

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION )  
AGAINST DISCRIMINATION & )  
ALLEN LINCOLN )  
    Complainant )  
)  
v. )                   Docket No. 95-BEM-1379  
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)  
NATICK PAPERBOARD COMPANY, )  
et. al. )  
    Respondents )  
\_\_\_\_\_)

Appearances:

John M. Becker, Esq., for Complainant  
Shea Hutchins Lukascko, Esq., for Respondent Company

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 1, 1995, Complainant Allen Lincoln filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged that Natick Paperboard Company (hereafter: the Respondent) and The Newark Group<sup>1</sup> discriminated against Complainant because of his handicap (diabetes) and in retaliation for his participation in prior protected EEO activity in violation of G.L. c. 151B, §4, paragraphs 4(4)

and 4(16).

Attempts to conciliate this matter were unsuccessful. On November 17, 2000, Dorca I. Gomez, the Investigating Commissioner, certified this case for a public hearing.<sup>2</sup>

I conducted a public hearing in this case on April 29 and May 1-3, 2002. On August 23, 2002, the parties submitted post-hearing memoranda with proposed findings of fact, conclusions of law and exhibits.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, the proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions to render them acceptable.

My findings of fact are based on the complaint filed in this case, Respondent's answer and the testimony pre-

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<sup>1</sup>On November 17, 2000, Investigating Commissioner Dorca I. Gomez dismissed three individuals as respondents in this case: Jeffrey Comeau, Plant Manager; John Hancock, Plant Superintendent; Donald Sohaskey, Supervisor, Shipping Department.

<sup>2</sup> Commissioner Gomez certified the following issues for public hearing: "(1) Whether Complainant is a handicapped individual within the meaning of G.L. c. 151B, §1(17); (2) Whether Complainant is a "qualified handicapped person" within the meaning of G.L. c. 151B, §4(16); (3) Whether Complainant sought and was denied a reasonable accommodation to his handicap; (4) Whether Respondent retaliated against Complainant for engaging in activity protected by G.L. c. 151B; (5) Whether Respondent otherwise retaliated against Complainant on account of his handicap when it twice suspended him in December of 1994 and November of 1995; (6) Whether Complainant suffered any compensable emotional distress as a direct result of any alleged discriminatory treatment, alleged failure to accommodate his asserted handicap, or retaliation by Respondent for his engaging in protected activities; (7) Whether Respondent The Newark Group is a properly named Respondent to this matter.

sented at the public hearing. Based on the credible evidence and reasonable inferences therefrom, I make the following findings of fact, conclusions of law and order.<sup>3</sup>

## II. FINDINGS OF FACT

1. Allen Lincoln is employed as a shipper and fill-in engineer in the shipping department at Respondent's plant in Natick, Massachusetts. Complainant has held his shipper position since July 30, 1985.<sup>4</sup> (Stipulation Nos. 1, 8 and 9). Complainant is married and has one daughter (age 7).

2. Respondent manufactures recycled paper products that are used for book covers, photograph packing, cereal boxes and industrial tubing cores. (Stipulation No. 6). Respondent operates 24 hours a day (three production shifts) and seven days a week. (Stipulation No. 7). It manufactures 125 tons of recycled paperboard daily.

3. At all times relevant to the instant discrimination complaint, Respondent employed 65 individuals, including 52 hourly employees. (Stipulation No. 1). Respondent is an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

4. Jeffrey A. Comeau is Respondent's Plant Manager. (Stipulation No. 2). Mr. Comeau has held this position since September 1987. He has overall responsibility for plant personnel, production, maintenance, sales and

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<sup>3</sup>Complainant did not offer any evidence on whether The Newark Group was properly named as a respondent. Accordingly, I have dismissed The Newark Group as a party in this complaint.

<sup>4</sup> Between 1981-1985, Complainant held several positions at Respondent: line operator, receiver, fill operator, beater engineer, winder, back tender, skid maker, third-, fourth- and fifth-hand and a utility man in the maintenance and shipping departments.

finance. In 1994-1995, Mr. Comeau worked on Mondays through Saturdays from 6:45 a.m. to 5:00 p.m.

5. John H. Hancock is the Plant Superintendent for Respondent and reports directly to Mr. Comeau. (Stipulation No. 3). Mr. Hancock is responsible for production and orders raw materials, parts and supplies. Mr. Hancock has held his position for 15 years. In 1994-1995, Mr. Hancock worked on Monday through Friday, 7:00 a.m. to 5:00 p.m.

6. Mr. Hancock is Complainant's father-in-law.

7. Donald A. Sohaskey is a Planner or Scheduler who has held his position since February 1994. Mr. Sohaskey schedules the plant's paper machines based on customer orders, supervises the shipping department and skid shop and schedules trucks for product delivery. Mr. Sohaskey has directly supervised Complainant since February 1994. (Stipulation No. 17). In 1994-1995, Mr. Sohaskey worked on Monday through Friday, 6:30 a.m. to 5:00 p.m.

8. During the period relevant to this complaint, Mr. Sohaskey spent approximately 75-80% of each workday in his office responding to customer calls, scheduling incoming orders for production and coordinating transportation. Mr. Sohaskey spent the remainder of his workday supervising activities in the shipping department. During 1994-1995, Mr. Sohaskey went to the shipping department three or four times each day and spent approximately 10 minutes per visit.

9. At all times relevant to this complaint, the Paper,

Allied-International, Chemical & Energy Workers International Union, AFL-CIO (hereafter: "PACE" or the "Union"), formerly known as the United Paperworkers International Union, has represented the hourly employees in collective bargaining at Respondent. (Stipulation No. 4 and Respondent's Exhibit No. 1). Complainant has served as Union President since 1994. (Stipulation No. 5).

#### Complainant's Job Duties

10. In 1994-1995, Complainant's duties as a shipper included operating a truck tractor with a 48 or 53-foot trailer, loading trailers with customer orders and moving empty and loaded trailers to six warehouses in the plant yard. Complainant operated a forklift to retrieve rolls of manufactured paperboard that weighed 200 to 4,000 pounds. (Stipulation Nos. 15 and 16). Complainant also moved paperboard rolls and pallet-type sheets from the warehouses to the shipping dock for loading onto tractor-trailers. After loading each truck, Complainant completed shipping and receiving work orders.

11. In March 1994, Complainant's regular work schedule as a shipper was Monday through Friday, 7:00 a.m. to 3:30 p.m. He also regularly worked a Sunday shift at premium pay. (Stipulation No. 12). Complainant worked until he completed all shipping activities required for the day and he frequently worked at least one or two hours of voluntary overtime when his shift ended at 3:30 p.m. (Stipulation No. 13). Because of Mr. Sohaskey's duties unrelated to shipping, Complainant was unsupervised most of the time during 1994-1995.

12. By December 1994, Complainant's regular pay rate was \$10.89 per hour. (Stipulation No. 64). Complainant received time-and-half pay for work he performed on Saturday and for all time after eight hours he worked on Monday through Friday. (Stipulation No. 12). Complainant received double time pay for his work on Sundays. His pay rate for a holiday was double time and eight hours holiday pay. (Stipulation No. 64).

13. During 1992-1993, there were two full-time shippers at Respondent: William Barber and Complainant. Mr. Barber worked from 11:00 a.m. until 7:00 p.m. He transferred to the skid shop in March 1994. Mr. Barber was qualified to perform shipping duties between December 1994 and November 1995. (Stipulation No. 62).

14. Mr. Comeau testified that Complainant is an excellent shipper with leadership skills who is willing to "do what is necessary to get [a] job done."

15. Prior to March 1994, Complainant regularly socialized after work on the weekdays with several of Respondent's employees, including Messrs. Hancock, Comeau, Sohaskey, John Mackun, the Plant Safety Officer, and Dan Poirier. Complainant socialized two or three times each week from 5:30 p.m. to 9:00 p.m. During his after-work socializing, Complainant drank beer with his co-workers on the grounds of a nearby Edison plant.

#### Complainant's Diabetes and Treatment

16. On March 24, 1994, Complainant was diagnosed with diabetes mellitus after his admission to Framingham Union

Hospital. (Stipulation No. 10 and Respondent's Exhibit No. 5). On March 25, 1994, Framingham Union Hospital discharged Complainant. (Respondent's Exhibit No. 6).

17. Messrs. Hancock and Sohaskey visited Complainant during his hospitalization at Framingham Union Hospital in March 1994. (Stipulation No. 18). During their visit, Mr. Hancock testified that he offered Complainant a beer as a joke but he declined.

18. During his hospital stay, Complainant received educational information related to treatment of his diabetes, including diet, nutrition, taking insulin shots and monitoring his blood sugar through a glucometer. Complainant learned that his diabetes, if untreated, could result in neuropathy or the loss of sensation in his nerves, blindness and heart problems. Complainant also learned that he could lapse into a diabetic coma and/or die if his blood sugar level went "too low." Complainant did not receive any instructions regarding his consumption of alcohol nor was he told that he could not drink an occasional beer.

19. Upon Complainant's discharge, Dr. Bartholomew Alfano, his treating physician since 1991, recommended the following treatment regimen: (1) a maximum daily intake of 2,500 calories and non-concentrated sugar; (2) a combination of regular insulin injections every four hours and NPH Humulin insulin that acted between 1-12 hours; (3) daily monitoring of Complainant's blood sugar level by using a glucometer to test blood he obtained from skin pricks; (4) eating snacks during frequent daily breaks. (Stipulation No. 11).

20. Complainant returned to work on March 29, 1994. Upon his return, Complainant gave a note from Dr. Alfano to Mr. Hancock or Mr. Sohaskey certifying that he was able to return to full duty with no restrictions. (Respondent's Exhibit No. 7). Complainant continued to perform his shipping duties and maintained the same work schedule he had prior to March 29, 1994. (Stipulation No. 14). Complainant did not request any change in his job duties or work schedule to accommodate his diabetes.

21. When Complainant returned to work on March 29, 1994, he discussed his diabetes with Messrs. Comeau, Hancock and Sohaskey. Complainant told them about his need to monitor his blood sugar level and described his treatment regimen including his daily insulin injections and his need for additional snacks and/or rest breaks.

22. From April through September 1994, Complainant worked with Dr. Alfano and his nurse practitioner, Judith Remnick, to establish an effective treatment regimen. Complainant took additional snacks and used breaks to check his blood sugar and inject insulin. Complainant took a 20-minute break between 10:00 a.m. and 11:00 a.m., a noon lunch break and an afternoon break. Complainant took his breaks in the shipping office or in the break room depending on whether he brought snacks with his lunch. These breaks were allowed but not required by Respondent's policy or the Union collective bargaining agreement. (Stipulation No. 19). Complainant also established an overall pattern of eating: breakfast, morning snack, lunch, afternoon snack, supper and evening snack.

