Docket # **Docket No. 96-BEM-1390**
Parties: **HELEN FOREST, Complainant, v. WAL-MART, Respondent**
Appearing:
Date: **May 8, 2001**

DECISION AND FINAL ORDER OF HEARING OFFICER

I. Introduction

The issues in this case are whether the Complainant's former employer engaged in unlawful disability discrimination by 1) failing, during her tenure, to equip a telephone at work with an amplifier and 2) later terminating her employment. Because I conclude that the Respondent did not engage in unlawful discrimination with respect to the telephone amplifier issue, I shall dismiss that portion of the Complaint. However, I also conclude that the Respondent's decision to terminate the complainant's employment, in the circumstances presented here, did constitute unlawful disability discrimination and therefore issue the remedial order set forth below.

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II. Procedural Background

On April 26, 1996, the Complainant, Helen Forrest ("Forrest") filed this charge of employment discrimination. She alleged that her former employer, Wal-Mart, had engaged in unlawful disability discrimination by failing to accommodate her hearing disability by not relieving her of the task of answering telephones at work and/or by not installing a telephone amplifier; by terminating her employment in February, 1996 because of her disability; and by harassing and forcing her to sign "coaching forms". The Investigating Commissioner found probable cause to proceed on the first two theories, and when conciliation efforts proved unsuccessful, the matter was certified to a public hearing. The matter came to be tried before me on April 3 and 4, 2000.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law, and supporting arguments of the parties. To the extent the proposed findings and conclusions are not in accord with my findings and conclusions herein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with

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my findings. To the extent testimony of various witnesses is not in accord with the findings herein, such testimony is not credited. Based on the credible evidence and the reasonable inferences therefrom, I make the following findings of fact.

III. Findings of Fact

A. The Complainant

1. At the time of the hearing, Helen Forrest was approximately 42 years old, married and living in Canton, Massachusetts. She has multiple impairments, some stemming from birth defects.

2. They include a substantial hearing impairment which she has had since birth, which has progressively worsened and led to greater hearing loss. She

wears hearing aids in both ears, and they compensate for her hearing loss and enable her to converse with people and hear everyday sounds.[1] She sometimes encounters difficulty hearing callers on the telephone, and to address this, she has installed a telephone amplifier in her home telephones.
Depending on the particular phone she is using, however, she is able to carry out conversations without an amplifier.

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[1] I note that Ms. Forrest testified during the hearing and generally seemed able to hear and respond to all questions put to her.

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3. Medical records introduced at the hearing also reflect that Ms. Forrest has been clinically diagnosed as "mentally handicapped" and as being of "limited intellectual capacity". Apparently as a result, she has difficulty with reading and spelling. She was a special needs student during her elementary and secondary schooling and successfully completed a vocational high school program.

4. Forrest has been a client of, and received services from, the Massachusetts Rehabilitation Commission at various times between January 1993 and November 1996. Complainant's ex. 3. She has also received services from the Massachusetts Department of Mental Retardation. Complainant's ex. 2.

5. I note that the characterizations of her mental development contained in the submitted medical records are consistent with my observations during the hearing. It was apparent from her manner of speech, her general comportment, (including her acknowledged inability to understand certain words and questions,"and her apparent lack of understanding of others) and the substance of her
answers, that she is of limited intellectual capacity.

6. Beginning in her early thirties and continuing during her employment with Wal-Mart, Ms. Forrest suffered

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from recurring migraine headaches. They occurred monthly, often in connection with menstruation, and have been diagnosed as menstrual migraines. They were throbbing-type headaches and could be accompanied by nausea, photophobia and phonophobia and numbness in her right arm and leg.

7. Their duration varied from one-half a day to two to four days. She was under the care of a medical doctor for this condition and was prescribed a series of medications. The medications brought some relief, as did behavioral interventions such as lying in a bathtub and lying quietly in a darkened room.[2]

8. Following her graduation from vocational high school, Ms. Forrest spent a period of time caring for her siblings and father. She became gainfully employed in approximately 1984, and held various jobs thereafter.

B. Ms. Forrest's Employment With Wal-Mart

9. Ms. Forrest sought employment with Wal-Mart in approximately June 1994. Evidence in the record indicates that she was assisted in her job placement

by an employment service which assists developmentally challenged individuals find employment.

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[2] Wal-Mart has candidly acknowledged at page 7 of its Post-Hearing Brief that "there is no dispute that the Complainant suffered from a hearing impairment and migraine headaches".

10. During a pre-employment interview, she identified and discussed her impairments. In this respect, she told the Wal-Mart interviewer that she had difficulty with reading or spelling and that if the position required performing those tasks, she would need assistance. Consistent with this identified difficulty, Ms. Forrest testified that she informed the interviewer that she was "slow on things" and that the interviewer helped her complete the employment application.

11. She also informed the interviewer that she suffered from recurring migraine headaches; that she had a hearing impairment; and that she had been diagnosed with high blood pressure and a high cholesterol level. Ms. Forrest also identified certain tasks that she felt she would not be able to perform, and provided written documentation from her medical providers bearing on the matters she had brought to the interviewer's attention.[3]

12. Following the interview, and notwithstanding these identified impairments, Wal-Mart offered Ms. Forrest employment as a sales associate. She accepted, and began her employment on June 29, 1994. She was assigned to the

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[3] Wal-Mart does not dispute that its agents learned of these impairments during the interview process. Respondent's Proposed Finding of Fact No. 2.

shoe department, where her principal duties were to "zone,"[4] assist customers, put returned items back in the appropriate shelf space, maintain the appearance of the department and fill in the fitting room during the break times of the employee regularly assigned to cover that area.[5]

13. At some point during her employment, Ms. Forrest transferred to "soft lines", a different department featuring girls' and women's clothes, where her duties were largely the same.

14. During her tenure, her regular work shift was from 2:00 until closing, which was usually 10:00 p.m.

15. Wal-Mart assessed Ms. Forrest's job performance at various points during her tenure. At her 90-day Evaluation, her performance was rated as "standard" and she was given a small raise in her hourly rate of pay. Six months into her employment, she was again evaluated, at the end of 1994, but this time, her performance was rated as "below standard". The evaluator noted that Ms. Forrest

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[4] "Zoning" involves going to the fitting room and picking up items from one's department which have been left in the fitting area and returning them to their proper place.

[5] Associates assigned to the fitting room are responsible for answering phones, maintaining the fitting room, ensuring that customers bring in only the allowed number of items and preventing theft.

needed to be more reliable in reporting for her scheduled work hours.

16. One year into her employment, in late June 1995, her performance was again rated as -below standard", with her attendance again being cited as an area of needed improvement.[6] She was placed on a 30-day probationary period at that time. I infer that she successfully completed the terms of that probation, as her employment continued thereafter, and there was no evidence that this probationary status was continued.

17. During her employment, Wal-Mart had in place a policy entitled "Coaching for Improvements", a process which involved progressively more serious disciplinary interventions and which were to be used "at appropriate intervals until either the Associate's conduct or performance reaches the desired improvement or all coaching levels have been exhausted". Prior to her termination, Wal-Mart counseled Ms. Forrest pursuant to this policy for a number of behaviors, including calling in sick on a weekend shift without producing proper medical verification; not attending to or satisfactorily completing her duties and leaving work without management approval.
The record reflects that on August 1995, Ms. Forrest had

been issued a "decision-making day", the third and final step in the process short of termination.

