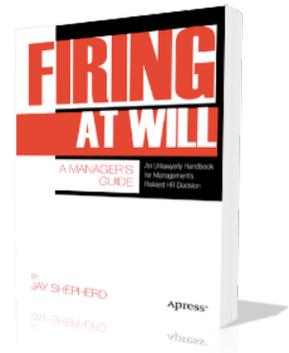


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## Sample Agency Position Statement

*This is an example of a letter-style position statement as described in Chapter 11. It's from an actual reply I filed several years ago at the Massachusetts anti-discrimination agency. As you can imagine, all the names have been changed (except mine).*

Dear Ms. Jones:

Respondent Wormwood Finance, LLC submits this statement in response to the Complaint of Bob Smith alleging discrimination based on his alleged disability.

Smith cannot demonstrate that he was unlawfully discriminated or retaliated against under Massachusetts law. Wormwood did not discriminate or retaliate against him on the basis of his alleged disability. To the contrary, Wormwood had multiple conversations with Smith regarding what type of accommodations would be necessary to ensure that he would be able to continue working. They then made several accommodations including: (1) providing him with an air mattress in a private office so that he could lie down during work hours, (2) renting a parking space so that he would not have to take public transportation to work (see Exhibit A), and (3) allowing him to leave early and take paid days off (well in excess of his allotted sick time) if his back was hurting or if he needed to seek medical attention.

Despite these accommodations, Smith was unable or unwilling to perform the essential functions of his job and he has not provided any evidence to the contrary. Smith's charge of discrimination and retaliatory discharge should be dismissed for lack of probable cause.

### **Background**

Smith started working for Wormwood on April 22, 2008. Wormwood is a small investment company located in Boston. Smith was hired to perform the duties of a financial analyst. As an analyst he was expected to produce accurate and timely daily profit and loss reports for all funds, as well as many other duties (see Exhibit B). The position of financial analyst is a full-time position. As a full-time employee Smith was expected to work a minimum of 40 hours a week.

Just two months after he started working for Wormwood, Smith began to complain that he was having some back pain. After taking several sick days, he requested, and was granted, the ability to leave early and seek medical attention if necessary, and the ability to leave his desk during the day in order to stretch his back—so long as someone knew where he was in case he was needed. Additionally, Wormwood agreed to pay the full cost of renting a nearby parking space so that Smith would be able to get to and from work easier (see Exhibit A). In fact, in his December 2008 self-review, Smith acknowledged the accommodations that were being made to help him and thanked Wormwood for its understanding. (See Exhibit C.)

On January 8, 2009, John Peters met with Smith (see Exhibit D) to further discuss additional options that would help him to continue working. As a result of that meeting, Wormwood purchased an air mattress so that Smith could lie down during work hours in order to stretch his back if necessary. Smith failed to take advantage of this accommodation and did not use the air mattress despite a statement made to his doctor on January 23, 2009, claiming that “lying down seems to be the only position that alleviates his pain.” (See Exhibit E.)

But Smith did take advantage of the option to leave his desk: he was spotted numerous times chatting with the receptionist and making personal calls from another employee’s private office. And during those times, Smith had not informed anyone that he would be away from his desk, as he had agreed to do when taking breaks for his back pain. These absences tended to last 30–45 minutes at a time. Smith also took advantage of the flexible scheduling Wormwood offered him (see Exhibit F). Wormwood business hours are between 8 a.m. and 5 p.m.; as the security log shows, Smith was frequently late for work and frequently left early. His multiple absences from work and from his desk compounded his inability to perform the essential functions of his job.

When he did show up for work, he underperformed. Smith was frequently reprimanded for failing to perform the tasks he was asked to do and for failing to be proactive on the tasks that he did undertake. Examples abound: an e-mail from one of Smith’s supervisors shows how it took Smith 35 days to do a simple task, despite repeated reminders (see Exhibit G). Other e-mails show how he failed to follow a direct order (see Exhibit H), failed to meet a deadline (see Exhibit I), repeatedly failed to perform assigned duties (see Exhibit J) failed to be proactive in his work (see Exhibit K). Smith’s supervisors and coworkers were forced to bear the burden of performing the essential functions of his position because of his frequent absences and tardiness and failure to perform effectively when he was at work.

Despite the multiple accommodations that Wormwood provided, Smith remained unable or unwilling to perform the essential functions of his job. On February 28, 2003, Wormwood terminated Smith's employment for a legitimate business reason: that he was not performing the essential functions of his job.

## **Affirmative Defenses**

In compliance with 804 CMR 1.10 (8)(d), Wormwood asserts the following additional defenses in response to the allegations contained in the Complaint:

### **First Defense**

Smith has failed to establish a prima facie case with respect to claims made based upon his alleged disability.

### **Second Defense**

Smith fails to present sufficient evidence upon which a fact finder could form a reasonable belief that it is more probable than not that Wormwood committed an unlawful practice.

### **Third Defense**

The Complaint fails to state a claim upon which relief can be granted.

### **Fourth Defense**

To the extent Smith failed to mitigate, minimize, or avoid any damages allegedly sustained, any recovery against Wormwood must be reduced by that amount.

### **Fifth Defense**

Every action taken by Wormwood with respect to Smith's employment was taken for a legitimate business purpose and was consistent with principles of law. Wormwood has acted, at all times in good faith, reasonably and justifiably.

### **Sixth Defense**

Smith is not disabled within the meaning of the ADA, nor is he handicapped within the meaning of G.L. c. 151B.

### **Seventh Defense**

If Smith is disabled as alleged in his Complaint, any such disability was reasonably accommodated.

### **Eighth Defense**

Smith's claim for damages is barred by the doctrine of waiver, laches, estoppel and/or unclean hands.

Very truly yours,

Jay Shepherd

Counsel for Wormwood