

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and CHRISTOS TSIGAS,

Complainants

Docket No. 13 SEM 00535

v.

MASSACHUSETTS  
DEPARTMENT OF CORRECTION,

Respondent  
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Appearances: Ryan Avery, Esq. for Complainant  
James Kavanaugh, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 4, 2013, Complainant Christos Tsigas filed a charge of employment discrimination against Respondents Massachusetts Department of Correction.

Complainant alleges that he was subjected to discrimination based on disability when terminated from his employment as a correction officer.

A probable cause finding was issued and the case was certified to public hearing on July 7, 2015.

A public hearing was held on March 29, 30, 31, 2016 and on May 20, 2016. The following witnesses testified at the hearing: Christos Tsigas, Kelley Correia, Paul Henderson, Patrick DePaola, Lynn Bissonnette, Katherine Tsigas, Ana Fritze, Monserrate Quinones, and Paul Stubbart. The parties presented eighty-eight (88) joint exhibits. Complainant presented four (4) additional exhibits and Respondent presented nine (9) additional 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. Christos Tsigas (“Complainant”) resides in Worcester, MA. He began employment as a Correction Officer I with the Massachusetts Department of Correction on January 15, 2012. Complainant successfully completed the Recruit Training Program conducted by the Department of Correction Training Academy on February 24, 2012. Joint Exhibits 23 and 47.
2. Respondent Massachusetts Department of Correction (the “Department”) is the Massachusetts agency responsible for the care and custody of adult individuals sentenced to facilities within the Commonwealth’s correctional system. The primary duty of a Correction Officer I is the care and custody of inmates.
3. Beginning on February 27, 2012, Complainant was assigned to the Massachusetts Correctional Institution at Framingham, MA (“MCI-Framingham”) on the 11:00 p.m. – 7:00 a.m. shift. Joint Exhibit 42.
4. On the evening of March 22, 2012, at the start of his 11:00 p.m. shift, Complainant complained of chest pain, headache, and difficulty breathing. Joint Exhibit 38. MCI-Framingham’s Health Services Unit arranged for Complainant to be transported by ambulance to MetroWest Medical Center. Id. He was released within hours of arrival at the Hospital. Complainant reported to work for his next shift at 11:00 p.m. on March 23<sup>rd</sup>. When he returned to work, he joked that he had consumed too much caffeine and had become anxious. Stubbart testimony, Day 4 at 52:10.

5. Complainant's primary care physician, Dr. Richard Lerner of UMass Memorial Medical Center, requested by letter of May 3, 2012 that Complainant be allowed to wear a heart monitor at work for thirty days in order to evaluate "certain spells of unclear etiology." Joint Exhibits 3 & 30. The Department approved the request. Joint Exhibit 45.
6. During the early morning hours of May 16, 2012, Complainant, while at work, again reported that he was not feeling well. Joint Exhibit 39. According to Complainant's deposition testimony which I find to be more credible than his public hearing testimony, he said he was "a little bit dizzy." Respondent's Exhibit 6. According to Captain Paul Stubbart's credible testimony and his contemporaneous report (Joint Exhibit 40), Complainant said that his heart was racing and he was hyperventilating. Complainant did not mention having knee pain. Stubbart testimony, Day 4 at 53:20; Joint Exhibit 40. Complainant was again transported by ambulance to MetroWest Medical Center. Joint Exhibit 39. Complainant returned to work later in the morning and was driven home by a member of the staff. Joint Exhibit 40.
7. On the following day, May 17, 2012, Complainant was admitted to St. Vincent's Hospital in Worcester. Joint Exhibit 31. He remained there until May 20, 2012. Id. While he was an inpatient at Saint Vincent's Hospital, the Radiology Department x-rayed his left knee, citing as the reason: "extreme pain, unknown etiology" and made the following findings: "The osseous structures are normally mineralized, aligned and intact. The joint spaces are preserved. Soft tissues within normal limits. Impression: Normal examination of the left knee." Complainant's Exhibit 4. On Complainant's last day as an in-patient at Saint Vincent's Hospital, he was given a note which stated

that he “may return to work after he is cleared by his PCP [Dr. Lerner].” Joint Exhibit 31.

