benefit Programs Policy prohibits an employee who is out of work on either a duty-related illness/injury or a non-duty related illness/ injury from working for another employer. Joint Exhibit 31, pp. 18-19. The prohibition applies even if the employee had previously worked at the same job as secondary employment. Joint Exhibit 31, p.19; Transcript V at 27-28.
50. Pursuant to Respondent’s Paid Details and Secondary Outside Employment Policy, employees may engage in secondary outside employment for up to twenty hours per week provided they submit a written request to the Chief through the chain of command and receive approval. Joint Exhibit 26, p. 15; Transcript IV at 89-90; VI at 43.
51. Chief Racine testified that he was “shocked” to learn in the summer of 2012 that Complainant was working for the federal government. Transcript VI at 35. He told Complainant that he could not engage in such work while receiving Section 111F injured-on-duty leave benefits pursuant to Chapter 41, section 111F. Transcript VI at

36. He gave Complainant until December 31, 2012 to retire so that Complainant could earn an additional year of retirement income. Transcript IV at 60; VI at 37, 67. Chief Racine testified that he used his discretion to allow Complainant additional time to retire as a courtesy because he liked Complainant. Transcript VI at 81. Complainant filed for an ordinary (superannuation) retirement from his position of police officer, effective December 31, 2012. Joint Exhibit 13; Transcript III at 47, 51.

52. As of the date of public hearing Complainant was still employed by Homeland Security.

### III. CONCLUSIONS OF LAW

#### Handicap Discrimination

##### A. Reasonable Accommodation

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person. 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. The statute requires that the employer accommodate a disabled employee so that the employee is able to perform the essential functions of his/her job unless the employer can demonstrate that an accommodation would impose upon it an undue hardship. According to 2008 amendments to the Americans with Disabilities Act (“ADA”), the term “disability” (i.e., handicap) 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), *amending* Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq.

Complainant's diagnosis of PTSD rendered him a disabled employee. His diagnosis was based on symptoms consisting of intrusive thoughts, sleep maintenance problems, difficulties concentrating, irritability, near-continuous panic, and social isolation, and multiple suicide attempts. The symptoms resulted in three months of inpatient treatment at a Veterans Administration residential treatment program. Complainant's condition constituted an impairment which substantially limited his ability to work and sleep and justified the imposition of reasonable accommodations at work.

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). Accommodations may take many forms including changes in work schedules and assigned tasks, some modifications of job requirements, and provision of adaptive equipment ...." MCAD Guidelines supra at 2C. An accommodation is not reasonable if it requires a fundamental alteration of a job or the waiver of an essential job function. See Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. at 443, 454 (2002) (employer not required to "fashion a new position"); Beal v. Selectmen of Hingham, 419 Mass. 535, 541-542 (1995) (same); Cox v. New England Telephone & Telegraph Co., 414 Mass 374(1993) (reasonable accommodation doesn't waive performance of essential job functions); Tompson v. Department of Mental Health,

76 Mass. App. Ct. 586, 596 (2010) (can't require employer to reallocate responsibilities to others).

There is a factual dispute concerning the nature of the accommodation sought by Complainant in late 2008 after he returned to work following his three-month stint of in-patient treatment for PTSD. Complainant claims that the sole accommodation he requested was to work the day shift. According to Complainant, he sought to avoid working nights because the night shift consists of officers working both midnight to eight a.m. and 4:00 p.m. to midnight. At times, officers on the night shift must work sixteen hours out of a twenty-four hour cycle. It was this schedule which Complainant sought to avoid.

Complainant's therapist LISCW Paula Smith and Sgt. Mauretti corroborate Complainant's assertion that the accommodation he sought in late 2008 was placement on the day shift in order to avoid the possibility of having to work two eight-hour tours of duty in a twenty-four hour period. Their testimony in this regard is both credible and convincing. Retired-Chief Souza, on the other hand, maintains that Complainant's requested accommodation was not confined to working days but consisted of a request by Complainant to avoid having contact with the public.

Although there was concern about Complainant having contact with the public, i.e., being "on the street," I find that it was Chief Souza, not Complainant, who believed that it was imprudent for Complainant to have contact with the public. My finding is corroborated by testimony of Union President Perreira that Chief Souza and Deputy Chief Morrissette both expressed the view that Complainant couldn't function as a police officer on the street because of his PTSD.

Regardless of the precise nature of the accommodation sought by Complainant, credible testimony establishes that he was offered and accepted an evidence custodian position consisting of purging, organizing, managing, cataloging, and storing evidence at police headquarters. The evidence custodian position addressed Complainant's concerns about maintaining a regular sleep routine by allowing him to work a consistent schedule of weekday hours from 8:00 a.m. to 4:00 p.m. It was, by all accounts, an assignment which allowed Complainant to successfully perform the essential functions of his job as a police officer.