C. The Telephone Issue

18. The duties of the sales associates included answering the telephone in their department (and the phone in the fitting room, during those times when the associate filled in for the associate assigned to the fitting room). Calls typically come either from customers seeking merchandise information or from store cashiers seeking price information or assistance.

19. From time to time, Ms. Forrest received such calls. Some times she was able to successfully complete the call without assistance, while at other times she encountered difficulties. In the latter instances, she either enlisted a co-worker to assist her or, in the case of calls from cashiers, improvised by going up to the front of the store, where the cashiers were, to find out what they needed.

20. There was no evidence that Wal-Mart viewed Ms. Forrest's performance in regard to telephone inquiries as

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[6] At some point prior to June 1995, she received a more significant raise of one dollar an hour.

[7] The fourth step in the process, "Final Written Coaching", misleadingly suggests that it is the last step before termination. In fact, the record indicated that it is the termination step. In other words, there is no further

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deficient or inadequate, or that her handling of the phone duties factored negatively into any of her evaluations. In fact, it appears that one of her supervisors relieved her of that duty.

21. In this respect, her supervisor in the soft lines department, Barry Kaplan, testified that "because of her hearing impairment, we had other people helping her out with the phone when she was there". There was no evidence that this method of dealing with Forrest's difficulty with the phone negatively affected any of the terms or conditions of her employment. And, as stated above, there
was no evidence that Forrest's occasional inability to effectively use the telephone was held against her in her evaluations. There was no evidence that it was ever the topic of any -Performance Coaching".

22. Ms. Forrest testified that she asked three Wal-Mart supervisory personnel (her supervisor in the shoe department; Barry, her supervisor in the soft lines department; and a store manager) to install a telephone amplifier in the phone in her department. Two of the, people Forrest said she asked, supervisor Barry Kaplan and
store manager Pat Magalhaes, denied that she had ever asked

"coaching" afforded; rather, the employment relationship is severed at that time.

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for a phone amplifier.[8] No telephone amplifier was ever installed in any of her assigned areas during her tenure.

D. Ms. Forrest's Migraines and Her work

23. Throughout her tenure at Wal-Mart, Ms. Forrest experienced migraines, sometimes on days she was scheduled to work. On some of those occasions, she called in sick and did not report to work, and later followed up those

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[8] Because, for reasons to be explained later, I do not find Wal-Mart to have violated the Act by failing to install a telephone amplifier, I do not need to resolve this particular dispute of fact. If it were necessary for me to do so, I would resolve in the Respondent's favor, for the following reasons. First, Mr. Kaplan testified that he was "positive" that Ms. Forrest had never asked him for a telephone amplifier, whereas Ms. Forrest's account of her
interaction with him on that topic seemed to have combined elements of her other conversations on the topic. He further indicated that if such a

request were to have been made, he would have brought the request to store management. While that speculation could certainly be viewed as a self-serving statement, I find he had no reason to not be truthful about this matter. He was no longer employed by Wal-Mart at the time of his testimony; he had no personal stake in the matter concerning the amplifier request, and at other times he offered testimony which was not favorable to Wal-Mart's position in this case. On the whole I found him to be a credible witness.

With respect to Ms. Magalhaes, she credibly testified that she was unaware that Ms. Forrest even had a hearing impairment, and expressly denied ever being asked by Ms. Forrest for this accommodation. More importantly, she testified that Wal-Mart had a policy in place for processing such requests and that they are routinely granted. Indeed, she had been involved in obtaining a phone amplifier for an employee at another store she had worked at. There would have been no reason for her not to have processed Ms. Forrest's request accordingly, and therefore if it were necessary for me to do so I would

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absences with doctor's notes explaining the reason for her absence. On other occasions she either reported to work notwithstanding her headache, or the headache developed while she was at work.

24. In some of the instances where she had migraine pain while at work, she reported to store management that she was suffering from a migraine and not feeling well. Store manager Magalhaes recalled in this respect that she had sent Forrest home once upon learning she was not feeling well due to a migraine. The parties also do not dispute that "Gail", an assistant store manager (whose last name was not identified at hearing) allowed her to take an unscheduled break during her shift to see if the migraine subsided. Forrest understood in this respect that if she was suffering from migraine pain, she could leave the customer area of the store and sit down for a short break.

25. I conclude, that Wal-Mart management knew that Forrest suffered from recurring migraines; knew that when they struck, they interfered with her ability to satisfactorily perform the duties of her position; and knew that sometimes, by affording her a brie~f break period to rest, the pain would subside sufficiently for her to return to her duties and complete her work shift.

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conclude that Ms. Forrest never actually articulated such a

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E. The Termination

26. On February 13, 1996, Wal-Mart store management informed Forrest that her employment was being terminated. Prior to meeting with her and informing her of that decision, Mr. Kaplan prepared a "Performance Coaching Form" dated February 13, 1996 which stated in the category "causes for counseling" the following: "Lack of productivity. Misuse of company time". From the evidence adduced at hearing, I reach the following fact conclusions regarding the circumstances leading up to the termination decision and the termination.[9]

27. The conduct which Forrest engaged in which formed the basis for her termination occurred on Monday, February 12, 1996, which was the day before Ms. Forrest was informed of her termination. During her work shift that Monday, she was suffering from a migraine headache. At some point a co-worker observed her with her head down at the desk in the fitting room. Assistant store manager Barry Kaplan

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request to Ms. Magalhaes.

[9] I am compelled to point out that neither the complainant nor the Respondent have offered any proposed findings of fact concerning the decision-making process. Given the centrality of the termination decision to this case, I am at a loss to explain this omission.

was summoned to the fitting room and he spoke to Ms. Forrest.[10]

28. No one overheard the fitting room interaction between Kaplan and Forrest that Monday, and at hearing, their accounts differed in certain respects. (In fact, as described below, Forrest did not acknowledge that she had been found that night with her head down in the fitting room.) The evidence as a whole, including the testimony of witnesses Elizabeth Desroshers and Diana Lightbody,
convince me that indeed an interaction had occurred on Monday.

29. Kaplan testified, and I find, as follows: that Forrest told him she was suffering from a migraine; that he ,asked her if she wanted to go home; and that she said she did not want to go home. Upon learning she did not want to go home, he asked if she wanted to take a break to get some

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[10] Regarding the chronology of events, to the extent there is a conflict between the testimony of Forrest and Kaplan, I am assisted by the testimony of Diana Lightbody and Mary Desrosiers, co-workers of Ms. Forrest. Lightbody testified she spotted Forrest with her head down in the fitting room and alerted Kaplan and then saw Kaplan speaking with Forrest. She recalled that Forrest was not
terminated that day but thought it was the following day. Similarly, Desrosiers recalled that another co-worker had informed her that Forrest had her head down in the fitting room and that she saw Kaplan come to the fitting room and speak with Forrest. She also testified that Forrest was not terminated that shift, hut that she had been terminated by the time Desrosiers worked her next shift, which was two days later.

rest and take Tylenol to see if she felt better. He testified that she told him she did not want to take a break at that time. Notwithstanding her rejection of his suggested interventions, he took no further action at that time and the matter came to an end.