23. Complainant monitored his blood sugar level at least

twice daily while at work: in the morning and late afternoon when he worked overtime. Complainant injected insulin in the morning before he ate and in the evening before his dinner. He sometimes injected insulin in the middle of the day if his blood sugar level was too high. Complainant generally took 15-20 minutes to test his blood sugar level and administer his insulin injections into his stomach, legs, sides, buttocks and/or thighs. Sometimes other Respondent employees were in the Shipping Office when Complainant took his injections.

24. Between March 1994 and October 1994, Complainant experienced a few instances of hypoglycemia or low blood sugar. There were several symptoms before Complainant went "low blood sugar:" he became irritable, his body began to sweat and his hands began to shake. Complainant testified that he experienced these symptoms long before they affected his ability to operate a forklift and before he became a "safety hazard." On these occasions, Complainant ameliorated the effect of hypoglycemia by drinking orange juice or having a snack.

25. Mr. Hancock saw Complainant "go low blood sugar" on two instances at work and two instances off work but he does not recall when they occurred. During these incidents, Mr. Hancock observed Complainant turn white, sweat and shake. He testified that Complainant corrected his blood sugar level at work by drinking juice, eating a candy bar or other snacks. Mr. Hancock also testified that he did not report Complainant's "low sugar" episodes to Mr. Comeau because "they all knew he was diabetic" and that he was "bound" to go into low blood sugar "sooner or later." Mr. Hancock felt that Complainant was able to "take care of"

himself in these instances.

26. Mr. Comeau testified that he saw Complainant have one low sugar episode while he was in the "trainer" position—sometime during late 1994.

27. After his diabetes diagnosis, Complainant curtailed his drinking to "hardly at all" so that he could maintain a "decent" sugar level and avoid neuropathy. Complainant testified that he stopped attending the after-work gatherings at the Edison plant property. I credit Complainant's testimony regarding his drinking during 1994-1995.

First Request for Accommodation-October 1994

28. By August or September 1994, Respondent had implemented a continuous move transportation delivery system. Under the system, it hired an outside contractor to coordinate and schedule product deliveries through trucks operated by various outside trucking companies. Respondent adopted this system because The Newark Group directed it to eliminate its two leased drivers and trucks because of financial constraints. In October 1994, Respondent changed its shipping hours to 9:00 a.m. to 5:00 p.m. because the contracted trucks routinely arrived at the plant later than originally planned because of the traffic patterns.

29. In October 30, 1994, Mr. Hancock offered Complainant a new assignment as a trainer. The position involved training the "dry end crew" on the paper machine and assisting in the development of safety procedures and job descriptions. (Stipulation No. 20).

30. Complainant began his training assignment on or about October 30, 1994. (Complaint, paragraph 7). Respondent anticipated that Complainant's training assignment would last at least six months. Complainant's new duties required him to train employees inside the plant and resulted in his increased physical labor and activity. (Stipulation No. 21).

31. To cover Complainant's shipping duties, Respondent transferred Joseph Doorley, a line employee, into the shipping department to train as a shipper. Mr. Doorley's work hours were 9:00 a.m. to 5:30 p.m. although his truck loading duties sometimes required him to work overtime as late as 10:00 p.m. (Stipulation No. 23).

32. Complainant's training duties also required him to train Mr. Doorley. (Stipulation No. 21). Complainant trained Mr. Doorley for an unspecified time period before changing to his new training position.

33. During his training assignment, Respondent changed Complainant's work schedule to 9:00 a.m. to 5:30 p.m. Complainant accepted the assignment with the understanding that he could also work overtime in the shipping department between 7:00 a.m. to 9:00 a.m. on Monday through Friday and on Sunday, as needed. (Stipulation No. 22).

34. Complainant's new duties required more physical activity than his former duties in the shipping department. Complainant's increased physical activity affected his diabetes as his sugar levels fluctuated more frequently and he had a "tendency to go low sugar more." To compensate for his increased work activity in his training position,

Complainant readjusted his break schedules and ate more snacks to maintain his sugar level.

35. Shortly after Complainant began his duties as a trainer, he asked Mr. Hancock for an additional weekday off because he wanted to regain control over his blood sugar level and adjust for the changes in his activity levels. Complainant requested to take off Fridays in addition to Saturday, his regularly scheduled day off. Mr. Hancock told Complainant that an additional day off was "okay" as long as Messrs. Mackun and Sohaskey approved it.

36. Messrs. Mackun and Sohaskey approved Complainant's request for an additional weekday off. After consulting with Mr. Comeau, Mr. Hancock told Complainant that he could take Sundays as his extra day off but not Fridays. Mr. Comeau did not authorize Complainant to take off Fridays because he believed he could not cover Complainant's position with other employees on Fridays. Mr. Comeau testified that it was easier to cover Complainant's shipping duties on Sunday because other employees were available from the skid shop, recovery and shift peripheral departments to work on Sundays but not Fridays. Mr. Comeau also testified that Sundays were more attractive for employees because Respondent paid "double-time" for work on Sundays.

37. Complainant did not accept Mr. Hancock's offer to take off Sundays. Complainant felt that "financially it would kill him" since Sunday was a double-time payday and Saturday was only a time-and-one-half payday.

Second Request for Accommodation-December 1994

38. On December 20, 1994, Respondent terminated Mr. Doorley for absenteeism. (Stipulation No. 24). On the same day, Mr. Hancock told Complainant that he was returning immediately to his full-time shipper duties. (Stipulation No. 25). Mr. Hancock did not give Complainant a new work schedule.

39. On December 20, 1994, Complainant worked from 7:00 a.m. to 3:30 p.m. in the shipping department. Sometime on December 20, 1994, Mr. Sohaskey told Complainant that his work hours in the shipping department were changed to 9:00 a.m. to 5:30 p.m. (Stipulation No. 26). Mr. Sohaskey also testified that he told Complainant that voluntary overtime was available from 7:00 a.m. to 9:00 a.m.

40. Mr. Sohaskey also testified that he told Complainant that these work hours were the best for loading trucks under the continuous move system. Mr. Sohaskey testified that Complainant told him, "I've been trying to get them to change my hours for years." (Respondent's Exhibit No. 54). Complainant testified that Mr. Sohaskey walked away before he could discuss the proposed change in his work schedule. I do not credit Mr. Sohaskey's testimony regarding his offer of voluntary overtime or Complainant's commentary regarding his work schedule change.

41. On December 21, 1994, Complainant worked from 7:00 a.m. to 3:30 p.m. because he had to take his daughter to a doctor's appointment.

42. On December 22, 1994, Complainant began working on the 9:00 a.m. to 5:30 work schedule. (Stipulation No. 27). Later that morning, Complainant met with Messrs. Hancock

and Mackun and told them that he was concerned because Mr. Sohaskey had changed his work schedule without advance notice to him. Complainant also told them that he needed advance notice so that he could determine how the schedule change would affect his diabetes and treatment regimen; specifically, whether he had to "re-regulate" the timing of his insulin injections, snacks, breaks and meals. (Respondent's Exhibit 56). Complainant testified that his entire work schedule was geared to taking his insulin shots and eating at certain times--when Complainant worked until 5:30 p.m., he ate dinner at 6:00 p.m.

43. During the meeting, Mr. Mackun told Complainant that he should not worry "if anything happened to him" because his spouse and daughter would be "well taken care of" based on his company life insurance policy. Complainant replied that he would hold Respondent responsible "if anything happened to [him]." Complainant did not tell them that he was experiencing low blood sugar or that he had physical problems on that day. Complainant testified that Mr. Hancock told him that "it was not a big deal, to go back to work." Complainant testified that he then returned to his job duties. I credit Complainant's testimony regarding this meeting.

44. At Mr. Comeau's request,<sup>5</sup> Complainant met with Messrs. Comeau, Hancock, Sohaskey, Mackun and Charles McLaughlin, a union representative, about two hours after his earlier meeting on December 22, 1994. (Stipulation Nos. 28 and 29). Complainant repeated his concerns about the change in his work schedule and told them that he wanted to consult

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<sup>5</sup> There is a dispute in the record regarding whether Complainant or Mr. Comeau requested the second meeting on December 22, 1994. I find that Mr. Comeau requested this meeting.

with Dr. Alfano or Nurse Kremnick regarding the potential impact of the schedule change on his diabetes and/or treatment regimen.

45. During the meeting, Mr. Comeau told Complainant that he was unfamiliar with diabetes. He asked Complainant for information about his diabetes and treatment regimen. Mr. Comeau also asked Complainant to explain about "going low sugar" or hypoglycemia. (Stipulation No. 30). Messrs. Comeau or Mackun then asked Complainant what was the worst possible consequence of a person "going low sugar." Complainant told them that "ultimately a person could die or drop dead" in such circumstances. (Stipulation No. 31 and Respondent's Exhibit No. 55). Complainant believed their inquiry was general and was not specifically related to him.

46. Complainant did not tell them how long it would take to adjust his blood sugar level because he had to change the timing of his insulin injections and break times. Complainant told them that he was trying to contact Dr. Alfano or Nurse Kremnick to "double-check" and discuss the work schedule change. I credit Complainant's testimony about the discussion during the meeting with Messrs. Comeau, Hancock, Sohaskey, Mackun and McLaughlin regarding his diabetes.

47. At the conclusion of the meeting, Mr. Comeau told Complainant that he was unsafe to work. Mr. Comeau also told Complainant that he was suspended from work without pay until a company doctor certified that he was safe to return to work. (Stipulation No. 32). Mr. Comeau told Complainant that he would not be paid for the time that he was

not working pending the results of his examination. Complainant disagreed with Mr. Comeau's assessment and became agitated. Complainant told Mr. Comeau that he intended to call the U.S. Equal Employment Opportunity Commission (hereafter: the "EEOC") regarding his suspension and fitness for duty examination.

48. Complainant went immediately into Mr. Sohaskey's office and called the EEOC. (Stipulation No. 33). While Complainant was on the telephone, Mr. Comeau told him that he scheduled his appointment for a medical examination on December 27, 1994, the first available appointment. Complainant hung up. (Stipulation Nos. 34-36).

49. Complainant testified that Mr. Comeau told him he was "creating a dog and pony show" about the changes in his work schedule. Mr. Comeau denied making this statement but told Complainant that he could not return to work until the company doctor examined him. I credit Complainant's testimony.