By creating the evidence custodian position, moreover, Chief Souza was able to side-step the issue of seniority. Had the Chief made Complainant a day-shift patrol officer, such action might have run afoul of the parties' Collective Bargaining Agreement by displacing a more senior officer on the day shift. At the time, there was no settlement agreement in place between the parties and there was no finding of probable cause by the MCAD. Thus, in late-2008, the Chief was arguably without authority to ignore the seniority provisions of the Collective Bargaining Agreement in an effort to assist Complainant. See Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Local 589, Amalgated Transit Union, 454 Mass. 19 (2009) (An award of retroactive seniority in contravention to a collective bargaining agreement held to be permissible where MCAD has issued a probable cause finding or parties have entered into a settlement agreement); see also U. S. Airways Inc. v. Barnett, 535 U.S. 391 (2002) (recognizing that employee's request for an accommodation does not, as general matter, trump established seniority rules). The evidence custodian position allowed Respondent

to accommodate Complainant and also adhere to the seniority requirements of the parties' labor contract in regard to patrol officer positions.

Complainant asserted at the public hearing that the evidence custodian position was a demeaning assignment in that he was required to sit inside an isolated and cold evidence vault in order to perform his duties. Credible evidence contradicts this assertion by establishing that Complainant was allowed to work wherever he chose within a suite of rooms devoted to the collection of evidence. There is, in addition, considerable evidence that Complainant enjoyed performing the evidence custodian job prior to learning that he was barred from details and overtime. Based on the foregoing, I conclude that the evidence custodian position was an acceptable accommodation for Complainant's PTSD disability.

What caused a rupture between Complainant and Respondent in January of 2009 was not the nature or location of his assignment but, rather, the denial of an honor guard for Complainant's father's funeral and the denial of details and overtime opportunities for Complainant while he served as evidence custodian. The Chief testified credibly that he refused Complainant's request for an honor guard because such guards are only provided for funerals of police officers and that he denied Complainant details and overtime because Complainant was serving as evidence custodian in a restricted or light-duty capacity. According to Chief Souza, police department rules prohibit officers working in a restricted or light-duty capacity from engaging in extra-duty assignments.

Reasonable people can differ as to whether Complainant filled the evidence custodian position on a restricted or light-duty basis which, in turn, justified restrictions on overtime and details. Complainant asserts that his denial of overtime and details was

evidence of handicap discrimination. According to the Chief, however, the granting of an accommodation to Complainant which allowed him to only work days carried with it a corresponding restriction against working details and overtime. The Chief justified this restriction on the Department's Paid Details and Secondary Outside Employment Policy which states that officers on restricted or light duty, on various types of leave, or on suspension are prohibited from working paid details. According to the Chief, the philosophy behind the policy is that a police officer who is restricted in regard to his regular tour of duty should also be restricted in regard to additional tours of duty. In arriving at this position, the Chief sought input from the Fall River City Solicitor who likewise concluded that Complainant did not qualify for extra shifts under the Department's Paid Details and Secondary Outside Employment Policy. The foregoing is credible evidence that the denial of extra-duty shifts was undertaken in good faith and did not constitute disparate treatment based on handicap discrimination.

Apart from relying on the Department's Paid Details and Secondary Outside Employment Policy, the Chief also harbored concerns that paid details and overtime would place Complainant in contact with the public and create potential safety issues. The Chief denied having such concerns, but his denial is not credible. Rather, credible evidence supports a finding that the Chief sought to keep Complainant off the streets as a result of his PTSD symptoms which flared up in the latter part of 2008 and which led to months of in-patient treatment at a residential treatment program in Coatesville, PA operated by the Veterans Administration. The Chief's concerns are supported by evidence in the record and are not unreasonable. See Carleton v. Commonwealth, 447 Mass. 791, 808 (2006) *citing* Dahill v. Police Department of Boston, 434 Mass. 233, 240

(2001) (noting that Chapter 151B's public policy of protecting handicapped people from unfounded, prejudicial fears does not preclude legitimate concerns about health and safety risks).

The legitimacy of the Chief's concerns is illustrated by the extreme nature of Complainant's reaction to being denied extra-duty shifts. Complainant expressed his frustration over the denial of details and overtime by leaving the Department on January 27, 2009 and refusing to return. Complainant testified that he became "stressed out," "physically shaken up inside," felt like his head "was going to explode," and was "suicidal." He left the police station to meet with LISCW Smith in Brockton despite a lack of clearance to do so and refused to report to work on the following day due to "stress."