30. He also recalled that some time later in the shift, he came upon her again with her head down in the fitting room and that he spoke with her again. At hearing, he testified he could not recall what was said in that second interaction. I credit his testimony that he did come upon Forrest a

second time with her head down in the fitting room.

31. Forrest had a different account of the events of Monday. She testified that she was the one who initiated contact with Kaplan sometime into her shift, telling him that she "had to go home because [her] head was pounding" and that she had "the worst migraine". She recalled that he refused her request to go home, telling her instead that she had "to stay and work it out". She further testified that she did as instructed and completed the shift. She added that when she was leaving, she told Kaplan that she might not be able to report the following day, and that he warned her that if she did not report, she "would probably get fired or written up". I find, however, for the reasons

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set forth in footnote 11 below, that her account did not accurately reflect the historical facts.

32. The preponderance of evidence leads me to conclude that on Monday, Kaplan was informed that Forrest had put her head down in the fitting room and did have a discussion with her about it. I also conclude that later in that same shift, he personally observed her with her head down.[11]

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[11] Because I have concluded that Wal-Mart's duty to accommodate Forrest's migraine condition imposed on it an affirmative obligation to refrain from terminating her employment notwithstanding this observed behavior, I need not resolve the dispute over precisely what was said when he spoke to her on Monday.If it were necessary for me to resolve this dispute, I would credit Kaplan's account, for the following reasons. First, as indicated above, I found him to be a credible witness with no obvious reason to try to place himself in a better light in respect to his interactions with Forrest or to offer testimony that did not honestly comport with his memory. Second, the coaching form he completed contemporaneously with these events, as well as Magalhaes's account of her interaction with him, corroborate his account that he personally observed her some time on Monday with her head down. Moreover, the steps he described taking - offering her the opportunity to go home, then to take a break and see if she felt better were consistent with the approach other supervisory personnel had taken when confronted with the same presenting issue.

The position attributed to him by Forrest - that he refused to let her go home and instead insisted that she "work it out" - is also inconsistent with the weight of the evidence, which indicated Wal-Mart had a generally understanding approach to Forrest's limitations. There is no evidentiary basis for me to conclude that Kaplan alone would take such a hard-nosed approach to Forrest's migraine problem, and it would be illogical for me to do so on this record. While I do not believe that Forrest consciously

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33. Regarding the decision to discharge, I conclude that on Monday, Kaplan told store manager Magalhaes that he had seen Forrest with her head down and that she appeared to have been sleeping. He did not, however, tell her that Forrest's observed conduct was linked to her migraine, and she did not ask him if Forrest had offered any explanation for her behavior.

34. Magalhaes concluded that Forrest's observed behavior was inappropriate and cause for a disciplinary intervention of some sort, and instructed

Kaplan to review Forrest's file to determine where she was in the progressive disciplinary cycle so as to determine the appropriate level of intervention and to implement it. I conclude from her instruction that the specific precipitating infraction that Forrest was observed to have committed on Monday (putting her head down in a customer service area) would not have automatically called for her termination; rather, the severity of the punishment would be a function of where she was on the counseling progression.

35. Upon checking her file, Kaplan learned that Forrest had previously been issued a level 3 "decision-

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misrepresented the conversation, I cannot credit her account.

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making day" and concluded that the relevant policy now called for her discharge.

36. As I indicated above, I conclude that in deciding to terminate Forrest's employment, Kaplan was not motivated by any animus toward Forrest based on any impairment she had. He based his "decision" on the fact that she had been observed sleeping at work and on his understanding that given the number of prior coachings, discharge was the step automatically called for under Wal-Mart's performance improvement policy.

37. I further conclude, however, that it is more likely than not that if Magalhaes had learned that Forrest's observed conduct was attributable to her migraine, she would not have directed Kaplan to apply the coaching policy and Forrest's employment would not have been terminated. I base this conclusion on Magalhaes's testimony that if she had known that Forrest was suffering from a migraine, she would have gone out to speak with her and would have offered her the opportunity to go home and would have in any event gotten her off of the sales floor during the period of her incapacity. She further stated that there have been other instances of Wal-Mart employees suffering from recurring headaches and that in those instances, Wal-Mart has offered "whatever they would

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need", which has included, she said, such steps as letting them go home and offering to take them home or to take them to a doctor.

F. Post-Termination Events

38. Forrest briefly looked for new employment following her termination. Among other things, she sought help from the Massachusetts Rehabilitation Commission and the Massachusetts Office on Disability and visited her local unemployment office. See Complainant's ex. 4. She soon obtained a position with a Wendy's restaurant, but left shortly after starting, when work hours which had asked for did not materialize.[12] She has not obtained any employment since leaving Wendy's.

39. There is no evidence that Forrest received any unemployment benefits after her termination.

40.At some point following her discharge, Forrest also applied for disability benefits from the United States Social Security Administration ("SSA"). Her actual written application was not tendered by either side and is not in the record.

41. By letter dated February 1998, she was notified that she was deemed eligible for monthly disability benefits, retroactive to February 13, 1996. The

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notification does not state the basis for SSA's determination that she "became disabled on February 13, 1996".

42. The monthly benefit rate she was initially assigned was later adjusted upward to $433 after SSA credited her for additional earnings which apparently had not been included when it originally calculated her benefit rate. The rate was later adjusted downward to $394 per month, although the record does not reflect when that.
occurred. As of the close of the hearing, she continued to receive monthly benefits at that rate.

43. The loss of Forrest's Wal-Mart employment was upsetting to her. She testified it was the "best job I ever had" and that she enjoyed learning new tasks from her co-workers. Also, she had made friends among her co-workers, and after her discharge she did not see them as often as she had during her employment. Her husband testified that following the discharge, she "moped around the house" and cried "quite a few times" and seemed "just miserable about it". He recalled that after the discharge she was "withdrawn" and "really didn't want to see anybody".

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[12] I credit her testimony that she was unable to work the offered hours because of transportation issues.

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44. In October 1996, eight months after her discharge, Forrest sought counseling from the Family Service of Norfolk County. Notes of her initial intake session reflect she was seeking assistance "because she wants to learn how to handle her anger in a better way
rather than swearing". The therapist conducting the intake also noted that Forrest reported that in February 1996, she had been fired from her job at Wal-Mart and was contesting the discharge, although there is no indication that the discharge itself, or her continuing feelings concerning the discharge, were among the reasons she sought counseling.

45. The notes reflect that after her intake, Forrest commenced a course of individual therapy in late 1996 or early 1997, and thereafter saw her therapist approximately two times a month. Complainant's ex. 2. An "Interim summary" dated November 2, 1999 indicated that Forrest was still in therapy as of that time. Narrative notes prepared by the therapist of their sessions contain little reference to Wal-Mart, her discharge or her feelings concerning her termination.[13]

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[13] This Hearing Officer could discern only one entry that pertained to her discharge. In a note dated March 11, 1997, the therapist

wrote that Forrest "appears to miss her friends from Wal-Mart but not the job itself." Complainant's ex. 2, numbered p. 13.