50. On December 22, 1994, Complainant left work at approximately 11:00 a.m. (Respondent's Exhibit 55).

51. Respondent paid Complainant for 3.14 hours of work at his regular hourly rate for the work he performed on December 22, 1994. (Stipulation No. 65).

52. On December 23, 1994, James A. Lavin, Esq., Complainant's attorney, wrote Mr. Comeau and requested Complainant's immediate reinstatement. (Stipulation No. 37). Mr. Lavin also requested full back pay and Complainant's return to his 7:00 a.m. to 3:30 p.m. shift until Com-

plainant had an opportunity to consult with Dr. Alfano regarding adjustments in his treatment regimen. (Respondent's Exhibit No. 8).

53. Complainant did not work on Saturday, December 24, 1994, because it was his regular day off. Complainant also did not work on Sunday, December 25, 1994, because the plant was shut down for Christmas. Respondent paid Complainant for 8 hours of straight time holiday pay for December 25, 1994. (Stipulation No. 66).

54. On December 27, 1994, Dr. John Burrese, Corporate Medical Services, examined Complainant for Respondent. (Stipulation No. 39). During his examination, Complainant refused to submit to a drug test or provide a urine sample and objected to all testing or assessment except that related to his diabetes. (Respondent's Exhibits No. 9 and 10). During a telephone conversation with Dr. Burrese, Mr. Comeau instructed him to limit his examination to an assessment of Complainant's diabetes. Dr. Burrese told Complainant that he would not give him a return-to-work note until he talked with Dr. Alfano.

55. On December 27 and 28, 1994, Complainant signed limited medical authorizations that enabled Dr. Alfano to discuss his diagnosis and treatment of Complainant's diabetes as it related to an accommodation of Complainant's employment as a shipper. (Respondent's Exhibit Nos. 9, 13 and 58).

56. Respondent paid Complainant for 5.75 hours of work at his regular hourly rate for the time he spent at Dr. Burrese's office on December 27, 1994. (Stipulation No.

66).<sup>6</sup>

57. Complainant did not work on and was not paid for December 23, 26, 28 and 29, 1994. (Stipulation No. 67).

58. On December 29, 1994, Dr. Burress determined that Complainant's diabetes did not prevent him from performing his shipper duties safely and efficiently. Dr. Burress also determined that Complainant was able to return to work as a shipper, with certain restrictions. (Stipulation No. 40). Dr. Burress made his determination after conferring with Dr. Alfano who wrote that Complainant was a "well-controlled insulin dependent diabetic who has been taught to closely monitor his blood sugars for best long-term results. He has been following a strict regimen of insulin injections (16-18 units NPH at 8:00 a.m. and 10 units NPH 4:00 p.m.) as well as structured mealtimes." Dr. Alfano also described certain changes he recommended to Complainant to avoid his blood sugar dropping too low, including a decrease in his morning insulin and an additional snack prior to increased work activity. (Respondent's Exhibit No. 14).

59. Dr. Burress' restrictions included a reevaluation of Complainant's fitness for duty if his job description changed such as a return to a utility man position; Complainant's immediate cessation of his shipper duties at the "first hint of [hypoglycemic] symptoms;" monitoring; diabetic teaching of supervisors and nearby co-workers regarding the symptoms and treatment of hypoglycemia; an adjustment period and discouragement of end of the day overtime. Dr. Burress also recommended that Respondent

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<sup>6</sup>The hearing record includes two exhibits that the parties inadvertently marked as joint exhibit 6.

grant Complainant allowances in his work schedule during a one-week adjustment period for him to take additional snacks and check his blood sugar. He also recommended that Respondent attempt to accommodate Complainant's early morning over-time on a trial basis and reassess it. Dr. Burress requested submission of medical documentation every six months to determine if significant changes occurred in Complainant's condition. (Respondent's Exhibit Nos. 12 and 15).

60. Complainant testified credibly that his suspension from work on December 22, 1994 and his fitness-for-duty examination was "devastating" to him and disrupted his "whole lifestyle." Complainant also testified credibly that the fitness-for-duty examination and suspension greatly affected him because he worried about whether he would lose his job even though he had not done anything wrong. Complainant felt that the entire situation put his life into complete turmoil because of the uncertainty it created about his job. Complainant also felt that there was a lot of tension between him and Mr. Hancock when they had family activities during the holiday season. Complainant also felt that Respondent's actions prevented him from having a "normal, happy Christmas" with his spouse and their young daughter.

#### Additional Allegations of Retaliation

61. Complainant returned to his duties at Respondent on December 30, 1994. Upon his return, Complainant met with Messrs. Comeau, Hancock, Sohaskey and Mackun. They reviewed and discussed Dr. Burress's work status report, bullet-by-bullet. (Respondent's Exhibit No. 15).

62. During the meeting on December 30, 1994, Complainant learned that Respondent did not schedule him to work on Sunday, January 1, 1995, because it was a contractual holiday. (Stipulation No. 42). Complainant worked on Saturday, December 31, 1994, preloading shipments for Monday morning deliveries. Complainant testified that Respondent generally gave him an opportunity to work on a Saturday if the following Sunday was unavailable for work.

63. Under its contract, Respondent treated December 31 as a holiday and paid Complainant for eight hours straight holiday and double time pay. Complainant received the same pay for working on December 31, 1994 as he would have received for working on January 1, 1995.

64. Complainant felt that this change was intended to inconvenience him and interfere with his family plans for the weekend because company trucks that were loaded on Saturday or Sunday were for all pre-loaded trailers that were picked up on Monday mornings. He felt that this change was directed at him because of his diabetes and telephone call to the EEOC.

65. During the meeting, Mr. Comeau also told Complainant for the first time that Respondent planned to remodel the shipping office because of its poor condition. and replace two picture windows with larger windows. Mr. Comeau testified that there were two reasons for installing new windows: to brighten the shipping office and enable a supervisor to "see what was going on in the employee's work area." When Complainant commented that he would be in a "fishbowl," he testified that Messrs Comeau, Hancock and Sohaskey laughed.

I credit Complainant's testimony.

66. The remodeling of the shipping office was part of a process that Respondent began in late 1992 and early 1993 to remodel several offices in the plant. The remodeling occurred in the following order: supervisors' office, break room, test laboratory, beater engineer's office and the shipping office. Respondent installed new windows in all remodeled offices.

67. Complainant testified that Mr. Comeau denied his request to install curtains inside the new windows to prevent other employees seeing into the office when he was injecting insulin into his legs and thighs. Mr. Comeau did not recall Complainant's request to install curtains.

68. Mr. Comeau testified that an employee couldn't see directly into the shipping office, as remodeled, because the windows are three or four feet above the floor level. He also testified that Complainant taped posters onto the windows that prevented employees from looking directly into the shipping office. I credit Mr. Comeau's testimony.

69. After the December 29, 1994 meeting, Complainant talked to his co-workers and gave them informational literature to educate them about diabetes. Complainant also gave literature to Messrs. Comeau, Hancock and Sohaskey and discussed his diabetes with them. During one of these discussions in Mr. Sohaskey's office, Mr. Hancock told Complainant that "if anything had ever happened, that he would know somebody that would like to, wouldn't mind giving [Complainant] a shot." Mr. Comeau then told Complainant that he "would not mind stabbing" or giving him an insulin shot.

70. Mr. Comeau testified that he and Mr. Hancock made these comments in a joking or kidding manner and that Complainant laughed at their "play on words." Complainant felt that these comments were sarcastic and insensitive. He denied that Messrs. Hancock and Comeau made them in joking manner. I credit Complainant' testimony.

71. Sometime in early 1995, Respondent's nurse held an educational session on diabetes (at an unspecified date). Messrs. Hancock, Sohaskey and Mackun attended this session but not Mr. Comeau.

72. In early 1995, Respondent shipped virtually all products between 7:00 a.m. and 6:00 p.m. (Stipulation No. 43). In January 1995, Respondent shipped 3,685 tons which was the highest monthly total shipped from March 1994 through October 1995. (Respondent's Exhibit No. 69). I credit Mr. Comeau's testimony that shipping volume depended on customer orders and delivery dates and that customers often delayed deliveries at the end of the calendar year into January.

73. Between December 1994 and November 1995, Complainant testified that his workload increased because he was the sole shipper at Respondent. During this period, Complainant testified that he had less time to take care of his daily needs, including checking his sugar levels. Complainant also testified that Messrs. Hancock and Sohaskey directed him more than 20 times to return to the shipping department and/or load trucks. Complainant testified that some of these orders occurred while he was checking his blood sugar level or getting his "stuff."

Complainant testified that these instances began in March 1994 and continued after he filed his discrimination complaint in June 1995. I credit Complainant's testimony.

74. Mr. Comeau denied telling Complainant that he could not take a break for a diabetes related task or activity. Mr. Comeau recalled one instance in which he asked Mr. Sohaskey to tell Complainant to return to work after he saw Complainant remain in the break room beyond the normal break period. Mr. Comeau did not recall when this incident occurred. Mr. Comeau testified that he told other plant supervisors to check on employees who may have exceeded their break time at least several times a month during 1995.

75. Mr. Sohaskey testified that Messrs. Comeau and Hancock told him, on a few occasions, to direct Complainant to "go back to work from a break." Mr. Sohaskey testified that he learned some of these orders were made after Complainant took a break because of his diabetes.

76. Mr. Hancock testified that there were instances before March 1994 during which he directed Complainant to return to the shipping department because his break was too long. Mr. Hancock testified that he was not aware of any restrictions on Complainant's ability to take breaks in 1994 and 1995 related to his diabetes. Mr. Hancock also denied that Complainant ever told him that he was not receiving sufficient time to take breaks.

77. On or about February 9, 1995, Complainant was loading a truck when he determined that it was unsafe because there was snow and ice throughout the entire trailer. Com-

plainant raised his safety concerns with Mr. Sohaskey who directed him to apply "Speedy Dry," an absorbent. Despite the application of Speedy Dry, Complainant continued to believe the loading conditions were unsafe. In Mr. Comeau's presence, Complainant again expressed his safety concerns to Mr. Sohaskey who told him to "load the f---ing truck anyways."

78. While loading the truck, Complainant's forklift slipped and the two forks went through the back of the trailer. As a result of this accident, Complainant sustained pulled muscles in his shoulder and back. Despite his injuries, Complainant worked on February 10, 1995 (10 hours) and took his regularly scheduled day off on February 11, 1995 (Saturday). During the following week, Complainant only worked only on February 12 (Sunday) and 15 (Wednesday), 1995. Complainant did not work for two or three weeks thereafter and received workers' compensation benefits. (Stipulation No. 44).

