

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and GERALD S. GERMAN,
Complainant

v.

Docket No. 00-13-0577

BUILDING TECHNOLOGY ENGINEERS, INC.,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Joseph F. Ryan, Esq., for Complainant.
Gregory W. Homer, Esq., Gerald S. Hartman, Esq.,
and, Alisa H. Reff, Esq., for Respondents.

I. PROCEDURAL HISTORY

On February 23, 2000, Complainant, Gerald S. German (“Complainant” or “German”), filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”), against his former employer, Building Technology Engineers, Inc. (“BTE” or “Respondent”). In his complaint, Complainant alleged that BTE discriminated against him on the basis of disability in violation of G.L. c. 151B, § 4(16).¹

On October 29, 2001, the Commission found probable cause to credit Complainant’s allegations. On February 25, 2003, the Commission certified the case for Public Hearing. A Public Hearing was held before me on March 10 and 11, 2003, in Boston, MA. In deciding this matter, I have considered the entire

¹ Complainant also named EMCOR Group, Inc. (“EMCOR”), as a Respondent. However, the Commission dismissed the claim against EMCOR prior to the Public Hearing.

record, including the testimony and exhibits introduced at the Public Hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the Public Hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Gerald German presently resides in New Jersey. From May 1993 until September 15, 2000, German worked for Respondent at its offices in Boston, MA. At the time of the public hearing, German was approximately fifty-seven years old. I find that German is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Building Technology Engineers, Inc., is a corporation with an office in the Marine Industrial Park at 306 Northern Avenue, Boston, MA. BTE provided building services to commercial, industrial, and institutional clients. At the time BTE first employed Complainant, it was a subsidiary of Energy Systems Industries, Inc. ("ESII"). In 1999, ESII and BTE were acquired by EMCOR Group ("EMCOR"). After the acquisition, BTE continued to exist and operate as a subsidiary of EMCOR. As of the summer of 2002, BTE employed approximately 600 employees and had revenues of sixty million dollars. I find that BTE is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Prior to working for BTE, Complainant had finished college in England and then obtained various Merchant Marine licenses before spending twelve years in the marine industry. He subsequently worked for the British Government in Saudi Arabia, where he was responsible for maintaining the facilities of the Royal Saudi Air Force. He then came to the United States and worked at the World Trade Center in Los Angeles. Sheraton Corporation then recruited Complainant to help open a brand-new hotel in Los Angeles and he managed that facility until 1990. Sheraton then promoted him to the position of assistant divisional engineer, which involved managing the facilities at forty-four Sheraton Hotels. I credit Complainant's testimony on these matters.

4. In May 1994, Respondent hired Complainant as an Assistant Operations Manager. When Complainant first started at Respondent, approximately 10 or 12 people reported directly to him and an estimated 150 employees reported to his immediate subordinates. Complainant was ultimately responsible for supervising Respondent's services to approximately 50 to 60 residential, commercial, and some minor industrial buildings. Respondent initially paid Complainant a salary of \$65,000. From 1994 to 1997, Complainant's duties and responsibilities remained largely the same. During this period, he received positive performance reviews from his supervisor, Don Larson, and regularly received bonuses and wage increases. I credit Complainant's testimony.

5. On January 1, 1998, Respondent promoted Complainant to the position of National Technical Service Manager ("NTS Manager"). As NTS Manager, Complainant was responsible for managing Respondent's Technical Services

Department. His duties included providing both revenue generating consulting services to outside customers and non-revenue generating support services to BTE's other departments. Complainant testified that he had performed some of these duties as Assistant Operations Manager. He stated that prior to his appointment, the NTS Manager's position did not exist; consequently, he developed a job description for the position at the request of General Manager Tony Shaker. I credit Complainant's testimony regarding these matters.

6. After becoming NTS Manager, Complainant became eligible for a bonus totaling as much as 25% of his salary. In addition, Respondent assigned Complainant a new office and gave him a company car. Complainant stated that Respondent considered the company car as "compensation" and, according to a W-2 statement, the company valued the car at \$9,200 per year. I credit Complainant's testimony.