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IV. Conclusions of Law

A. Relevant Standards

It is important to recognize that this case is not about whether Wal-Mart's refusal to install a telephone amplifier for Forrest was motivated by animus directed toward her because she was a handicapped person, and it is not about whether Wal-Mart siezed on Forrest's observed behavior of twice putting her head down in a customer service area and falsely relied upon that as the reason for termination, with the true reason being animus toward her due to her disabilities. In short, this case is not about the "motives" of the relevant Wal-Mart officials.

Rather, it is an "accommodation" case, involving two separate questions: first, whether Wal-Mart was required to install a telephone amplifier as an accommodation to Forrest's hearing impairment; and second, whether Wal-Mart's decision to discharge Forrest for resting her head in a customer service area constituted an unlawful failure to accommodate a known disability, that is, her migraine condition, insofar as the offending behavior was causally
related to that condition. The relevant case law teaches that answering these questions does not involve assessing the motives of the relevant actors. See, e.g., Marcano-Rivera v. Peublo International, Inc., 232 F.3d 245, 256-57

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(1st Cir 2000)("Unlike other enumerated constructions of "discriminate," this construction does not require that an employer's action be motivated by a discriminatory animus directed at the disability. Rather, any failure to provide reasonable accommodations for a disability is necessarily "because of a disability"--the accommodations are only deemed reasonable (and, thus, required) if they are needed because of the disability--and no proof of a particularized discriminatory animus is exigible.").

These are difficult questions that require a careful assessment of the purposes, and limits, of c. 151B's accommodation requirement. In making this assessment, I am guided by the observation of the First Circuit Court of Appeals concerning the comparable accommodation requirements of the ADA, that "[c]ases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior."
Soto-Ocasio v. Federal Express Corp., 150 F.3d 14 (1st Cir. 1998)
M.G.L. c.151B, section 4(16) prohibits an employer from discriminating against a qualified handicapped person who is capable of performing the essential functions of the position at issue with or without a reasonable accommodation, unless the employer can demonstrate that the

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accommodation required would impose an undue hardship to the employer's business.

To state a claim of discrimination based upon an employer's failure to accommodate the limitation associated with her handicap, an employee must demonstrate that: a) she is a handicapped person within the meaning of the statute; b) she is a "qualified" handicapped person, i.e., she is able to perform the essential functions of the job with a reasonable accommodation; c) she requested a reasonable accommodation; and d) she was

prevented from
performing her job because her employer failed to reasonably accommodate the limitations associated with her handicap. See, e.g., Bergman v. Town of Burlington School Department, 18 MDLR 143 (1996); Regarding the first element, an individual is considered to be "handicapped" within the meaning of the statute if she has a physical or mental impairment that substantially limits one or more
major life activities; has a record of such impairment; or is regarded as having such impairment.

"Major life activities" include, among other things, performing manual tasks, hearing, learning and working. The phrase "substantially limits" means that the impairment prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the

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ability of the average person in the general population to perform that activity. M.G.L. c. 15 113, sections 1(16), (17), (20); MCAD Handicap Guidelines, sec. II, A(6) (March 31, 1998). See Bragdon v. Abbott, 524 U.S. 624, 631, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998).

B. Forrest's Hearing Impairment And Migraine Condition Are Qualifying Disabilities

In this case, I find that Forrest's hearing deficit and her migraine condition each rendered her "handicapped" in the relevant sense. As to her hearing condition, the first and second prongs of the test are easily met: it is a physical impairment which, if uncorrected, substantially restricts her ability to engage in the recognized major life activity of hearing. See, e.g., Nagle v. City of Boston Fire Dept., 18 MDLR 221, 221-23 (1996) (hearing commissioner found that firefighter who had a 36% hearing loss in left ear and speech discrimination impairment was handicapped under c. 151B); G.L.c. 151B, s. 1(20) (both hearing and working are defined as major life activities); Clemente v. Executive Airlines, 213 F.3d 25 (1st Cir. 2000)(noting that hearing is explicitly recognized in EEOC regulations as a major life activity). See also Colwell v. Suffolk County Police Dept., 158 F.3d 635, 642 (2d Cir.
1998), cert. denied, 526 U.S. 1018, 143 L. Ed. 2d 350, 119

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S. Ct. 1253 (1999) (activities listed in EEOC regulations are treated as major life activities per se, rather than as major life activities only to the extent that they are shown to affect a particular ADA plaintiff).

Resolving the third prong of the test, i.e., whether Forrest's hearing impairment "substantially limits" her hearing, could require that I confront the question of whether I assess Forrest's hearing in its corrected or uncorrected state. It is an unresolved issue in Massachusetts as to whether mitigating measures that
correct a disability should be taken into account in determining whether a handicap is present within the meaning of c. 151B. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450
(1999).[14] There is no controlling authority from any Massachusetts appellate court, although the Supreme Judicial Court has recently had oral argument in a case that presents this very question. I need not predict how the SJC will resolve that issue, because, as I explain below, even assuming the
Forrest was in a position to demand, and did demand,

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[14] In Sutton, the Supreme Court held that corrective and mitigating measures must be considered in determining whether an individual is disabled under the federal ADA. 119 S. Ct. at 2146. "Hence, courts must examine how an impairment affects a plaintiff's life activities in light of her attempts to correct her impairment, including hearing aids." Clemente, supra, 213 F.3d at 33 n. 6..

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installation of-a telephone amplifier to.accommodate her condition, Wal-Mart did not violate the act in declining to do so.

Forrest's recurring migraine headache condition also qualifies as a handicap in the relevant sense. First, it is a medically diagnosed, organic condition which repeatedly manifests itself in pain, naseau and sensitivity to light. She has been under the care of a medical doctor for the condition and has taken prescribed medications to alleviate pain.

Second, when the condition manifests itself, affects the major life activities of thinking, concentrating, interacting with others and working.[15]

Third, the degree to which it affects those activities satisfies the "substantially limits" prong of the test. The evidence established in this respect that when in the throes of a migraine attack, Forrest often could find

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[15] While I do not believe it is necessary in this case to reach the question, if it were required I would conclude that the evidence in the record would also support the conclusion that when in the throes of a migraine, the condition affects her ability to engage in the major life activity of working. I note in this respect that alleviating the pain essentially requires that Forrest
remove herself from human contact and secure herself from offending light, steps which would render her incapable of performing a sufficiently broad category of jobs to implicate this major life activity. See generally Clemente, supra, 213 F.3d at 32-33.

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relief from the pain only by closing herself in a darkened room or by immersing herself in cold baths.

As complainant notes in her post-hearing brief, courts enforcing statutory schemes analogous to the act have, in similar circumstances, found migraines to be a qualifying impairment. See, e.g., Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989)(cluster migraine condition constitutes a handicap within the meaning of Washington's disability discrimination law).