79. Complainant believed that Respondent's policy required him to perform a supervisor's direct order and grieve it at a later time. Complainant also believed that this policy applied even if the employee had a safety concern about the supervisor's order. Complainant also believed that his refusal to comply with Mr. Sohaskey's order to load the truck would constitute insubordination.

80. Mr. Comeau testified that Respondent has consistently told the Union that it is the employees' obligation to perform a task that is ordered by a supervisor and then grieve it. Mr. Comeau also testified that the employees could refuse to perform the task if they believed it was a

safety issue and that the supervisor must raise the issue with him or Mr. Hancock. Mr. Sohaskey did not bring the Complainant's safety concerns on February 9, 1995 directly to Messrs. Comeau or Hancock.

81. Complainant returned to work on February 28, 1995 with certain restrictions. (Respondent's Exhibit 18). Complainant's physician instructed him to go to physical therapy once or twice a week. Complainant's physician also told him to get off the forklift and regularly complete stretching exercises. Complainant testified that Mr. Sohaskey received a copy of Complainant's exercises but would not let Complainant complete his exercises while there were trucks to load.

82. On March 6, 1995, Dr. Burress certified Complainant for regular duty. He noted that Complainant reported that he had 2 or 3 episodes of low sugar while operating a forklift. Complainant reported that he adjusted his insulin dosage and sometimes ate before loading an extra truck. Dr. Burress concluded that "overall, it appears that [Complainant's] accommodations for diabetes have been acceptable." (Respondent's Exhibits No. 19 and 20).

83. In or about May 1995, Respondent transferred a second-shift employee into the shipping department to work as a shipper because of the workload. The employee worked in the shipping department from 3:00 p.m. to 7:00 p.m. He then worked in the skid shop building skids or pallets from 7:00 p.m. to 11:00 p.m.

84. On May 23, 1995, Nurse Kremnick wrote Mr. Comeau and informed him that Complainant "should have no problem

performing work in the boiler room on a ladder" if he is able to take regular breaks for meals and snacks. Nurse Kremnick also requested that Mr. Comeau give Complainant one or two days notice if his "job times change in a significant way" so that Complainant could discuss any required medication adjustments with her. (Respondent's Exhibit 21).

85. On July 24, 1995, James L. Rosenzweig, M.D., advised Complainant that he had Type II diabetes. Dr. Rosenzweig also reported that Complainant's blood sugar level in the preceding six to eight weeks was in an acceptable range and his urinalysis was normal. (Respondent's Exhibit No. 23).

86. On September 7, 1995, Health Resources evaluated Complainant's diabetes as "excellent."

87. On October 19, 1995, the parties, including Complainant and Mr. Comeau, appeared before the Commission for an investigative conference. (Stipulation No. 48).

88. On October 31, 1995, Steven G. Miller, M.D., Medical Director for Corporate Medical Services, Inc., wrote to Seamus Tuohey, Respondent's attorney. In his letter, Dr. Miller confirmed his telephone advice that Complainant would be medically unfit to perform safety-sensitive work such as driving a forklift if he was "drinking heavily (or even modestly, say, more than 1-2 drinks a day)." Dr. Miller wrote that alcohol "poses a threat to diabetics who are taking insulin [like Complainant] because it can precipitate dangerously low blood sugar levels, putting him at a significant risk for insulin-induced seizures, coma and even death." Dr. Miller also wrote that an insulin

reaction could occur suddenly, even after the blood alcohol has returned to a normal level. (Respondent's Exhibit No. 59).

89. During preparation for the arbitration hearing on November 7, 1995, Mr. Hancock told Mr. Comeau that he and Complainant regularly drank beer together (six or more cans each) three to four evenings a week between April 1995 and September 1995. (Respondent's Exhibit No. 60).

90. Mr. Hancock testified that Complainant did not drink for a number of months after he was diagnosed with diabetes. Mr. Hancock also testified that he quit drinking from October 1994 until Spring 1995 and that he did not drink with Complainant during this period. Mr. Hancock also testified that Complainant began to drink again slowly so he could monitor his diabetes and manage his insulin. I do not credit Mr. Hancock's testimony regarding the level of Complainant's drinking after his diabetes diagnosis.

91. On November 2, 1995, John Muller, HR, called Mr. Comeau and told him that Dr. Miller recommended that he arrange for Complainant's examination to determine if he was safe to work and that he should immediately relieve Complainant from duty as soon as possible. Mr. Comeau did not talk to Dr. Miller or anyone else from Corporate Medical Services before meeting with Complainant.

92. On November 2, 1995, Mr. Comeau met with Complainant and told him that he was suspended from work without pay until he underwent a fitness for duty examination. (Respondent's Exhibit No. 61). Mr. Comeau told Complainant that he was requiring the examination because he had received infor-

mation that Complainant was using and abusing alcohol. Mr. Comeau did not tell Complainant who provided this information. He also told Complainant that Corporate Medical Services advised him that it was not good for a diabetic person to drink and work. (Stipulation No. 49).

93. To satisfy Mr. Comeau's safety concerns, Complainant offered to show him the glucometer results of his last 100 sugar level tests covering a one-month period. Complainant also offered to see his personal physician. Mr. Comeau declined to review the glucometer results because he felt that he could not interpret the data. Mr. Comeau told Complainant that he could not return to work until Corporate Medical Services examined him.

94. Later on November 2, 1995, Complainant had a second meeting with Mr. Comeau and Jeff Whalen, a Union representative. During the meeting, Mr. Comeau reviewed the same matters he discussed earlier with Complainant. Mr. Comeau did not ask Complainant about his alcohol consumption habits or tell him who reported the information about his alleged alcohol use.

95. On November 2, 1995, Attorney Lavin requested Complainant's immediate reinstatement with full pay and retraction of the requirement of a fitness-for-duty examination. (Respondent' Exhibit No. 62). Attorney Tuohey responded by letter, dated November 3, 1995. (Respondent' Exhibit No. 62).

96. Dr. William E. Daley, Dr. Alfano's associate, examined Complainant on November 2, 1995. Dr. Daley determined that

he was fit to return to his "usual job." (Respondent's Exhibit 64).

97. On November 8, 1995, Dr. John Clarke, Corporate Medical Services gave Complainant a complete physical examination. (Stipulation No. 50). During the examination, Complainant was required to strip naked, after which Dr. Clarke examined Complainant's genitals. As part of his examination, Dr. Clarke also talked with Dr. Alfano who told him that Complainant was managing his diabetes in a responsible manner and was well educated about diabetes. (Respondent's Exhibits No. 65 and 66).

98. On November 8, 1995, Dr. Clarke determined that Complainant was medically fit to return to his work as a shipper. (Stipulation No. 51 and Respondent's Exhibits No. 65 and 66).

99. Complainant denied that he regularly drank beer after work with Mr. Hancock between January 1995 and November 1995. Complainant told Dr. Clarke that he drank beer on an "occasional basis, not daily and that he drank six beers over the prior month, "one or a couple at a time." (Respondent's Exhibit 65). I credit Complainant's testimony regarding his drinking habits.

100. Complainant returned to work on November 9, 1995. (Stipulation No. 52).

101. Complainant testified that his second suspension from work and fitness-for-duty examination had a greater effect on him than his first one. Complainant believed the fitness-for-duty examination was frivolous and he was upset

about having to undergo a physical examination. Complainant was concerned that Respondent was "trying to push [him] out of a job" again during another holiday—Thanksgiving. Complainant felt demeaned by the manner and extent of Dr. Clarke's examination that he believed was unrelated to an evaluation of his diabetes. Complainant testified that he had difficulty sleeping and felt that his entire family life was in "turmoil" and "chaos," especially because Mr. Hancock's claims about his drinking.

102. Complainant testified that Mr. Comeau has allowed at least two other employees to work at the plant while they were "unsafe:" Charles Backstran and Frank Byam. Complainant testified that Mr. Comeau permitted Mr. Backstran, a licensed boiler operator in the power plant, to work despite his back and prostate problems and use of pain medication.

103. Mr. Hancock denied that Mr. Backstran was "unsafe to perform his job." Mr. Comeau testified that Mr. Byam experienced a racing heart at the end of his shift and went to the hospital. When Mr. Byam returned to work with a doctor's note that limited his hours (including overtime) to 10 hours per day, Mr. Comeau scheduled an examination with Corporate Medical Services. Mr. Comeau denied that Mr. Byam was "unsafe" or that he sent Mr. Byam home prior to scheduling him for his examination.

#### Grievances and Arbitration Decision

104. On or about December 22, 1994, Complainant filed a grievance under the collective bargaining agreement regarding his suspension from work on December 22, 1994 and his

fitness-for duty examination. (Stipulation No. 38 and Respondent's Exhibit 17).

105. On August 31, 1995, the arbitration hearing began on Complainant's grievance for the December 22, 1994 suspension and fitness-for-duty examination. No testimony was taken and the arbitrator continued the hearing until November 7, 1995. (Stipulations No. 46 and 47).

106. On November 14, 1995, Complainant filed a union grievance regarding his relief from duty on November 2, 1995 and his fitness for duty evaluation. This grievance was made a part of the ongoing arbitration proceeding arising from his December 1994 relief from duty. (Stipulation No. 53).

107. On January 9, 1997, the arbitrator ruled that Respondent did not violate the collective bargaining agreement when it relieved Complainant from duty on December 22, 1994 and ordered him to undergo a fitness for duty examination.<sup>7</sup> (Stipulation Nos. 54 and 57).

108. The arbitrator also ruled that Respondent violated the collective bargaining agreement when it relieved Complainant from duty and ordered him to undergo a fitness for duty medical examination in November 1995. He ordered Respondent to pay Complainant for the missed work in November 1995. (Stipulation Nos. 55 and 56).

109. In response to the arbitrator's award, Respondent paid

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<sup>7</sup>Neither party offered the arbitrator's decision as part of the hearing record.

Complainant the sum of \$470.71<sup>8</sup> to cover 41.73 hours for the work he missed from November 2, 1995 to November 8, 1995. (Respondent's Exhibit No. 68). The Union did not contest the amount of this payment. (Stipulation No. 63).