8. On May 21, 2012, the Department’s Industrial Accident Director (“Workers’ Compensation Director”) Kelley Correia informed Complainant about the Department’s Temporary Modified Duty Program, told him that he might qualify upon submission of appropriate medical documentation, explained that temporary modifications differ from reasonable accommodation requests, said that the St. Vincent’s note did not satisfy requirements for a temporary modification, and stated that he had to supply acceptable documentation before a temporary modification could be granted. Correia testimony, Day 1 at 45:00 and 3:35:54.
9. The Department’s Temporary Modified Duty Program allows employees to return to work on modified duty for up to one hundred twenty days (with a possible sixty-day extension) after suffering a work or non-work related injury. If the injury is non-work-related, however, an employee may be given modified duty only if such positions are available after the needs of those suffering from work-related injuries are addressed. Joint Exhibit 1, p.2-3. Under the Program, an employee must be able to have “incidental inmate contact”<sup>1</sup> and must supply medical documentation stating that the modified duty is necessary, that the modified work schedule is not likely to be permanent, and that a specific amount of time, up to one hundred twenty days, is being requested for the modified duty. Joint Exhibit 1 at 3-4. The Temporary Modified Duty Program differs from an accommodation granted to a qualified handicapped employee in that a temporary modification lasts only for a limited period and is

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<sup>1</sup> Incidental employee contact is defined as interaction with inmates that is generally limited to coincidental meetings in common spaces and excludes supervision of or care and custody obligations with respect to inmates. Joint Exhibit 1 at 4.

applicable even if an employee cannot perform all the essential functions of his/her job during the period of modification. Correia testimony, Day 1 at 3:26:50; Joint Exhibit 1 at 3. The program is implemented by Workers' Compensation Director Correia whereas Monseratte Quinones, Director of Diversity and Equal Opportunity, handles requests for reasonable accommodations.

10. On May 22, 2012, Correia wrote to Dr. Lerner in response to the request that Complainant be allowed to wear a heart monitor. Joint Exhibit 3. Correia inquired whether Complainant could work full duty or whether he required restrictions. Correia informed Dr. Lerner of the Department's Temporary Modified Duty Program.
11. On or around May 24, 2012, Complainant faxed to the Department a medical note dated May 22, 2012 from Dr. Amudhan Jyothidasan, another doctor at UMass Memorial Medical Center. Joint Exhibit 2. The note stated that Complainant could return to work on May 25, 2012. Id. The note does not reference the heart-rate monitor that Complainant was to wear for thirty days beginning on May 3, 2012 or any work restrictions. Id.
12. Correia subsequently asked Complainant, on more than one occasion, for clarification from Dr. Lerner about the discrepancy between his note of May 3, 2012 about Complainant wearing a heart monitor for thirty days and Dr. Jyothidasan's note of May 22, 2012 providing for Complainant's unrestricted return to work on May 25, 2012. Correia's office spoke to Complainant on May 30 and June 6, 2012 about his return to work status. Joint Exhibit 4. Complainant said that his doctor "would be responding." Id. In the meantime, Complainant remained out of work following the May 16, 2012 medical incident. Joint Exhibit 29.

13. While Complainant was out of work, the Department issued an employee performance review evaluating Complainant for the period of July, 2011 through June, 2012. He was rated as “meets” for all criteria except for those deemed “not observed” or “not applicable.” Joint Exhibit 24. His supervisors described Complainant as having the “potential to become a great officer” and as “coming along nicely as a new officer.” Id.
14. On June 6, 2012, Dr. Lerner, in a handwritten note on a prescription pad, stated that Complainant could return to work on a “light” duty, “full time” basis as of June 6, 2012 provided that he: 1) not lift more than 20 lbs. and 2) remain seated most of the time. Joint Exhibit 33.
15. On June 7, 2012, Dr. Lerner dictated a two-page report summarizing Complainant’s recent medical history. He noted that Complainant had been to four emergency rooms, had been hospitalized as an in-patient, and had seen two neurologists, one psychiatrist and one rheumatologist in response to episodes of left arm pain, weakness and numbness, lightheadedness, shortness of breath, palpitations, knee pain, and intermittent right-sided temporal headaches. Joint Exhibit 88.<sup>2</sup> Dr. Lerner noted that despite tests and multiple labs, “really nothing has been found.” Dr. Lerner opined that, “I do not believe his knee pathology is that significant and obviously does not explain his arm.” Id.

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<sup>2</sup> Although not cited by Dr. Lerner, Complainant’s medical history also includes an office visit to UMass Memorial Nurse Practitioner Maureen Dodakian on December 13, 2011 which references a history of depression. Respondent’s Exhibit 7.