C. Forrest Was Qualified in the Relevant Sense

The disability provisions of Chapter 151B do not require employers to retain disabled employees who cannot perform the essential functions of their jobs without reasonable accommodation. Forrest therefore was required to demonstrate that she was "qualified," or capable of performing the essential functions of the position of sales associate with or without a reasonable accommodation provided by Wal-Mart. c. 151B, s.1 (16). See LaBonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) ("To recover under
Massachusetts discrimination law, a plaintiff must be a "qualified handicapped person." A "qualified handicapped person" is one who can perform

the "essential functions" of his position given "reasonable accommodation.", quoting from Cox v. New England Tel. & Tel. Co.,' 414 Mass. 375, 381

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(1993)). Wal-Mart contends, for two separate and distinct reasons, that Forrest cannot satisfy this aspect of the relevant test. Wal-Mart first maintains that Forrest is barred from claiming that she is qualified, because she previously represented, in connection with her application for disability benefits from the Social Security Administration, "that she was totally disabled and not able to work" and that her physical condition at the time she made that statement was materially the same as when she was fired. Brief of Respondent at p. 7. The SJC confronted this very issue in LaBonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) a case not cited by Wal-Mart.

In LaBonte, the SJC noted that "[c]ourts are wary of allowing plaintiffs to play "fast and loose with the courts" by claiming to be too disabled to perform the functions of a job and also claiming that they were terminated from their positions despite being able to perform those same functions . . . . However, if the evidence creates a disputed issue of fact whether the handicapped person can perform the essential functions of the job, then estoppel is not appropriate." Id. At 816. The SJC declined, therefore, to accept the proposition (also urged here by Wal-Mart) that merely seeking

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disability benefits would automatically disqualify a plaintiff from pursuing a handicap discrimination claim." As I understand LaBonte, the SJC has instructed that two factors become particularly relevant in cases of this sort. The first is the relationship in time between when the denial of the accommodation and the application for disability benefits.[17] The second is what the individual

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[16] It noted in that regard that a majority of courts considering that question had also rejected that position. Id. at 817.

[17] It relied in this respect on the case of D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996), in which the federal court found the plaintiff was not legally barred from pursuing his disability discrimination case, notwithstanding having sought disability benefits, because the plaintiff "never claimed to be totally disabled during the time in which she requested her accommodation". (emphasis added). The SJC cited the timing of the disability representation as the factor which distinguished its earlier holding in Beal v. Selectmen of Hingha, 419 Mass. 535 (1995), where it found the plaintiff was barred from pursuing his disability discrimination claim based in large part on the fact that he had made a declaration of total disability in connection with being asked to return to work. That representation, the Court found, was adequate proof that she could not have performed the essential functions of the position.

The court further explained why it was that the plaintiff in D'Abrile was not barred from bringing a disability discrimination claim even though she too had made a claim for disability benefits:

Unlike August, who had claimed "total disability" while seeking

accommodation, D'Aprile did not seek disability benefits until after she had been terminated. Therefore, the court reasoned that, because "D'Aprile never claimed to have been totally disabled during the time she requested her accommodation, and demonstrated her ability to work

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and/or her supporting health care providers have actually said about her disability in the benefits application.[18]

Applying LaBonte to the facts of this case, I decline to accept Wal-Mart's contention that Forrest's application for disability benefits renders her not "qualified" in the relevant sense. First, in terms of timing, although it is not entirely clear when Forrest applied for SSA disability benefits, the record clearly reflects that she did not do so until some number of months after her termination. There is no evidence that on or before February 13, 1996 (the date she claims Wal-Mart failed to accommodate her

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with the accommodation she requested," the mere fact that she sought disability benefits did not preclude her from bringing a claim of handicap discrimination. LaBonte, supra, 424 Mass. at 819.

[18] I note that the SJC's approach to the issue largely mirrors the approach which the Supreme Court, in Cleveland v. Policy Management System Corp., 526 U.S. 795 (1999), has directed to be taken in ADA cases. There, the Court ruled that a plaintiff's receipt of Social Security Disability Income benefits (SSDI) does not as a matter of law preclude a failure to accommodate claim under the ADA. It explained that "when the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of "reasonable accommodation" into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI". Id. At 803. Nonetheless, since the pursuit and receipt of such benefits sufficiently raises the question of the plaintiff's qualification, "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation". Id. At 806.

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migraine condition), she had ever represented that she was unable to do her job even with an accommodation.

Moreover, the evidence shows affirmatively that she was performing the duties of her job, notwithstanding her recurring migraine condition, until her employment was involuntarily terminated. Whatever her shortcomings were in relation to consistently performing her duties, the fact is that had she not put her head down in the fitting room on Monday, February 12, she would not have been fired for lack of qualifications to do her job.

I note as well that I have no evidence as to precisely what Forrest said about her disability when she eventually applied for SSA disability benefits. Neither her application, nor a blank application containing the questions that she would have been required to answer, were submitted, and the issue of what representations she made in support of her application was not explored at hearing. There is not a sufficient evidentiary basis for to me to assess whether the representations she made in connection with that application are so inconsistent with her present claim (that she could have continued in.;'her employment if

only Wal-Mart had refrained from treating her head-resting as a disciplinary event) so as disqualify her from even advancing her claim.

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Next, Wal-Mart essentially contends that without regard to her disability application, Forrest nonetheless proved herself incapable of carrying out the essential functions of the position of sales associate and that accordingly she cannot satisfy this aspect of her affirmative case. It contends in this respect that Forrest was

responsible for zoning, assisting customers, putting back returns and occasionally covering phones in the fitting room. However, Complainant was not capable of performing those tasks".

Brief of respondent, p. 8. I find this contention without merit as well. The fact of the matter is that as of the start of her shift on February 12, 1996, Forrest was still employed and Wal-Mart had not seen fit to discharge her on account of inability to perform the above-listed tasks. Her last coaching had been back the previous August, and there was no evidence that Forrest was slated for discharge due to those previously-identified problems. On these facts, Forrest is not rendered ineligible to advance her failure to accommodate claim because of her prior performance problems.

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It may be that Wal-Mart is also contending that Forrest demonstrated her lack of qualification for the job by resting her head in a customer service area on February 12, 1996. ("Complainant was not terminated because she [had] [sic] migraine headaches. She was terminated for putting her head down on the fitting room table"). See Brief of Respondent, p. 15. I take Wal-Mart to mean that the essential functions of the job of sales associate include being able to refrain from placing one's head down in a customer service area. That argument, however, is misplaced.

The issue is not whether Wal-Mart could require that Forrest refrain from putting her head down when she is on the sales floor. The fact that this is an accommodations case requires a more focused inquiry. Here, Forrest put her head down because she was suffering from a migraine headache, a condition I have concluded qualifies as a disability within the meaning of c. 151B. The relevant question is thus whether there is anything that Wal-Mart could have done by way of an accommodation that would have enabled her, notwithstanding her status as a migraine-sufferer, to perform that essential function.

Wal-Mart's own evidence showed that there was. Employees are not required to remain on the sales floor for

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the entire duration of their shift; rather, break times are afforded employees during which their duties are assumed by other employees not then on break. Forrest simply could have been ordered onto her break time (Kaplan specifically offered her this option in his first discussion with her). Moreover, the record shows that Wal-Mart had in other instances offered headache-suffering employees, including Forrest, the chance to go to a break area even when not due for a break or to leave work early. There were accommodations that Wal-Mart could have extended which would have enabled Forrest to perform all of the essential

functions of the job. She thus is not "unqualified" in the relevant sense.