### III. CONCLUSIONS OF LAW

#### A. Denial of Reasonable Accommodation

Complainant alleges that Respondent unlawfully denied his request for a reasonable accommodation made in December 1994.<sup>9</sup> Massachusetts General Laws, Chapter 151B, §4(16), provides that it is an unlawful practice for an employer to refuse to hire, rehire, advance in employment or otherwise discriminate against, because of a handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position at issue with a reasonable accommodation. Russell v. Cooley Dickinson Hospital, 437 Mass. 443 (2002); Woodason v. Town of Norton School Committee, et. al., 24 MDLR 21 (2002). It is the employer's burden to establish that the accommodation sought is unreasonable because it would impose an undue hardship on its business operations. See e.g., Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63 (2000)(the employer's duty to provide a reasonable accommodation requires it to

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<sup>8</sup> As of November 2, 1995, Complainant's pay rate was \$11.28 @ hour. (Stipulation No. 68).

<sup>9</sup>Complainant also contends that Respondent unlawfully denied his request in November 1994 for a change in his work schedule to accommodate his diabetes; specifically to facilitate an adjustment in his blood sugar level based on his new training duties. I have not addressed Complainant's allegation in this decision because it was not set forth as a disputed issue in his complaint, Commissioner Gomez's certification order or the parties' joint pre-hearing memorandum, dated October 17, 2001. However, I will consider the information regarding Complainant's November 1994 request for accommodation as part of his retaliation claim and as background information for Respondent's alleged denial of a reasonable accommodation on December 22, 1994 and unlawful retaliation.

demonstrate its willingness to make changes in the manner in which it operates, unless such changes would impose an undue hardship on its business operations); Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995).

A reasonable accommodation is defined as a "modification or adjustment to the work environment enabling a qualified handicapped person to perform the essential functions of [the] position, or enabling handicapped employees to enjoy the same privileges and benefits of employment as are enjoyed by non-handicapped employees." See Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap-Chapter 151B (hereafter: MCAD Guidelines), Definitions, dated March 31, 1998,<sup>10</sup> and Section VIIC, Provision of Reasonable Accommodation.

To establish a prima facie claim of discrimination based on Respondent's failure to grant or provide a reasonable accommodation in December 1994, Complainant must prove that: (1) he was a qualified handicapped individual within the meaning of G.L. c. 151B, i.e., he was able to perform the essential functions of his shipping position with a reasonable accommodation; (2) he required a reasonable accommodation because of his handicap to perform the essential functions of his shipping position; (3) Respondent knew of his handicap and that he needed a reasonable accommodation to perform the essential functions of his position; (4) Respondent knew of a means to reasonably accommodate his handicap, or it breached a duty, if any, to undertake reasonable investigation of a means to reasonably accommo-

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<sup>10</sup> In Dahill v. Police Department of Boston, 434 Mass. 233 (2001), the Supreme Judicial Court held that the Commission's Handicap Guidelines are entitled to substantial deference because they represent the Commission's interpretation of Chapter 151B, even though they do not carry the force of law.

date his handicap; (5) Respondent failed to provide him with a reasonable accommodation. Mazeikus v. Northwest Airlines, Inc., supra.; D'Ambrosio v. Massachusetts Bay Transportation Authority, 23 MDLR 81 (2001). See also MCAD Guidelines, Section VII, Proving Handicap Discrimination.

To prove his prima facie case, Complainant must first establish that he is a "handicapped person" within the meaning of G.L. c. 151B, §1(19). A "handicapped person" is defined as any person who "(a) has a physical or mental impairment which substantially limits one or more major life activities. . . (b) [has] a record of such impairment; (c) or [is] regarded as having such impairment." See G.L. c. 151B, §1(17). An impairment includes a physiological disorder affecting one or more body systems. See MCAD Guidelines, Section II, Definitions. Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others. See G.L. c. 151B, §1(20). A handicap is "substantially limiting" if it "prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity." MCAD Guidelines, Section II, Definitions. A handicap is also "substantially limiting" if it renders an individual "significantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity." See 29 C.F.R. §1630.2j.

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The Commission has consistently recognized that an individual who has diabetes<sup>11</sup> is an "individual with a handicap" as defined in G.L. c. 151B, §§1(16) and (17). See e.g., D'Ambrosio v. Massachusetts Bay Transportation Authority, supra. (left untreated, diabetes can result in uncontrolled weight loss, diabetic coma, circulation problems and blindness); Ferry v. Fall River Police Department, 17 MDLR 1447 (1995)(unless treated through daily insulin injections, a regular schedule of snacks and breaks and a controlled diet, the complainant will lapse into a diabetic coma and ultimately die); Garrity v. Town of Somerset, 17 MDLR 1173 (1994)(the complainant's diabetes meets the statutory definition of handicap in two respects: he has a past medical record of diabetes and he is regarded by his employer as having an impairment).

I find that Complainant's diabetes, if left untreated, may result in neuropathy or a loss of sensation in his nerves and extremities, hypoglycemia (low blood sugar level), a diabetic coma, blindness and heart disease.<sup>12</sup> I also find that Complainant's diabetes affects one or more of his body systems, including his nervous and cardiovascular systems, and substantially limits one or more of his major life activities, e.g., seeing, eating, caring for himself and the performance of manual tasks. See e.g., Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7<sup>th</sup> Cir. 2001)(the

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<sup>11</sup> Diabetes is a physiological disorder that involves an individual's inability to metabolize sugar caused by an inadequate production or utilization of insulin. It is the product of the failure of the beta cells of the pancreas to produce sufficient insulin for normal carbohydrate, protein and fat metabolism, or the failure of the body in general to use effectively the insulin produced. Without insulin, sugar remains in the bloodstream, causing severe and potentially, fatal consequences. See Nawrot v. CPC International d/b/a Bestfoods, Inc., 277 F.3d 896 (7<sup>th</sup> Cir. 2002).

<sup>12</sup> As in Complainant's case, a primary problem with controlling blood sugar levels is the increased chance of hypoglycemia (low blood sugar) that can cause organs such as the brain to malfunction or fail. Surprenant v. Potter, Postmaster General, U.S. Postal Service, No. 01996186 (July 27, 2001).

severity of the plaintiff's dietary restrictions and the dangerous consequences that could result from his failure to maintain them are sufficient to find a "substantial limitation" on his ability to "eat;" Nawrot v. CPC International d/b/a Bestfoods, Inc., 277 F.3d 896 (7<sup>th</sup> Cir. 1138)(the plaintiff sufficiently demonstrated that his diabetes substantially limited his ability to think and care for himself). I conclude, therefore, that Complainant is a "handicapped individual" because he is an insulin-dependent diabetic who must adhere to his daily regimen of monitoring his blood sugar levels through glucometer readings, insulin injections and diet. If Complainant fails to adhere to his daily regimen, he could experience debilitating and potentially life-threatening symptoms with severe medical consequences. See Dahill v. Police Department of Boston, 434 Mass. 233, 240, n.10 (2001)("employees with diabetes . . . may be able to control their impairments, but to do so they may require an adjusted work schedule to take occasional time off from work to attend doctor's appointments, take medication, or receive therapy or testing")<sup>13</sup>.

I also conclude that Complainant is a "qualified handicapped individual" within the meaning of G.L. c. 151B, §§1(16), (17) and (19). A "qualified handicapped person" is a "handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a parti-

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<sup>13</sup>I have determined that Complainant is a "handicapped individual" based on his diabetes in its uncorrected or unmitigated condition. As required under G.L. c. 151B and the Commission's policy, I made my determination without considering whether Complainant successfully mitigated or corrected his diabetes in 1994-1995 through his medication and/or treatment regimen.<sup>13</sup> See Dahill, supra. (a police officer with a severe hearing impairment was a "handicapped individual" within the meaning of G.L. c. 151B even though a hearing aid corrected his hearing to normal limits); D'Ambrosio v. Massachusetts Bay Transportation Authority, supra.; MCAD Guidelines, Section II, Definitions.

cular job with reasonable accommodation to his handicap.”<sup>14</sup> G.L. c. 151B, §1(16). The undisputed evidence in the record establishes that Complainant successfully performed the essential functions of his shipping position during the relevant time period in 1994 and 1995 with an accommodation, i.e., additional time for his insulin injections and extended breaks for snacks and food, as needed. In addition, Respondent failed to produce any objective evidence that Complainant was unable to perform his training or shipping duties after March 1994, with or without a reasonable accommodation.

I find that Complainant has met the next element of his prima facie case of discrimination by showing that he requested, on December 22, 1994, that Respondent forbear on the change in his work schedule.<sup>15</sup> Based on Complainant’s credible testimony, I conclude that he requested a delay in the proposed change to his work schedule so that he could consult with Dr. Alfano or Nurse Kremnick regarding its potential impact on his diabetes and daily treatment regimen. In making his request for an accommodation, Complainant is not required to use legal terms or explicitly use the phrase “reasonable accommodation.” See e.g., Schmidt v. Safeway, Inc., 664 F.Supp. 991, 1997 (D.Ore. 1994). I conclude that Complainant’s oral request was sufficient,

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<sup>14</sup> Commission guidelines define the “essential functions” of a position as those that are fundamental and not incidental or tangential to the position in question. Functions that are identified as part of the job but which are in fact rarely or never performed will likely not be considered essential. In assessing whether a function is essential, the Commission may consider whether removal of the function in question would fundamentally change the nature of the job in question. It may also consider the amount of time an employee spends performing the function and the work experience of past incumbents in similar jobs. Woodason v. Town of Norton School Committee, *supra.*; MCAD Guidelines, *supra.*, Section II, Definitions.

<sup>15</sup>I also conclude that Attorney Lavin’s letter was sufficient to provide notice to Respondent of Complainant’s request for an accommodation. (Respondent’s Exhibit No. 8).

under the circumstances, to place Respondent on notice that he needed an adjustment or change at work for a reason related to his diabetes.

Even if I were to conclude that Complainant failed to explicitly request an accommodation on December 22, 1994, I find that Respondent had an obligation to explore his need for an accommodation based on his statements during both meetings on December 22, 1994. There is abundant testimony in the record that Messrs. Comeau, Hancock and Sohaskey knew about Complainant's diabetes, his adherence to a strict daily treatment regimen and his request in October 1994 for an additional day off to regain control over his blood sugar and adjust for his training duties. In this context, Complainant's statements to his supervisors regarding his concerns about the potential impact of a schedule change on his diabetes and treatment regimen should have reasonably triggered Respondent's further exploration of Complainant's needs and potential accommodations. See MCAD Guidelines, Notice and Duty ("Where an employee has not requested an accommodation, an employer's duty to offer reasonable accommodation may still be triggered if the employer knows or should know that the employee is handicapped and requires reasonable accommodation. An employer should know that an employee is handicapped and requires reasonable accommodation if a reasonable person in the employer's position would know that the employee was handicapped and required an accommodation.")