16. On June 7, 2012, Workers' Compensation Director Correia was contacted by Complainant who stated that Dr. Lerner cleared him to return to light duty and would fax a note later in the day. Joint Exhibit 4.
17. On Friday, June 8, 2012, Dr. Lerner faxed to Correia two versions of the same workers' compensation form, both dated June 7, 2012. Respondent's Exhibits 1 and 2. After the first form was received, Correia's unit contacted Dr. Lerner to inform him that the document did not contain required information for a temporary light duty assignment and faxed it back to Dr. Lerner who included the required information and re-faxed it to the Department. Correia testimony, Day 1 at 1:35:57-1:47:38 & 3:46:12. Respondent's Exhibit 2 adds the notation that "pt. can return to regular duties in 120 days – pt. can have incidental inmate contact."
18. On Monday, June 11, 2012, Correia was out of the office. Day 1 at 3:59:30. On the following day she determined that Complainant met the criteria for a Temporary Modified Work Program based on the revised form faxed by Dr. Lerner. Joint Exhibit 5. According to Correia, the period between Complainant's release from St. Vincent's Hospital on May 20, 2012 and receipt of Dr. Lerner's medical forms on June 8, 2012 was a long time for a probationary officer who really wants to return to work and that typically an officer who wants to come back to work is proactive in obtaining medical notes. Correia testimony, Day 1 at 3:58:25.
19. Captain Paul Henderson informed Correia on June 13, 2012 that MCI Framingham could accommodate Complainant's work restrictions. Joint Exhibit 5. The Department granted Complainant a temporary modified duty assignment, effective

June 13, 2012, for up to one hundred twenty days, with a possible sixty-day extension at the discretion of the Superintendent based on medical necessity. Joint Exhibit 6.

20. Complainant returned to work on June 13, 2012. Joint Exhibits 6 & 29. He was assigned to the Inner Control Room post on a modified-duty basis. He distributed radios, keys, weapons, and sorted mail. No inmates at MCI Framingham are allowed in the Inner Control Room.
21. On Thursday, June 28, 2012, Capt. Paul Stubbart spoke to Complainant about improperly leaving the Inner Control Room in order to go into the admissions area. Joint Exhibit 17. Later that night, Complainant requested permission to go to MetroWest Medical Center because he was not feeling well. Day 4 at 1:33:21 & 3:42. Capt. Stubbart assumed that Complainant was experiencing symptoms similar to those at issue in the prior incidents. Stubbart testimony, Day 4 at 134:10. A co-worker drove Complainant to the Hospital's Framingham campus at the direction of Capt. Stubbart. Complainant returned to his shift at approximately 5:00 a.m. the next morning. The Hospital discharge note contains the following "Diagnosis: Paresthesias; Muscle Spasm; Atypical Chest Pain." Respondent's Exhibit 4. Upon returning to his shift the next morning, Complainant presented a medical note from the Hospital's Emergency Department stating that he could return to work on Monday, July 2, 2012. Joint Exhibits 7, 17.
22. On July 3, 2012, Workers' Compensation Director Correia wrote to Dr. Lerner to obtain clarification of Complainant's medical status because the June 29, 2012 note from MetroWest Medical Center's Emergency Department provided for return to work *without restrictions* on July 2, 2012 whereas the modified-duty assignment previously



given to Complainant was to remain in effect for one hundred twenty days, until October 12, 2012. Joint Exhibits 8 & 9.

23. According to Correia, she was told by Complainant at some point between July 3<sup>rd</sup> and July 6<sup>th</sup> that he had begun to treat with Dr. Michael Brown, an orthopedic physician affiliated with UMass Memorial Medical Center. Correia testimony, Day 2 at 32:30, 35:46 & 46:30. Dr. Brown completed a form on July 12, 2012 stating that Complainant had been examined on July 6, 2012 and was, at the time, experiencing increased pain climbing up and down stairs. Joint Exhibits 34 & 10. Dr. Brown diagnosed Complainant with “left knee chondromalacia patella” (damage to the cartilage under the kneecap) and prescribed “physical therapy, follow up in six weeks/surgery possible.” Joint Exhibit 10. The note stated that Complainant needed modified duty until October 12, 2012 (the expiration date of his modified duty assignment).
24. Complainant remained out of work following his July 6, 2012 appointment with Dr. Brown. He attended physical therapy for two to three weeks.
25. By memorandum of July 16, 2012, Superintendent Bissonnette initiated the termination of Complainant due to “his failure to report to work on a consistent basis and his inability to fulfill his current role at MCI-Framingham.” Joint Exhibit 18. According to Supt. Bissonnette, “prison staffing is probably our number one challenge” because the Department frequently goes a long time without filling vacancies, causing it to be “strapped” for employees. Day 3 at 10:49 & 27:10. She testified that probationary officers with unreliable attendance drain shift resources because the Department’s institutions work “close to bare bones” requiring that