D. Wal-Mart's Duty to Accommodate was Triggered in the Circumstances of this Case

Generally an employee needing some form of accommodation is responsible for asking for it. The employer may not agree to extend the particular accommodation requested, but the employee's affirmative request at least triggers the informal interactive process. That process should ultimately lead to the identification of a mutually satisfactory step that the employer can take

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to enable the employee to perform the duties of the employment notwithstanding the disability.

This element of a disability case based on failure to accommodate has not, however, been construed as requiring in all cases that the complainant specifically request accommodation. The Commission has held in this respect that where an employer knows, or reasonably should know, that an employee needs an accommodation, its failure to offer one may not later be justified on the basis that the employee did not ask for one. Rather, in those instances, employers have an affirmative duty "to search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee". Mortimer v. Atlas Distributing Co., 17 MDLR 1715 (1995), citing Carter v. Boston Public Schools, 13 MDLR 1800 (1991) and Williams v. Town of Stoughton, 1 MDLR 1-385 (1991).[19] See also Marcano-Rivera v. Peublo International, Inc., 232 F.3d 245 (1st Cir 2000)(employer's accommodation duty arises in the context of "the known physical or mental limitations of an otherwise qualified individual with a disability . . .")

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[19] The Commission's view would appear to be consistent with that which applies under the ADA. The First Circuit has noted in this respect that "there may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the

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and Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999)(same).

This caveat is especially important when the employee's own mental limitations affect her ability to affirmatively request an accommodation or meaningfully participate in the interactive process. Federal courts construing the analogous provisions of the ADA have recognized in this respect that while an

[e]mployer cannot be expected to anticipate all the problems that a disability may create on the job and spontaneously accommodate them", special considerations nevertheless come into play when the employee is affected by a mental or psychological condition, because such employees "may not be fully aware of the limitations their conditions create, or be able to effectively communicate their needs to an employer.

Loulseged v. Azko Nobel Inc., 178 F.3d 731 (5th Cir. 1999), citing Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir.

1996) and Taylor v. Phoenixville School Dist., 174 F.3d 142 (3rd Cir. 1999).

As indicated above, I do not accept Forrest's claim that Wal-Mart unlawfully failed to install a telephone

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ADA." Soto-Ocasio v. Federal Express Corp., 150 F.3d 14(1st Cir. 1998)

[20] See also Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1283-84 (7th Cir.1996)("Hence, an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship for its business.").

amplifier. I therefore do not need to reach the question which would otherwise be called for at this point of the analysis, i.e., whether Forrest satisfied her responsibility of triggering Wal-Mart's accommodation duty in respect to that subject.

While Forrest contends in this respect that she needed the amplifier "to be considered qualified to perform all the essential functions of her job", Wal-Mart did not penalize her for her occasional inability to perform this task. Even if she had specifically asked that an amplifier be installed, Wal-Mart was not obliged to give Forrest the specific accommodation she requested. Rather, it was permitted to offer an alternative accommodation; it could even relieve her of responsibility for the specific task
that she encountered difficulty completing. I conclude that Kaplan's decision to relieve her of the telephone-answering
responsibility (by assigning other Wal-Mart employees to receive the calls that came in to Forrest's area) was a "practical alternative" and within the range of permissible alternative accommodations.[21] See, e.g., Humphrey v.

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[21] Forrest has not argued that relieving her of the telephone answering duty would be an unlawful response to her accommodation need. Indeed, while at hearing Forrest's theory was that Wal-Mart was obliged to install the telephone amplifier, in her original complaint to the MCAD she alleged it was obliged to either relieve her of the telephone-answering duties or install the amplifier.

Memorial Hospital Association, 239 F.3d 1128. 1139 (9th Cir. 2001).

Regarding the second aspect of this case, Wal-Mart does not contend that Forrest cannot prevail because she failed to specifically request an accommodation to her migraine condition on February 12, 1996. Nonetheless, since it is a matter that goes to Forrest's prima facie case, I examine whether, in the circumstances of this case, Wal-Mart's duty to accommodate Forrest's migraine condition was triggered. For the following reasons, I conclude that it was.

There was no evidence that on February 12, Forrest expressly asked for a specific accommodation for her migraine condition. I am, however, satisfied that in the circumstances of this case, Wal-Mart was

sufficiently on notice that Forrest needed an accommodation for her migraine condition that its obligation to participate in the interactive process was triggered.

It was undisputed in this respect that Forrest told Mr. Kaplan when he spoke with her in the fitting room that she was then suffering from a migraine. Although he was not aware of her history of migraines, other members of Wal-Mart management, including store manager Magalhaes (who was present on the night in question) knew of this condition.

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Indeed, Forrest had specifically mentioned it in her pre-employment interview. I am satisfied that Wal-Mart knew that Forrest had a medical condition that could give rise to an accommodation request, and that its obligation to participate in the interactive process was triggered on February 12, 1996.[22]

E. What the Duty to Accommodate Required in these Circumstances

Wal-Mart does not dispute that Forrest's head resting was causally related to her migraine. (Indeed, there is no basis for me to conclude that Forrest would have put her head down if not for the pain she was then experiencing as a result of her migraine). Wal-Mart contends, however, that it does not matter that Forrest's conduct was related to

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[22] While Kaplan certainly "interacted" with Forrest by suggesting two options for Forrest, which Forrest declined, this did not, in the circumstances of this case, discharge Wal-Mart of its on-going accommodation responsibility. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000) ("the duty to provide reasonable accommodation is a continuing one . . . and not exhausted by one effort." . . . It is an interactive process that "requires a great deal of communication between the employee and employer.")(internal citations ommitted). It simply cannot be overlooked that Mr. Kaplan knew from,:'his own experience with Forrest that she possessed limited intellectual capacity. Because of that, neither her initial refusal of his offers, nor her subsequent repeating of the head-resting behavior, can be equated with a knowing rejection of the employer's offered accommodation. Moreover, store manager Magalhaes would have responded differently if she had learned that Forrest's head-resting was causally linked to her migraine condition.

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her disability; the only relevant consideration is that such conduct is against its rules governing employee behavior. Since I do not believe that contention accurately reflects the law, I decline to accept it.

Where, as here, the conduct giving rise to the discipline is itself a manifestation of the disability, the behavior cannot analytically be considered apart from the disability. In Humphrey v. Memorial Hospital Association, 239 F.3d 1128, 1139-40 (9th Cir. 2001), the court explained that

For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. . . . The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known

disability that leads to discharge for performance inadequacies resulting from that disability. . . . (citations omitted).

See also Barnett v. Revere Smelting & Ref. Corp., 67 F. Supp. 2d 378 (S.D.N.Y 1999)(noting that "where an employer asserts excessive absenteeism as a non-discriminatory justification for an employee's termination, that justification cannot analytically be considered apart from the alleged disability causing the absenteeism".)