Once Respondent knew or had reason to know about Complainant's need for an accommodation, it had a corresponding obligation to engage in direct, open and on-going dialogue with him regarding the nature and scope of any accommodation

he sought and an assessment of its feasibility. See MCAD Guidelines, Provision of Reasonable Accommodation, Id.; D'Ambrosio v. Massachusetts Bay Transportation Authority, supra., citing Mazeikus, 22 MDLR at 68-69. See also 29 C.F.R. §1630 App. (2001) ("once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability"). The primary goal of the interactive discussion is to accommodate the needs of qualified handicapped individuals while satisfying the legitimate business interests of employers. D'Ambrosio v. Massachusetts Bay Transportation Authority, supra.

Despite Complainant's notice of his need for an adjustment regarding his work schedule, I find that Respondent did not have a meaningful and direct discussion with Complainant in December 1994 regarding his precise limitations and how he could be accommodated and still accomplish his shipping duties. I conclude that Respondent failed its statutory duty to engage in a dialogue with Complainant regarding potential adjustments in his work schedule<sup>16</sup> and failed to reasonably or adequately investigate whether it was possible for Complainant to perform the essential functions of his shipping position with a reasonable accommodation. Rather than engaging in the type of "interactive discussion" contemplated under Chapter 151B, Respondent improperly focused on what it believed was Complainant's threatened litigation.

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<sup>16</sup>Modifying work schedules may be a reasonable accommodation depending on the circumstances. See MCAD Guidelines, Definitions-Reasonable Accommodation.

Respondent contends that it was not required to provide a reasonable accommodation to Complainant in December 1994 because it reasonably believed that he represented a threat to his health or safety and that of other employees in its plant because of his diabetes. Under G.L. Chapter 151B, Respondent may make a post-hire handicap-related inquiry or require Complainant to submit to a medical examination if it is job related and consistent with business necessity.<sup>17</sup> Accordingly, Respondent may conduct a medical examination and/or inquiry about Complainant's ability to perform job-related functions or where there is reasonable, objective evidence of a job performance or safety problem. MCAD Guidelines at 19, 21; EEOC Enforcement Guidance on Disability-Related Injuries and Medical Examinations of Employees Under the ADA, dated July 27, 2000.

Respondent can require a post-hire medical examination if Complainant posed a "direct threat" to his safety or that of other employees. MCAD Guidelines, supra. Under this standard, Respondent must prove that there was a "reasonable probability of substantial harm" based on the nature of Complainant's diabetes in December 1994. See Nagle v. City of Boston Fire Department, 18 MDLR 221 (1994); Ryan v. Town of Lunenburg, 11 MDLR 1215, 1242 (1989), citing Manolette v. Bolger, 767 F.2d 1416, 1422 (9<sup>th</sup> Cir. 1985). Respondent must show, therefore, that it had a reasonable belief, based on objective evidence, that (1) Complainant's ability to perform his essential job functions in December 1994 was impaired by his diabetes; or (2) he posed a direct threat

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<sup>17</sup> There is no language in G.L. c. 151B that distinguishes between post-offer and post-hire medical examinations and inquiries. MCAD Guidelines at 22, 23. See also 29 C.F.R. §1630.14(c).

due to his diabetes. EEOC Enforcement Guidance (July 2000) at 6-9. Objective evidence is "reliable information, either directly observed or provided by a reliable third party, that an employee may have or has a medical condition that will interfere with his or her ability to perform essential job functions or will result in direct threat."<sup>18</sup> Id. at 7.

Respondent asserts that it reasonably believed, based on Complainant's statements, that there was "a threat to health and safety due to the risk of [Complainant] experiencing hypoglycemia and becoming unconscious, perhaps while operating a forklift or other heavy machinery." (Respondent's Brief, page 22). I find that Respondent's reliance on Complainant's statements is disingenuous and insufficient to justify its requirement that Complainant submit to a fitness-for-duty examination.

First, Complainant's description of the potential consequences of "going low sugar" or "hypoglycemia" was in response to Mr. Comeau's inquiry about a hypothetical situation. During both meetings on December 22, 1994, Complainant never indicated that he was experiencing "low blood sugar" or had other physical problems and he did not

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<sup>18</sup>Under EEOC Enforcement Guidance (2000), "direct threat," means a "significant risk of substantial harm that can not be eliminated or reduced by reasonable accommodation." See 29 C.F.R. §1630.2(r). Further, direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable judgment relying on the most current medical knowledge and/or best available objective evidence. Id.

request any relief from or adjustment in his work duties. In addition, the responses Complainant gave to Mr. Comeau were consistent with the general educational information about diabetes that he had already provided to Messrs. Comeau, Hancock and Sohaskey after he returned to work in March 1994.

Second, Respondent cannot require Complainant to submit to a medical examination based solely on its subjective evaluation or mere speculation about a future risk of injury or harm because of Complainant's diabetes. In this case, Respondent failed to conduct an individualized assessment of whether Complainant's handicap posed a "direct threat" of substantial harm based on his work and medical history. Martinez v. Resource Recovery System, 16 MDLR 1589 (1994); Nagle v. City of Boston Fire Department, supra. There is no evidence in the record that Respondent observed any work performance problems or conduct that it could be reasonably attributed to Complainant's diabetes. See MCAD Guidelines, Id. at 38; Garrity v. Town of Somerset, 17 MDLR 1173 (1994) (there was no evidence in the applicant's medical history and employment record to establish that his diabetes affected his ability to function as a paramedic or fire-fighter, or that he posed a safety risk to himself or others when he performed the job functions of a paramedic or fire-fighter). To the contrary, there is no dispute that Complainant satisfactorily performed his duties as a shipper at all times after his initial diagnosis of diabetes as shown by Respondent's return of Complainant to his shipping duties on December 20, 1994. Respondent also failed to identify any essential job functions that were impaired by Complainant's diabetes nor did it identify any direct threat posed by Complainant's condition as of December 22, 1994.

Respondent's perception of Complainant's alleged risk is clearly not supported by the facts in the record regarding Complainant's medical and work history. The evidence shows that Mr. Hancock was not concerned about Complainant's potential hypoglycemia on December 22, 1994 because he directed Complainant to return to work after their initial meeting. In addition, Messrs. Comeau and Hancock already knew that Complainant occasionally experienced hypoglycemia as one of the potential complications of his diabetes and that he consistently took ameliorative actions such as more breaks, snacks or insulin. In fact, Messrs. Hancock and Comeau observed Complainant "go low blood sugar" on at least three episodes prior to December 20, 1994. I reasonably infer that they had no legitimate concerns about Complainant's ability to safely perform his job duties since they took no action against Complainant nor did they require him to submit to a fitness-for-duty examination based on these episodes of hypoglycemia.

Respondent also failed to produce any objective evidence to show that Complainant's ability to successfully perform his job duties had changed or that the risk of harm arising from his potential hypoglycemia had increased compared to the risk that was present from March-December 1994. Aside from Complainant's general observations about hypoglycemia, Respondent did not have any medical documents nor did it establish an employment history that supported its perception on December 20, 1994 that Complainant posed a danger to himself or was a safety risk to others while performing the essential functions of his shipping position. Ferry v. Fall River Police Department, supra. Respondent's lack of objective information regarding Complainant's "risk

of harm" is even more egregious when I consider the fact that they knew Complainant had been disciplined and vigilant since March 1994 about monitoring his diabetes and properly maintaining his daily treatment regimen.

I also conclude that the following actions and statements are consistent with my finding that Respondent held a discriminatory animus against Complainant based on his diabetes and requests for accommodation: (1) Mr. Hancock's offer of a beer to Complainant during his hospitalization in March 1994 after the onset of his diabetes; (2) Mr. Makun's statement to Complainant during the initial meeting on December 22, 1994 that she should not worry if something happened to him because of his diabetes because his family would be taken care based on his company life insurance policy; (3) Mr. Comeau's statement to Complainant during the second meeting on December 22, 1994 that he was "trying to create a dog and pony show" about his request for a change in his work schedule; (4) their statements to Complainant after December 29, 1994 that they wouldn't mind "stabbing" or giving him his insulin shot. Instead of responding reasonably and appropriately to Complainant's needs, these statements and actions show that Respondent's managers and supervisors were motivated by unlawful prejudice, stereotypes and an unfounded fear about his diabetes.

Accordingly, I conclude that Complainant has proven his prima facie case of discrimination based on Respondent's denial of a reasonable accommodation. I conclude that Respondent failed to engage in an interactive discussion with Complainant about his need for an accommodation, failed to reasonably investigate an effective accommodation on

December 22, 1994 and did not provide a reasonable accommodation. I also conclude that Respondent's purported justification is without merit and that its requirement that Complainant submit to a fitness-for-duty examination on December 22, 1994 was a violation of Chapter 151B, §4(16).

B. Retaliation for Complainant's Participation in Prior Protected EEO Activity

Complainant alleges that Respondent retaliated against him when it took the following employment actions:

(1) suspended him and required him to undergo a fitness-for-duty examination in December 1994 and November 1995; (2) denied him an opportunity to work a shift on Sunday, January 1, 1995; (3) remodeled and enlarged windows in the shipping department; (4) increased his shipping workload in 1995; (5) repeatedly interrupted his breaks; (6) ordered him to unload an unsafe trailer in February 1995; (7) denied breaks to him to stretch after his forklift injury in February 1995.

Massachusetts General Laws, Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected EEO activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five."<sup>19</sup>

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<sup>19</sup> G.L. c. 151B, §4, paragraph 4(A) makes it unlawful "[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter."

Retaliation is a separate claim from discrimination and is "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful practice." Fountas v. Medford Public Schools, 22

MDLR 264 (2000), citing Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). To succeed on a retaliation claim, Complainant must prove that "he reasonably and in good faith believed that the employer was engaged in wrongful discrimination, that he acted reasonably in response to his belief and that the employer's desire to retaliate against him was a determinative factor in its decision . . ." Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000), quoting Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995).

In the absence of direct evidence of a retaliatory motive, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, supra at 116; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a prima facie case of discrimination based on retaliation, Complainant must establish by credible evidence that (1) he engaged or participated in protected EEO activity; (2) he suffered an adverse employment action after participating in protected EEO activity; (3) Respondent Natick Paperboard knew about Complainant's participation in protected EEO activity prior to taking the adverse employment actions at issue in this case; (4) a causal connection exists between Complainant's participation in protected EEO activity and the adverse employment actions taken by Respondent. Hudson v. Pembroke/ Hanover Elks Lodge, et al., 22 MDLR 45 (2000) citing Langford v. Massachusetts

Department of Employment and Training, 17 MDLR 1043, 1059 (1995); Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208 (2000). Since a link between the protected EEO activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer "a causal connection where the timing of events makes an inference reasonable." Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 144 (1995); Hochstad v. Worcester Foundation for Experimental Biology, 425 F.Supp. 318 (D. Mass. 1976).