vacancies be covered by officers having to come in early or officers having to supervise more than one post such as operating two housing units at once. Id. & Day 3 at 1:05:14. According to Bissonnette, when an officer leaves a shift to go to the hospital, it involves a net loss of two to three employees from the shift. Bissonnette further testified that when probationary employees have attendance issues, it doesn't bode well for the future." Day 3 at 27:56. According to Bissonnette, two or three absences by a probationary officer caused her to think about termination. Day 3 at 32:29.

26. Complainant was cleared to return to full duty by Dr. Lerner on August 1, 2012 who drafted a return-to-work note which Complainant faxed to the Department. Day 3 at 3:03:12. Complainant's Exhibit 1.
27. On August 2, 2012, Superintendent Bissonnette terminated Complainant's probationary employment at MCI Framingham for poor attendance. Joint Exhibit 20. Her termination letter noted that Complainant had used 48 hours of sick leave by May 17, 2012, had been off of the payroll for 244 hours by July 12, 2012 despite receiving a temporary modified work program, and had been transported to local hospitals during work shifts on three occasions for non-work-related health concerns. Id. Supt. Bissonnette cited Departmental rules stating that employees be physically and mentally fit and that attendance standards be strictly observed.
28. Complainant exercised his right to an informal appeal of his probationary termination. Joint Exhibit 25. At the hearing, he testified that he had experienced "excruciating knee pain" on two occasions at MCI Framingham which required that he be relieved

from duty and transported to the hospital. Joint Exhibit 19. I do not credit Complainant's assertion that he left work on two occasions due to knee pain.

29. On September 7, 2012, the Commissioner of the Department of Correction upheld Superintendent Bissonnette's termination decision. Joint Exhibit 26.
30. The Department provided examples of recruits (i.e., officers in training) dismissed from the Department's Training Academy due to: 1) a motorcycle accident requiring surgery; 2) a ruptured Achilles tendon requiring surgery; 3) late arrival to a recruit training formation and lying about the reason; 4) six consecutive absences from recruit training program; 5) a non-authorized day off after the denial of time off; 6) late arrival to recruit training class after falsely reporting that a lost debit card prevented the purchase of gas; and 7) failure to report to recruit training after calling to say that "personal reasons" and "vehicle issues" prevented attendance. Joint Exhibits 11-13; Respondent Exhibit 9. In addition to the aforementioned matters, two post-training probationary Correction Officers I's were dismissed from employment in 2012 for: 1) being "no call, no show" for a scheduled shift at MCI Norfolk and 2) being late for two shifts at MCI Concord after failing to call as required. Respondent Exhibit 9. Altogether, fifteen recruits and probationary correction officers were terminated between 2011 and 2015 for attendance-related matters and for the inability to complete all aspects of basic training. Joint Exhibit 14.
31. Workers' Compensation Director Correia testified credibly that one of the reasons for the Department's nine-month probationary period for correction officers is to monitor attendance. Correia testimony, Day 1 at 3:08:51. According to Correia, attendance is scrutinized in order to determine if a correction officer is going to have scheduling

issues. Correia testimony, Day 1 at 3:09:14. She said that attendance is significant because the Department often operates under hiring freezes and is not able to fill positions so if people don't show up to work, it causes overtime to be "really, really high." Day 1 at 3:11:10. Correia testified that during recruit training, it is "hammered home" that attendance is closely monitored during the probationary period. Day 1 at 3:14:10. According to Correia, if a probationary correction officer is absent even once – whether taking a personal day, a sick day, or a compensatory day -- it "raises a concern." Day 1 at 3:14:03.

### III CONCLUSIONS OF LAW

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person. 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. In order to be a qualified handicapped individual, an employee must be able to perform the essential functions of his/her job with or without a reasonable accommodation. See M. G.L. c. 151B sec. 1(16). The statute requires employers to accommodate qualified handicapped individuals unless the employer can demonstrate that an accommodation would create an undue hardship. See 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 factual record in this matter establishes that Complainant was not a handicapped individual. At his post-termination appeal hearing conducted by the Department of Correction, Complainant cast himself as the victim of excruciating knee pain while employed by MCI Framingham. Complainant maintained at the public hearing that it was this condition – subsequently diagnosed as chondromalacia patella -- which required that he be relieved from duty and transported to the hospital on two occasions. The credible evidence, however, does not support this claim.