Here, Wal-Mart penalized Forrest through its disciplinary process because Kaplan found her twice resting

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her head in the fitting room. That conduct, however, was a direct manifestation of Forrest's migraine condition. Had the appropriate interactive process been conducted when Kaplan first confronted Forrest about her conduct, and had it been conducted by a management official with both the knowledge of all of the relevant facts and the ability to impress upon Forrest her responsibility to either accept one of the suggested alternatives or come up with another, the second head-resting event would not have occurred.[23]
See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st. Cir. 2000) ("The duty to provide reasonable accommodation is a continuing one . . . and not exhausted by one effort . . . . It is an interactive process that "requires a great deal of communication between the employee and employer.,,). Having failed to intervene in the manner that c. 151B required, Wal-Mart was not lawfully free to ignore the causal link between the conduct and the

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[23] There was no evidence to explain why Forrest would have declined Kaplan's offer that she take a.break and see if she felt better, although Kaplan surmised it was because she did not want to lose any pay for not having completed the shift. Given Wal-Mart's knowledge of Forrest's mental limitations, it would have been appropriate for Wal-Mart to make it plain to Forrest, by warning her if necessary, that unless she accepted one of the suggested alternatives, or came up with one to which Wal-Mart could agree, she would be subject to discipline if she continued to rest her head in the fitting room.

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disability and treat the head-resting as a disciplinary event.

F. Undue Hardship

Wal-Mart could not be held accountable for failing to accommodate Forrest's migraine condition if refraining from treating her head-resting conduct as a terminable disciplinary event would have caused it undue hardship. "Undue hardship" means an action requiring significant difficulty or expense when considered in light of various factors including the nature and cost of the accommodation, the financial resources of the employer and the impact of the accommodation on the operation of the employer's business. Wal-Mart bears the burden of demonstrating that accommodating Forrest's migraine condition would have imposed an undue hardship. See MCAD Guidelines: Employment Discrimination on the Basis of Handicap - Chapter 151B (Definitions). See also Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st. Cir. 2000)(employer has burden of proof on the issue of hardship); 42 U.S.C.

Section 12111(10)(A)(B).

Here, there is no evidence that refraining from terminating Forrest for her head-resting behavior would have resulted in an undue hardship to Wal-Mart. The

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infraction (resting her head in a customer-service area) was not a dischargeable offense per se, and only became grounds for Forrest's discharge once Kaplan determined that she had already been assessed the second-to-last step in the disciplinary process.

I rely as well on the fact that Kaplan did not treat the first head-resting event as a disciplinary event at all, let alone one mandating summary termination. Rather, he only went to store manager Magalhaes after coming upon Forrest with her head down a second time. Indeed, even after she was found to be resting her head a second time, Forrest was still allowed to complete her shift.

My conclusion that undue hardship would not result is further supported by the fact that the Coaching For Improvement policy did not, by its own terms, mandate Forrest's discharge. While it is true that she had already reached the Level Four - Decision-Making Day/Final written coaching, the behaviors that had been the subject of the earlier coachings were a mix of behaviors falling into both of the Policy's defined "Behavior Classifications", i.e., "below standard job performance" and "misconduct". The Policy appears to require that separate coaching processes be instituted when subsequent behavior falls into a different classification than the one which triggered the

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coaching process in the first place." In short, since the policy, if correctly applied, did not automatically mandate Forrest's dismissal, Wal-Mart cannot claim that accommodating her migraine condition by refraining from terminating her employment would have caused it undue hardship.

I note as well that by Wal-Mart's own policy, the fact that Forrest's observed conduct was directly connected to her migraine would have had a material bearing on the applicability of the performance improvement policy. Had Magalhaes learned that Forrest's observed behavior - twice putting her head down - was because of pain associated with her migraine, she would not have treated the behavior as a disciplinary event subject to the performance improvement policy and thus would not have directed Kaplan to determine where she was in the performance improvement policy progression and to take the next step called for by the policy

In conclusion, Wal-Mart has to its credit actively sought to employ persons with various disabilities,

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[24] The August 22, 1995 coaching form (Respondent exhibit 6) which served as the predicate for the decision-making day, indicates on its face that it was assessed for "job performance" reasons. The preceding coaching forms do not use the term "job performance" and instead identify behaviors which are expressly included in the portion of

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including employing persons like Forrest who present with a range of disabilities. While c. 151B does not render it powerless to enforce

facially neutral rules regarding employee behavior, it does require that when workplace infractions occur that are directly traceable to one or more known disabilities of the offending employee, it consider whether there is an accommodation it could offer which would permit the employee to overcome the affect of the disability on her ability to perform the job in question. Here, there was such an accommodation, and Wal-Mart's failure to extend it in the circumstances of this case constituted unlawful discrimination on the basis of handicap.

V. REMEDY

"Upon a finding of discrimination, the MCAD has authority to grant such relief as is appropriate, including lost wages and benefits, damages for emotional distress, and, in appropriate circumstances, compensatory damages for loss of future earning capacity." City of Salem v. MCAD, 44 Mass. App. Ct. 627 (1998).

A. Back Pay

Forrest seeks an order of back pay, which she says should be measured simply by calculating the wages she

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Coaching Policy which give examples of conduct constituting

would have made at Wal-Mart through the time of hearing had she not been discharged. (The amount she comes up with, $60,000 is the product of her base wage at the time of discharge, times forty hours times the number of weeks since her termination). Unfortunately, she does not address what, if any consequence should be attached to the fact that in the interim, she received disability benefits from SSA covering the same time period.

Wal-Mart, on the other hand, claims that for three reasons, Forrest is not entitled to any back pay. It contends in this respect that she failed to mitigate her damages; she did not adequately identify a specific time period for her damages;[25] and that even if her employment had not been terminated in February 1996, "her disability still would have kept her from working, as evidenced by her application for total disability shortly after her termination". Brief of Respondent, p. 19.

Although Forrest was required to mitigate her damages, the burden of proof on the issue of mitigation is on the employer. Assad v. Berlin-Boylston Regional School Committee, 406 Mass. 649, 656 (1990) (citations omitted).

"misconduct".

[25] I believe that the issue of the period for which Forrest seeks back pay has been adequately identified and thus presents no barrier to considering the other substantive

The obligation of discharged employees in Massachusetts is to use "reasonable efforts to secure other similar work.,, Id. Such employees

"cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party." Id.

Where an employer contends at hearing that the employee has failed to satisfy her mitigation obligation, its burden is to prove that "(a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs" (emphasis added). Id. At 656-57.

Wal-Mart has not taken on the affirmative responsibility of adducing its own evidence concerning mitigation, and instead relies upon Forrest's testimony regarding her post-termination employment experience with Wendy's and her having sought and received disability benefits from SSA. I am not convinced that that evidence suffices to prove the necessary elements of the mitigation defense, if for no other reason than that the position

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questions concerning her entitlement to this form of

which Forrest obtained and then left, at Wendy's, was not sufficiently comparable in terms of the hours of work. Accordingly I conclude that Wal-Mart has not met its burden of proving that Forrest failed to mitigate her damages.

I conclude that Forrest's receipt of disability benefits does not absolutely disqualify her from a back pay award. I have concluded that Wal-Mart could have accommodated Forrest in a way that would have permitted her to perform the essential functions of her position as sales associate, and that there is an inadequate evidentiary basis to rule that her receipt of disability benefits is fundamentally inconsistent with her claim that she would have been able to continue to perform her sales associate duties if Wal-Mart had accommodated her migraine condition. For the same reasons, I am unable to conclude that her filing for, and subsequent receipt of, disability benefits was the equivalent of unreasonably remaining idle in anticipation of a back pay award.