If Complainant establishes a prima facie case of retaliation, the burden shifts to Respondent Natick Paperboard to articulate a legitimate, non-discriminatory reason for the alleged adverse employment actions. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, supra. at 116-118. If Respondent Natick Paperboard meets its burden of production, Complainant must then show by a preponderance of the evidence in the record that the proffered reason(s) was not the real reason for the alleged adverse employment action(s) and that Respondent acted with a retaliatory intent, motive or state of mind. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 775-776 (2001); Lipchitz v. Raytheon Company, 434 Mass. 493, 501-502 (2001); Blare v. Husky, 419 Mass. 437, 443 (1995).

I find that Complainant has satisfied the first element of his prima facie case by showing that he requested an accommodation, orally and in writing, in 1994. The Commission has held that an individual, like Complainant, who requests a reasonable accommodation is "alleging to be a qualified handicapped person" within the meaning of G.L. c. 151B, §4(16). In protecting an individual alleging to be a "qualified handicapped person," Chapter 151B necessarily

protects the individual's right to request a reasonable accommodation. See Fountas v. Medford Public Schools, supra. I conclude, therefore, that Complainant participated in protected EEO activity when he requested a reasonable accommodation in November and December 1994 regarding a change in his work schedule. I also conclude that Attorney Lavin's letter to Mr. Comeau, dated December 23, 1994, constituted protected EEO activity because it requested reasonable accommodation in the form of Complainant's immediate reinstatement and return to his former work schedule, i.e., 7:00 a.m. to 5:30 p.m. (Respondent's Exhibit No. 8).

I further conclude that Complainant's oral statement to Mr. Comeau on December 22, 1994 that he intended to contact the EEOC regarding his initial suspension and fitness-for-duty examination constituted protected EEO activity even though he did not file a formal discrimination charge at that time. The Commission broadly interprets the anti-retaliation provision in Chapter 151B to apply to a variety of pre-charge and non-charge conduct, including instances where a complainant has orally "opposed" an unlawful employment practice or action. See Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999) (liability for unlawful retaliation when an employee complained about unlawful discrimination but did not file a formal discrimination complaint); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (one who complains about protected activity under Chapter 151B is not required to file a formal complaint to merit Chapter 151B's protection. The "opposition clause" by definition, applies in the absence of a formally filed complaint). The statutory protection against employer retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination as in Complainant's case.

See Sumner v. United States Postal Service, 899 F.2d 203, 209 (2<sup>nd</sup> Cir. 1990). The Commission's approach is sufficiently broad to encompass Complainant's statement on December 22, 1994 regarding his intention to contact the EEOC. See Clark County School District v. Breed, 532 U.S. 286 (2001) (complainant need only have a reasonable belief that the conduct she opposes constitutes unlawful discrimination).

The Commission also liberally interprets G.L. c. 151B, §4(4) to apply in instances where an employee participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). "Participation" includes an employee filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. I conclude, therefore, that Complainant participated in protected EEO activity when he filed the instant discrimination complaint on June 1, 1995.

To satisfy the second element of his prima facie case, Complainant must prove that Respondent subjected him to an adverse employment action(s) after he participated in protected EEO activity. Complainant must prove that the employment actions Respondent took against him were "substantial enough to count as the kind of material disadvantage that is a predicate for a finding of retaliation." MacCormack v. Boston Edison, 423 Mass. 652, 657 (1996), citing Lewis v. Gillette Co., 22 F.3d 22 (1<sup>st</sup> Cir. 1994); Blackie v. Maine, 75 F.3d 716, 725 (1<sup>st</sup> Cir. 1996) (an adverse employment action requires that the employer "take something of consequence from the employee . . . by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities (citations omitted), or (2) withhold from the employee an accouterment of the employment

relationship." Complainant must offer evidence of such actions, including reductions in salary, grade or title and changes in objective employment terms and conditions, that "materially disadvantaged" or threatened to disadvantage him. Fountas v. Medford Public Schools, supra. Applying the MacCormack standard, I find that Respondent's suspension of Complainant and its requirement that he submit to a fitness-for-duty examination are adverse employment actions. I also find that Respondent's repeated inter-ruptions of Complainant's breaks and denial of breaks to stretch after Complainant's forklift injury in February 1995, as alleged, are sufficient to constitute "adverse employment actions" to the extent that they are part of a pattern of harassment. See MacCormack v. Boston Edison Co., supra.

Respondent's one-time offer to Complainant (that he accepted) to work on December 31, 1994, his normal day off, and not on January 1, 1995, does not constitute an adverse employment action. Since January 1, 1995 was a contractual holiday, Complainant did not suffer any financial loss as a result of working on December 31, 1994. Complainant also testified that it was Respondent's practice to offer him a Saturday shift when his Sunday shift was unavailable as in the case of a contractual holiday. While Complainant may have been unhappy or dissatisfied with Respondent's failure to allow him to work on January 1, 1995, his disappointment or disillusionment is not sufficient to support a finding that Respondent took an action that adversely affected his employment terms and conditions. See Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997); MacCormack v. Boston Edison Co., supra.

Similarly, Respondent's remodeling of the windows in the shipping department cannot be construed to constitute an adverse employment action. I credit Mr. Comeau's testimony that the remodeling was part of an on-going renovation plan that Respondent had initiated prior to March 1994 and was designed to improve the overall working conditions within its plant. I also find that Complainant's concerns about privacy were resolved when Respondent allowed him to cover the remodeled windows with posters.

The evidence in the record does not support Complainant's contention that Respondent increased or materially changed Complainant's shipping workload beginning in 1995. (Respondent's Exhibit 69). The shipping data shows that Complainant's shipping workload after January 1, 1995 was less than that prior to January 1995: the average monthly total from January through October 1995 was 3,148.7 tons while that for March through December 1994 was 3,262.5 tons. (Respondent's Exhibit 9). In addition, Respondent hired a second shipper in May 1995 to assist Complainant with shipping.

In December 1994, Respondent shipped 2,868.92 tons or 136 trucks (2,868.92 divided by 21 tons/truck). In January 1995, Respondent shipped 3,685.80 tons or 175.5 trucks (3,6885.5 divided by 21 tons/truck). While this data shows an increase of approximately 33% in January 1995, it is consistent with Mr. Comeau's credible testimony that Respondent Natick Paperboard's shipping workload fluctuated based on customers' orders and delivery dates especially at the end of the year.

Respondent admits that Mr. Sohaskey's instructions to Complainant that he load an icy trailer in February 1995 was a "one-time isolated mistake." Respondent also admits that, contrary to its plant policy, Mr. Sohaskey failed to bring Complainant's safety concerns to Messrs. Comeau or Hancock. (Respondent's Brief, pages 32-33). Despite such admissions, I do not find that Mr. Sohaskey's order constituted a material change in Complainant's employment terms and conditions but was a regrettable one-time error in judgment.

There is abundant testimony in the record that Messrs. Comeau, Hancock and Sohaskey knew about Complainant's oral and written requests for reasonable accommodation in October and December 1994 prior to the adverse employment actions at issue in this case. I also conclude that they knew about the instant discrimination complaint before Mr. Comeau suspended Complainant in December 1995 and required him to submit to a second fitness-for-duty examination.

The timing of Complainant's requests for reasonable accommodation in 1994 and his discrimination complaint in June 1995 shortly after his participation in protected EEO activity raises a reasonable inference that Respondent was motivated by a retaliatory intent; specifically that Respondent viewed Complainant as a troublemaker after he made his requests for reasonable accommodation and filed his EEO complaint. Mindel v. Chelsea Clock Co., \_\_\_\_ MDLR \_\_\_\_ (May 16, 2001); Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1018 (D. Mass. 1995). Accordingly, I conclude that Complainant has established a prima facie case of discrimination based on unlawful retaliation.

Once Complainant establishes a prima facie case of unlawful retaliation, the burden of production shifts to Respondent to articulate a legitimate, non-retaliatory reason(s) for its employment actions. If Respondent meets its burden of production, Complainant must then show that the proffered reason(s) was not, in fact, the real reason(s) for the adverse employment actions, and that Respondent was motivated by a retaliatory animus. Sverck v. American Health Care et. al., 22 MDLR 50 (2000); Goquen v. Quality Plan Administrators, et. al., 2000 Mass. Super. Lexis 40 (Middlesex Superior Court, February 7, 2000); Lewis v. Gillette Co., 22 F.3d 22, 24 (1<sup>st</sup> Cir. 1994).

As discussed above, I have already concluded that Respondent did not have a reasonable basis for its opinion that Complainant represented a threat to his health and safety and others in its plant because of his diabetes on December 22, 1994. Respondent contends that it reasonably relied on evidence of Complainant's health or safety risk based on information it received from Dr. Miller, Attorney Muller and Mr. Hancock regarding the potential impact of alcohol on diabetes. (Respondent's Exhibits 59 and 60). As discussed below, I conclude, however, that Respondent's justification for its suspension of Complainant and requirement that he submit to a fitness-for-duty examination in November 1995 is equally suspect and deficient as its suspension and fitness-for-duty requirement in November 1994.

Dr. Miller's information merely describes the potential impact of alcohol consumption on insulin-dependent diabetics, including low blood sugar levels and insulin induced seizures, coma or death. There is no evidence in

the record that Dr. Burress or any other physician at Corporate Medical Services identified alcohol use as a potential issue in Complainant's case. In addition, I find that the generic information about the risks of alcohol use was reasonably available to and/or discoverable by Messrs. Comeau, Hancock or Sohaskey upon further inquiry of Dr. Burress, discussion with Complainant (like their meeting on December 30, 1994), or during the education session the company nurse held in early 1995. Attorney Muller's information merely relies on Dr. Miller's generic observations and is not sufficient, by itself, to support a conclusion that Complainant and others were at risk because of complications in his diabetes arising from his drinking.

As in December 1994, Respondent did not produce any objective evidence to show that Complainant's ability to successfully perform his job duties had changed or that the risk of harm arising from his potential hypoglycemia had increased compared to the risk that was present from December 1994 to November 1995. It did not establish an employment history to support its perception on November 2, 1995 that Complainant posed a danger to himself or was a safety risk to others while performing the essential functions of his shipping position.