Rather than leave work on multiple occasions due to incapacitating knee pain as Complainant now asserts, his emergency room visits in March and May of 2012 were due to dizziness, a racing heart, and hyperventilating. It is noteworthy that at the time of these visits, Dr. Lerner arranged for Complainant to wear a heart monitor for thirty days. Use of a cardiac monitor attests to the non-orthopedic nature of Complainant's first two absences from work. To be sure, left knee pain was included in the litany of Complainant's symptoms in 2012 and his left knee was x-rayed during an in-patient stay at St. Vincent's Hospital, but the findings establish that Complainant's knee was normal, aligned, and intact. Dr. Lerner noted that despite tests and multiple labs, "really nothing has been found."

In addition to the fact that Complainant's medical concerns were inconsistent and shifting, the record shows that Complainant was lax in his efforts to return to work. A medical note drafted on May 20, 2012 states that Complainant could re-commence his correction officer duties after Dr. Lerner medically "cleared" him. Instead of procuring such clearance from Dr. Lerner, Complainant faxed a note from a different doctor (Amudhan Jyothidasan, MD) at UMass Memorial Medical Center which stated that

Complainant could return to work on May 25, 2012. The note omits any reference to the heart-rate monitor that Dr. Lerner had previously arranged for Complainant to wear for thirty days or to any other work restrictions. Following the submission of this note and after numerous promptings from the Department, Complainant supplied a contradictory communication from Dr. Lerner dated June 6, 2012 which stated that Complainant could return to work on light duty as of June 6, 2012 provided that he not lift more than 20 lbs. and remain seated most of the time.

Resolution of the conflicting instructions was achieved, not through Complainant's efforts, but through the efforts of the Department's Workers' Compensation Director Kelley Correia. It was Correia who initiated contact with Complainant's primary care physician, Dr. Lerner, to inquire whether Complainant could return to work on a full-duty or a restricted basis. It was Correia who alerted Dr. Lerner to the existence of the Department's Temporary Modified Duty Program which was potentially available to Complainant. It was Correia who asked Complainant, on more than one occasion, for documentation from Dr. Lerner. When Dr. Lerner did respond on June 7, 2012, stating that Complainant could return to regular duty in 120 days with incidental inmate contact in the meantime, this instruction conflicted with a prior note submitted by Dr. Jyothidasan, which stated, absent any qualification, that Complainant could return to work on May 25, 2012. Despite this seeming contradiction, the Department fashioned a Temporary Restricted Work Program for Complainant based on Dr. Lerner's requirements.

The temporary restricted work arrangement fashioned by the Department was upended by yet another trip to the hospital by Complainant on June 28, 2012. Following

that hospital visit, Complainant presented an unrestricted return-to-work note from MetroWest Medical Center's Emergency Department followed by an inconsistent communication from Dr. Michael Brown. Dr. Brown, an orthopedic physician affiliated with UMass Memorial Medical Center, diagnosed Complainant with "left knee chondromalacia patella" (damage to the cartilage under the kneecap).

The aforementioned medical history presents an array of conflicting symptoms that cannot be tied to a single disabling condition. It is noteworthy that Dr. Brown's diagnosis of chondromalacia patella was ruled out at Saint Vincent's Hospital pursuant to radiological testing. Even if Complainant had developed an orthopedic condition at or around the time he saw Dr. Brown, there is no credible evidence that left knee pain caused Complainant to leave work on any of the three occasions on which he absented himself from work to go to the hospital.

Dr. Lerner summarized Complainant's medical encounters prior to June of 2012 as consisting of four emergency room visits, one hospitalization, two neurological appointments, one appointment with a psychiatrist, and one visit to a rheumatologist. These encounters involved episodes of left arm pain, weakness and numbness, lightheadedness, shortness of breath and palpitations, knee pain, and intermittent right-sided temporal headaches. Dr. Lerner noted that despite hospital stays, medical visits, testing, and multiple labs, nothing was found.

In light of the foregoing, Complainant has not succeeded in establishing that he was handicapped during the events at issue. His litany of complaints in May and June of 2012 consisted of brief medical episodes of unknown etiology, each lasting a matter of hours. His allegations of knee pain in July of 2012 resolved in less than two months

following several weeks of physical therapy. Any condition that resolves in a brief period of time may not qualify as a handicap under G.L. c. 151B. See Dube v. Middlesex Corp., 59 Mass. App. Ct. 734, 736-738 (2003); Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686, 688-689 (1997) (knee injury resolving within a month was not a handicap under G.L. c. 151B). See also MCAD Disability Guidelines IIA.6 (noting that “isolated medical problems such as a broken arm that heals normally and illnesses of short duration are not handicaps”).