That is not to say, however, that Forrest's receipt of the disability benefits is irrelevant to the back pay

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relief.

[26] Regarding the relationship between the act of applying for disability benefits and mitigation, Wal-Mart asserts in its post-hearing brief that "she mitigated by applying for disability". I therefore do not assess whether the act of applying for disability benefits constitutes a failure to

inquiry. I conclude that Forrest is entitled to an award of back pay, to be measured by calculating the wages would have earned had she not been discharged ("gross back pay") less the sum total of the disability benefits she received in the same period, with interest at the rate of 12%. See, e.g., City of Salem v. MCAD, supra at 645.

That the exact amount of Forrest's interim earnings is

not clear from the record does not preclude me from fixing an amount designed to compensate her for her loss of pay. See e.g., Conway v. Electro Switch Corp., 402 Mass. 385, 388 (1988) ("Mere uncertainty in the award of damages is not a bar to their recovery, particularly "where the critical focus is on the wrongfulness of the defendant's conduct", quoting from Datacomm Interface, Inc. v.
Computerworld, Inc., 396 Mass. 760, 777 (1986)). In April 1998, the SSA adjusted Forrest's monthly benefit rate to $433 and made retroactive payments to the start of her benefits. Complainant's ex. 4. I conclude therefore that from the time of her termination to this date, she has received approximately $26,413 in SSA benefits ($433 X 61 months). Had she continued in her employment at Wal-Mart, at her last rate of pay she would have made approximately

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mitigate, although I find there is a consequence to her having received disability benefits.

$84,480 ($320/week X 264 weeks). I order Wal-Mart to pay her the difference between the two, or $58,067.[27]

B. Reinstatement/Front Pay

Forrest has not sought by way of a remedy that she be reinstated to her former position at Wal-Mart, and absent a specific request, I am disinclined to issue such an order, even if I might have independently thought it an appropriate remedy in the circumstances.

She does, however, contend that I should order Wal-Mart to pay her "front pay" measured by the difference between what she would have made from the time of her discharge until her expected retirement, less the amount of disability benefits she has received (and presumably will continue to receive) from the SSA. She offers, however, no authority for that suggested remedy, and I am independently unaware of any disability discrimination case that has sanctioned that outcome.

In any event, I find there is an inadequate evidentiary basis for an order of front pay. See Handrahan v. Red Roof Inns, Inc., 48 Mass. App. Ct. 901 (1999) ("G.

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[27] The record does not reflect Forrest's earnings from her brief employment at Wendy's. Given that fact and the likely minimal amount involved, I decline to further reduce the back pay amount. In addition, while Forrest contends in her brief that I should also order Wal-Mart to pay her $6,000.00 to compensate her for "benefits" she claims she

L. c. 151B 'authorizes an award of damages for loss of future earnings and benefits which have been proved with reasonable certainty as attributable to the employer's misconduct subject to the employee's duty to mitigate); Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000 (noting that MCAD "hearing officer is warranted in refusing to award front pay if the amount is not reasonably ascertainable".). Here, I cannot find that but for Wal-Mart's failure to have accommodated Forrest on February 12, 1996, she would have continued in its employ until she reached 65. She had progressed through the first four steps of Wal-Mart's

performance coaching system, and I have no non-speculative, evidentiary basis to conclude that Forrest would have lasted until retirement age in Wal-Mart's employ.

C. Emotional Distress

Forrest also contends that she is entitled to an award of emotional distress damages. Wal-Mart contends, on the other hand, that Forrest failed to prove that any distress she suffered after her discharge was caused by Wal-Mart's actions. It notes in this respect that she did not initiate counseling until nine months after the discharge, and when

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lost as a result of her termination, I have no evidentiary basis for such a finding.

she did, it was to address anger management issues and no any distress stemming from her loss of employment.

Certain well-established principles concerning emotional distress damages inform this inquiry. First, the finding of discrimination alone permits the inference of emotional distress as a normal adjunct of the employer's actions. See, e.g.,LaBonte, 424 Mass. at 824. Second, in c. 151B cases an award of emotional distress damages can sustained even in the absence of physical injury or psychiatric consultation. Id. Third, "it has traditionally been left to the trier of fact to assess the degree of harm suffered and to fix a monetary amount as just compensation therefor". Id.

I find that Forrest did sustain some emotional distress as a result of Wal-Mart's decision to terminate her employment. I credit her testimony that it was the be job she had ever had, and it was clear to me that she enjoyed many aspects of her Wal-Mart employment, including the friendships that she had made, the fact of being productively employed and the challenge of learning new
things. It was also clear that the loss of those enjoyments resulting from her termination caused her genuine upset. This conclusion is also supported by the credible testimony of Forrest's husband, who recounted

observable changes in her attitude following the termination which included moping around the house, being withdrawn and disinterested in seeing anyone and frequently crying.

I am not persuaded, however, that her termination-related distress lasted for an appreciable time, or that it was the distress from losing her employment that propelled her to later seek counseling in the fall of 1996. Facts that militate against either of those conclusions include the following: there was a long gap between the termination of her employment and her seeking counseling; the notes from her intake session with the counselor address the issue of why she was seeking counseling but make no mention of her termination; and the notes from the sessions that followed mentioned important, apparently long-standing issues that were causing her ongoing concern but only once mention her discharge, and even that appears to refer to it as an historical fact, not a source of continuing distress.

Accordingly, I conclude that Forrest is entitled to an award of $20,000 to compensate her for the emotional distress she sustained as result of her discharge.

D. Other Affirmative Relief

As I have noted above, Wal-Mart's efforts to seek out and employ people with disabilities is commendable. This

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case demonstrates, however, that employing people with disabilities presents on-going challenges for store managerial and supervisory staff, including but not limited to recognizing, and appropriately responding to, those instances when deficiencies in conduct or performance are causally related to an employee's disability. Given the record evidence that Wal-Mart already has a policy of accommodating employees with disabilities, I deem it appropriate in this case to order that Wal-Mart undertake to insure that its store-level supervisory personnel are trained with respect to the interactive process that is part and parcel of the accommodation obligation, and specifically, how to conduct that interactive process with persons whose mental or intellectual limitations may limit their ability to engage in that interactive process.

ORDER

In light of the above Findings of Fact and Conclusions of Law, I hereby enter the following Order:

1. Wal-Mart shall compensate Ms. Forrest $58,067.00 for her lost wages resulting from the termination of her employment, with interest at the rate of 12% from the date of the filing of the complaint, until paid, or until

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this Order is reduced to a court judgment and post-judgment interest begins to accrue;

2. Wal-Mart shall pay Ms. Forrest $20,000 in damages for emotional distress, plus interest at the statutory amount of 12% 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.

3. Wal-Mart shall undertake to train its store-level managerial and supervisory staff with respect to the interactive process and with specific regard for how to conduct the interactive process with persons of limited mental or intellectual capacity, and shall report to the MCAD its compliance with this portion of my order.

Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 8th day of May, 2001

Commissioner:/s/

Commissioner: **/s/James F. Lamond**

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End Of Decision