I am also not persuaded that Respondent's reliance on Mr. Hancock's affidavit was reasonable under the circumstances. I find that a cursory review of Mr. Hancock's bare allegations would have revealed that they were suspect, contradictory and required a minimum level of corroboration. (Respondent's Exhibit 60). While Mr. Hancock implies in his affidavit that he and Complainant regularly drank two six-packs of beer three or four evening each week since 1986,

his testimony contradicts this information. Mr. Hancock testified that Complainant did not drink at all for a number of months after his initial diabetes diagnosis. Mr. Hancock also testified that he quit drinking from October 1994 through Spring 1995. Accordingly, he was not in a position to observe Complainant's drinking.<sup>20</sup>

Mr. Hancock's testimony about Complainant's resumption of drinking is also contrary Dr. Rosenzweig's observation on July 24, 1995 that Complainant's blood sugar level was at an acceptable level during the preceding six to eight weeks. (Respondent's Exhibit 23). I also reasonably infer that Mr. Hancock had no legitimate concerns about Complainant's ability to safely perform his job duties because of his drinking since Mr. Hancock did not discuss it with Messrs. Comeau or Sohaskey at anytime prior to November 1995 nor did he initiate any action against Complainant including submission to a fitness-for-duty examination based on his alleged observation of Complainant's drinking prior to November 1995. Mr. Hancock's untested assertions and Mr. Comeau's later speculation regarding Complainant's threat of risk or harm was contrary to Complainant's known work and medical history after December 1994. This history showed that Complainant was highly motivated and disciplined about his diabetes and that he maintained a treatment regimen that appeared to be effective. (Respondent's Exhibits 12, 14, 15, 19, 20 and 21).

While Messrs. Comeau, Hancock and Sohaskey may have directed Complainant to return to the shipping duties after certain breaks in 1994-1995, Complainant did not produce

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<sup>20</sup>Mr. Hancock's testimony corroborated Complainant's testimony that he resumed drinking slowly in April 1995 so that Complainant could monitor his diabetes and manage his insulin.

sufficient evidence to establish that their orders were motivated by a retaliatory animus or were intended to interfere with his diabetes-related breaks. There is no evidence that any Respondent supervisor or manager told Complainant that he could not take breaks to attend to his diabetes-related needs. The evidence also establishes that Complainant was generally unsupervised in 1994 and 1995 because of Mr. Sohaskey's other duties. Finally, Complainant did not establish, by objective evidence, that he was treated differently than other plant workers who remained on their breaks beyond the allowed time. Complainant did not testify that he raised a diabetes-related objection to Messrs. Comeau, Hancock or Sohaskey upon being told to return to his shipping duties.

Finally, I am not persuaded that Mr. Sohaskey did not allow Complainant to complete his prescribed stretching exercises after his forklift injury in February 1995. Since Mr. Sohaskey provided very little supervision to Complainant in 1994-1995, it is reasonable to conclude, in the absence of contrary testimony from Complainant, that he was easily able to complete his exercises without Mr. Sohaskey's oversight.

Based on the above, I conclude that Respondent has failed to meet its burden to produce a legitimate non-discriminatory reason for its suspension of Complainant on December 22, 1994 and November 9, 1995 and its requirement that he submit to two fitness-for-duty examinations. Based on my review of the hearing record, in its entirety, I find that Complainant has proven by a preponderance of evidence that Respondent would not have taken such actions but for his participation in prior protected EEO activity. I con-

clude, therefore, that Respondent has engaged in unlawful retaliation in violation of G.L. c. 151B.

#### IV. REMEDIES:

Upon a finding of discrimination, the Commission is authorized to award damages resulting from Respondent's unlawful discrimination, including Complainant proven lost wages, out-of-pocket expenses, and emotional distress. G.L. c. 151B, §5. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997); Bournewood v. Massachusetts Commission Against Discrimination, 371 Mass. 303, 315-16 (1976). The party seeking recovery must prove his or her damages by more than speculation or surmise. College-Town, Division of Interco, Inc., supra.

I find that Complainant is entitled to an award of lost wages based on his unlawful suspension and fitness-for-duty examination in December 1994. The record establishes that Complainant would have worked on December 22, 23 and 26-29, 1994 (including two hours each day of overtime consistent with his practice) but for Respondent's discrimination. Instead, he received pay for 3.14 hours on December 22 and 5.75 hours on December 27 for his medical appointment. Accordingly, I award Complainant \$556.59 in back pay calculated as follows: 51.11 hours (60 hours less 8.89 hours paid) x \$10.89 @ hour.

I decline to offset Complainant's award of back pay based on Respondent's frivolous contention that he contributed to his delay in returning to work because of his refusal to comply with his medical examination or supply requested medical documentation. I find that the delay, if

any, was primarily caused by the ambiguity in Respondent's directive to Dr. Burress regarding the scope of the fitness-for-duty examination.

An award of monetary damages is also appropriate to compensate Complainant for the emotional distress he suffered as a victim of Respondent's unlawful acts. See e.g., Baldelli v. Town of Southboro Police Dept., 17 MDLR 1541 (1995). A finding of discrimination, by itself, permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, supra. at 824, quoting Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination, 20 Mass. App. Ct. 172, 182 (1985). Expert testimony is not necessary to prove emotional distress damages. College-Town, Division of Interco, supra. at 169; Franklin Publishing v. Massachusetts Commission Against Discrimination, 25 Mass. App. Ct. 947 (1988). Permissible considerations to measure and compensate for emotional distress include such factors as the nature, severity, and duration of Complainant's emotional distress. See Baldelli v. Town of Southboro Police Dept., 18 MDLR 167, 169 (1996).

I conclude that Complainant is entitled to damages for emotional distress resulting from Respondent's discrimination. Complainant testified credibly regarding how Respondent's discrimination, beginning in December 1994 and continuing until November 1995, affected him mentally and physically. Complainant testified credibly that his suspensions from work and fitness-for-duty examinations had a substantial impact on him. He credibly testified that they were "devastating" to him, disrupted his "whole lifestyle" and caused him to worry about whether he would

lose his job even though he had not done anything wrong. Complainant felt that his life was thrown into complete turmoil because of the uncertainty it created about his job. Complainant also felt that there was a lot of tension between him and Mr. Hancock when they participated in family activities during the holiday seasons.

Complainant credibly testified that his second suspension from work and fitness-for-duty examination had a greater effect on him than his first one. Complainant felt demeaned by the manner and extent of Dr. Clarke's examination that he believed was unrelated to an evaluation of his diabetes. Complainant testified that he had difficulty sleeping and felt that his entire family life was in "turmoil" and "chaos," especially because of Mr. Hancock's unsupported claims about his drinking.

I am persuaded that Complainant sustained significant emotional distress attributable to Respondent's unlawful acts. Robinson v. Haffner's Service Stations, Inc., 23 MDLR 283 (2001); Lawless v. Northeast Battery & Alternator, Inc., 22 MDLR 138 (2000); Raffurty v. Keyland Corporation & Kheary, 24 MDLR 64 (2000). Based on the relative severity and duration of his physical and emotional distress, I award Complainant \$35,000 to compensate him for the physical and emotional harm he suffered from Respondent's discrimination in 1994-1995.

#### V. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondent shall pay Complainant the sum of \$556.59 in lost wages and \$35,000.00 in damages for emotional distress. I also order Respondent to pay interest on the award of lost wages and emotional distress damages at the statutory rate of 12% per annum from the date the complaint was filed until such date judgment is paid or this order is reduced to a court judgment and post-judgment interest begins to accrue. Respondent Natick Paper-board shall pay this sum to Complainant within 60 days of its receipt of this decision.
2. The complaint against The Newark Group is dismissed.
3. The parties shall promptly notify the Commission's Clerk when Respondent makes the ordered payment.

#### Training Provisions

4. Within 60 days of the Commission's final decision, Respondent shall submit to the Commission's Director of Training a written anti-discrimination policy, including receiving and responding to requests for reasonable accommodation. The Commission shall promptly notify Respondent as to whether its policy is acceptable. If the Commission determines that Respondent's policy is unacceptable, it will return the policy for revision, as appropriate. If, after 21 days

for revision, Respondent fails to submit an acceptable policy, the Commission shall prescribe the details of a policy in a supplemental order.

5. Within 30 days of its receipt of the Commission's final action on Respondent's written anti-discrimination policy, Respondent shall schedule all employees, including its supervisors and managers, to attend comprehensive training that addresses workplace retaliation and handling requests for reasonable accommodation. The training shall include, but not be limited to, definitions of discrimination and harassment in the workplace, the supervisor's role in recognizing and preventing retaliation and other forms of harassment, the appropriate methods of responding to a request for a reasonable accommodation, and Respondent's liability under G.L. c. 151B and federal law for unlawful discrimination. This training must be at least 4 hours in length and must be completed within 90 days of Respondent's receipt of the Commission's action on its written anti-discrimination policy.
6. Respondent shall submit the training agenda to the Commission's Director of Training for approval at least 30 days prior to the proposed training session(s). The agenda shall provide that no more than 25 employees shall attend each training session held.

7. At least three weeks prior to the training date(s), Respondent shall inform the Commission's Director of Training, in writing, of the proposed training dates and locations so that the Commission has the option of sending a representative to attend and observe one or more of the training sessions as it is conducted.
8. Respondent shall select a trainer who has completed the Commission's certified discrimination or harassment prevention training courses, or shall submit another proposed trainer's resume to the Commission's Director of Training for approval at least 30 days prior to the initial training session. Respondent shall give a copy of this decision to the approved trainer as background information.
9. Within 30 days after each training session, Respondent must submit documentation to the Commission's Director of Training of its compliance with this order. The documentation must be signed by the trainer and identify the training agenda, participants who completed the training session, the date and time of each training session, and a list of all employees as of the training date(s).
10. Once a year for three years after completion of the initial training session(s), Respondent

shall repeat the initial training session for all employees hired and employed since the date of the previous training session. Respondent shall also conduct a refresher course (at least two hours in duration) once each calendar year for all other employees, including managers and supervisors, for a total of three years. In the event Respondent is sold, the successor employer must complete these training requirements within the stated time frames if any of the following conditions apply:

- a. A majority of Respondent's managers employed as of the date of this decision continue to work for the successor employer as of the succession date;
- b. A majority of Respondent's governing board (such as the board of directors or trustees) as of the date of this settlement continue to serve on the successor employer's board as of the succession date;
- c. The new owner is a relative of Respondent's owner; and/or
- d. Respondent retains an interest in the successor entity.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 5<sup>th</sup> day of September, 2003.

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Kenneth B. Grooms  
Hearing Officer