Even if Complainant had established that he was handicapped, the evidentiary record establishes that his inability to attend work on a consistent basis disqualified him from performing the essential function of a correction officer position. An employee’s obligation to report to work on a regular basis is generally considered to be an essential job function. See Rios-Jimenez v. Principi, 520 F.3d 31, 42 (1<sup>st</sup> Cir. 2008) (upholding demotion of a medical technician due to numerous absences even though plaintiff attributed absences to anxiety and depression). An employee who frequently fails to report to work may be deemed unqualified to perform the essential functions of a job notwithstanding the fact that the employee has medical reason(s) for being absent. See Colon-Fontanez v. Municipality of San Juan, 660 F.3d. 17, 33-34 (1<sup>st</sup> Cir. 2011) (municipal employee with a fibromyalgia diagnosis and other ailments was not a qualified individual under the ADA because she her extensive absences meant that she could not perform essential functions of her job).

Whether a particular duty is an essential job function is “intensely fact-based.” Godfrey v. Globe Newspaper Co. Inc., 457 Mass. 113, 121 (2010) *citing* Cargill v. Harvard Univ., 60 Mass. App. 585, 587-588 (2004); Garcia-Ayala v. Lederle Parenterals,



Inc., 212 F.3<sup>rd</sup> 638, 650 (1st Cir. 2000) (denial of extended medical leave as an accommodation for breast cancer treatment depends on an individualized showing of undue hardship). The factual record in this case establishes that correction officers work in a dangerous setting where attendance is critical in order to maintain safety and security of inmates and fellow employees. See Andujar v. IPC International Corp., 583 F. Supp. 2d 213, 218 (D. Mass. 2008) (physical attendance is essential function of security officer). According to Supt. Bissonnette, prison staffing is a critical concern -- a prison's "number one challenge" -- because the Department frequently goes a long time without filling vacancies and is frequently "strapped" for employees. Workers' Compensation Director Correia likewise noted that Department often operates under hiring freezes and is not able to fill positions so if people don't show up to work, overtime would be "really, really high." Accordingly, probationary officers with unreliable attendance drain shift resources because absences increase overtime and/or decrease security by requiring officers to cover more than one post at once. For the stated reasons even two or three absences by a probationary officer caused Supt. Bissonnette to think about termination during the relevant time frame. Based on the foregoing, I conclude that the maintenance of reliable attendance is an essential attribute of a correction officer.

Complainant depicts himself as the victim of an unfeeling bureaucracy rather than as an unreliable employee, but the facts establish that the bureaucracy bent over backwards to accommodate his medical concerns. Complainant received more latitude, not less, than other recruits and probationary correction officers who were terminated for missing work due to surgeries, unauthorized absences, and tardiness. The two and one-half week period between Complainant's release from St. Vincent's Hospital and receipt

of Dr. Lerner's medical note on June 8, 2012 was, in the opinion of Workers' Compensation Director Correia, a long time for an officer who really wanted to return to work. Correia testified convincingly that probationary correction officers are expected to take the initiative in obtaining medical documentation concerning their fitness to work. According to Correia, one of the reasons for the Department's nine-month probationary period for correction officers is to monitor attendance. During this period, attendance is scrutinized in order to determine if a correction officer is going to have scheduling issues. Correia testified that during recruit training, it is "hammered home" that attendance is closely monitored during the probationary period. Correia testimony, Day 1 at 3:14:10. Correia testified that if a probationary correction officer is absent even once -- whether taking a personal day, a sick day or a compensatory day -- it "raises a concern." She explained that reliable attendance is important because absenteeism jeopardizes the proper supervision of inmates and/or results in excessive overtime costs.


According to data compiled by the Department, fifteen probationary recruits/correction officers were terminated between 2011 and 2015 for extensive absenteeism. Complainant's termination falls squarely into this category. His absences were numerous and poorly defined as to causation. Complainant was lackadaisical in obtaining the medical clearances necessary to return to work. For the aforesaid reasons, Complainant has demonstrated that he was not capable of fulfilling an essential function of a correction officer position: the ability to attend work on a reliable basis.

#### IV. ORDER

The complaint 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 8th day of November, 2016.



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Betty E. Waxman, Esq.,  
Hearing Officer