7. In March 1998, Respondent hired Joseph Mann to become its General Manager. As General Manager, Mann became Complainant's direct supervisor. In a memorandum dated April 21, 1998, Mann requested that Complainant assume responsibility for developing the Technical Services Department as a separate revenue source and profit center. Mann also wanted Complainant to leverage the Technical Services Department to provide new customer value-added products and services. Complainant testified that in response to Mann's directives, he successfully obtained new clients and sold computerized maintenance management systems. He also stated that he developed and then sold a "Y2K" compliance service that evaluated whether a building's equipment

would function properly upon the dawn of the new millennium. However, Complainant claimed that during 1998, he spent a considerable amount of time providing internal non-revenue support services, which he estimated accounted for 25% of his work; and, thus, he had less time to spend on revenue generating services. He testified that he tried to get some revenue "credit" for his internal support work, but Respondent denied his request. I credit Complainant's testimony on this matter.

8. Complainant testified that in June 1998, Mann asked the Operations Manager, Dean Larson, to conduct Complainant's annual evaluation since Mann had just arrived at BTE and did not feel comfortable assessing Complainant's work. Larson gave Complainant an "excellent" evaluation for period May 1997 to May 1998. Following the June 1998 appraisal, Complainant received another raise, increasing his salary to approximately \$76,000. I credit Complainant's testimony on this matter.

9. In 1998, Mann revised Complainant's performance goals and then asked Complainant to review his status with respect to these revised goals. In a memorandum dated December 16, 1998, Complainant told Mann that many of the goals could not be realized because they depended on the actions of other people or departments. Notwithstanding, Complainant received a \$14,800 bonus for 1998, which represented approximately 85% of the maximum bonus that he could receive.

10. In March 1999, Mann prepared a performance evaluation for Complainant and shared a draft of it with him. In the appraisal, Mann indicated that Complainant needed to improve his work performance in a number of areas; however, the evaluation was generally positive. For example, Mann indicated, "Gerry has done a good job managing the department during the year dealing with staff changes and budgetary management issues." Furthermore, with respect to Complainant's work "attributes", in almost all areas Mann indicated that Complainant met or exceeded expectations. Complainant testified that he considered Mann's evaluation to be "favorable", but he strongly disagreed with a number of points. In response, Complainant wrote a memorandum to Mann outlining his problems with the evaluation. Mann then revised the evaluation so as to incorporate some of Complainant's concerns. Notwithstanding, the final evaluation still stated that Complainant needed to improve his work performance in a number of areas.

11. On April 25, 1999, Complainant suffered a heart attack necessitating triple bypass surgery the next day. Although he was released from the hospital six days later, he suffered numerous medical complications that hindered his rehabilitation. Just one week after his initial release from the hospital, he had to be readmitted for atrial fibrillation (heart flutter). Then, in mid-July 1999, he suffered acute dyspnea (difficulty in breathing) upon exertion. According to Complainant, by the end of July, his doctors eventually discovered that his breathing difficulties were related to asthma brought on by his heart medication. Complainant testified that after this discovery, his recovery progressed rapidly

notwithstanding a minor relapse on or about August 17, 1999, when he became ill as a result of a bad drug interaction. He stated that his recovery began to improve, he started going to a gym for exercise under medical supervision. However, from the time he first suffered his heart attack through August 31, 1999, Complainant did not know when he would be able to return to work. In addition, throughout the summer of 1999, he feared that he might need to be readmitted to the hospital if his condition did not improve. Complainant remained out of work from April 25 to September 20, 1999. I credit Complainant's testimony.

12. While out-of-work for his heart condition, Complainant received short-term and then long-term disability. He testified that disability paid only \$1,800/month (\$22,000 annualized), which was considerably less than his \$80,000 annual salary. Complainant claimed that as a result of this severe drop in income, he and his wife had to live frugally and spend their savings in order to meet their financial obligations. I credit Complainant's testimony.

13. Complainant testified that during his leave of absence, he spoke to Mann eight to ten times. He claimed they discussed his health situation and work-related business. According to Complainant, Mann told him that work was building up, his "inbox was full", and there would be a lot to catch up on when he came back to work. Complainant also stated that he spoke with his assistant Kerri Nelson as well as with Leslie Baldwin and Natalie Peterson, both of whom

worked in BTE's Human Resources office.² Complainant testified that no one at BTE ever told him during his leave of absence that his job was in jeopardy. I credit Complainant's testimony.