In response to Complainant's rage and insubordinate conduct, Chief Souza acted reasonably in ordering Sgt. Mauretti to obtain Complainant's service revolver and, after learning that Complainant possessed a cache of personal weapons consisting of three to four shotguns, three to four rifles, several handguns, and ammunition, in seeking to confiscate those as well. The drama that unfolded on January 27, 2009 and thereafter supports Chief Souza's judgment that Complainant was too emotionally fragile to possess firearms and, thus, to function as a police officer. Compare Ryan v. Town of Lunenburg, 11 MDLR 1215 (1989) (where reserve police officer sustained back injury that was repaired by successful back surgery, there was no reasonable probability of substantial harm to officer or others in the future and, thus, the refusal to reinstate officer constituted handicap discrimination). As noted by Union President Ferreira, Complainant could have grieved the denial of details and overtime but, instead, acted in contravention

to a direct command to turn in his weapons and return to work. By engaging in insubordinate conduct, Complainant lent credence to Chief Souza's concerns that he was not in control of his emotions and could not conform to the strictures of a paramilitary organization.

After weighing factors supporting Complainant's right to work in a prejudice-free environment against the public's right to be free from potential safety risks, the Chief arrived at the reasonable conclusion that Complainant's emotional state did not permit him to possess firearms and interact with the public as a police officer. See Carleton v. Commonwealth, 447 Mass. 791, 810, n. 29 (2006) *citing* School board of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (individualized determination must be made in most cases claiming alleged handicap discrimination). Complainant's therapist (albeit not his psychiatrist) provided the Police Department with a note dated January 28, 2009 stating that Complainant was "not in danger of harming self or others" and [could] possess . . . firearms." This note constitutes a significant piece of evidence deserving of consideration, but it is contradicted by Complainant's out-of-control conduct in January of 2009. The note, moreover, focuses solely on the issue of "harm" and does not address Complainant's ability to otherwise fulfill the functions of a police officer.

Following Complainant's departure from work on January 27, 2009, he remained out of work for almost four years. During this time Complainant collected injured-on-duty pay pursuant to Chapter 41, section 111F. Beginning in January of 2012, Complainant commenced working for the federal government. Complainant did not report his outside income to the Fall River Police Department in contravention to Respondent's Leave Benefit Programs Policy which prohibits an employee who is out of

work on either a duty-related illness/injury or a non-duty illness/injury from working for another employer. At the public hearing, Complainant argued that he was no longer employed by Respondent but such an assertion is disingenuous in light of the fact that he continued to receive paychecks from Respondent and remained on injured-on-duty status. Complainant's attempt to justify working for the federal government while collecting Section 111F benefits undermines his credibility and his assertion of financial damages.

### B Disability Harassment

In his 2009 charge of discrimination, Complainant did not plead any facts relative to harassment, nor did he claim to be a victim of harassment as a matter of law. When a probable cause determination was issued by the MCAD in 2012, no claim of harassment was addressed by the Investigating Commissioner. Nonetheless, Complainant presented evidence at the public hearing that Chief Souza, Deputy Chief Morrissette, Sgt. Silva, and others referred to him as "crazy," "kook," "nuts," and a "loose cannon;" that he found a note on his car with the word "kook;" and that officers expressed the view that he should be "working the streets" rather than working inside

Assuming, arguendo, that the aforementioned epithets constitute a timely harassment claim, the proffered evidence fails to establish that Complainant was subjected to unwelcome verbal or physical conduct that was sufficiently severe or pervasive to alter the conditions of his employment and create a hostile working environment. See Sleeper v. New England Mutual Life Insurance Co., 24 MDLR 55 (2002) (recognizing disability harassment claim); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000) (setting forth elements of hostile work environment claim in sexual harassment context); Beldo v. University of Massachusetts, 20 MDLR

105 (1998) (setting forth elements of hostile work environment claim in racial harassment context). Complainant must demonstrate that his work environment was pervaded by harassment that posed a barrier to his full participation in the workplace.

There is, to be sure, some evidence of Chief Souza and Deputy Chief Morrisette using derogatory terms to describe Complainant's emotional state, but the evidence fails to establish whether Complainant was aware of the name-calling when it occurred. It is more likely that Souza and Morrisette used such terms behind Complainant's back. There is also some evidence that fellow officers referred to Complainant as a "loose cannon" and/or "kook" and criticized him for working inside the evidence area but such evidence is devoid of specifics such as the number, location, and content of the alleged statements. The impact of critical words is also diluted by the support extended to Complainant by his friends and supporters on the force. In sum, the evidence fails to rise to the level of unwelcome verbal or physical conduct that was sufficiently severe or pervasive to alter the conditions of his employment and create a hostile working environment.

#### 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 25th day of November, 2014.

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Betty E. Waxman, Esq.,  
Hearing Officer