14. Peterson testified that shortly after she began working for Respondent on August 2, 1999, she was informed that Mann had decided to replace Complainant as the NTS Manager. As reasons therefore, Peterson was told that the company did not know when Complainant would be able to return to work and business had suffered as a result of Complainant's absence. In particular, she claimed Respondent's managers informed her that BTE's customers had not received necessary support services since Complainant became ill. According to Peterson, the decision to replace Complainant may have been made by Mann on or before June 10, 1999, when BTE placed an add on Monster.com, an online recruiting service, for the position entitled "Director, Facility Audits & Technical Services."³ In June and July 1999, Mann apparently received resumes from a number of applicants, including the resume of Ken Stack. On August 24, 1999, Mann tendered his resignation to Respondent and, thereafter, appeared to have no further involvement in the decision to replace Complainant as NTS Manager. On August 27, several BTE supervisors, including Peterson, Bill Gorman, and Mike McGloin, interviewed Stack for the NTS Manager's position. Peterson testified that she understood that Mann had previously interviewed Stack by

² During German's leave of absence, EMCOR Group acquired BTE. On August 2, 1999, EMCOR hired Peterson to replace Baldwin and assume responsibility for the human resource functions at BTE, replacing Baldwin.

³ Although it remains unclear why the position was advertised under the title, "Director, Facility Audits & Technology Services", neither party has disputed that this position is substantially equivalent to the position of NTS Manager.

telephone and Mann had considered Stack to be qualified for the position. Peterson claimed that she considered her interview of Stack to be merely “pro forma.” After the interview, Peterson recommended that Respondent hire Stack as the NTS Manager. Respondent apparently first verbally offered Stack the position on September 24, 1999, and then made a written job offer to him on September 27, 1999. David Leathers, who took over for Mann as General Manager, testified that the delay in making Stack a formal offer was caused principally as a result of his disjointed transition into the Boston office. Leathers stated that during August and September 1999, he had to manage both the Boston and Washington, DC offices. Stack began working for Respondent on a part-time basis on October 11, 1999, and then began working full-time on November 1, 1999. I credit Peterson and Leathers’ testimony regarding the reasons for BTE’s delay in tendering Stack an offer of employment. In addition, I credit Peterson and Leathers’ testimony that BTE had essentially decided to replace Complainant as NTS Manager before September 3, 1999.

15. Complainant testified that neither Mann nor anyone else at Respondent had informed him that he was being replaced until he returned from his leave of absence on September 20, 1999. Complainant also claimed that he spoke with Mann toward the end of August 1999 to inform him that he was recovering very rapidly and expected to be back to work in the near future. Although Complainant did not provide Mann with a specific date with respect to his return, he stated that Mann expressed his enthusiasm about his coming back to work, stating, “We need you back”, “there is plenty to do.” In addition, Complainant

stated he had no knowledge that Mann had tendered his resignation. I credit Complainant's testimony.

16. Complainant testified that when he met with his cardiologist on August 31, 1999, they determined he could return to work in a few weeks on a restricted basis. He testified that on September 3, he then called Mann and left a voicemail message that he would be returning back to work on Friday, September 20. Complainant also claimed he telephoned Peterson on September 6 and left a similar message. He stated that he actually spoke with Peterson during the middle of September and informed her that he would be coming back to work on a four-hour per day restricted basis. Peterson told him that in order to return to work, he would need a physician's note describing his restrictions. Peterson corroborated Complainant's testimony regarding their conversation in mid-September. I credit Complainant's testimony.

17. Shortly after Mann tendered his resignation, Leathers assumed Mann's duties and responsibilities. Leathers testified that when he took over the operations in the Boston office in late August, he was aware that Respondent had made the decision to replace Complainant as NTS Manager, had gone through the interview process, and had essentially decided to hire Stack. Leathers claimed he understood, from his conversations with Mann and Peterson, that Respondent was replacing Complainant for two reasons. First, he was told that Respondent had a business necessity to fill the position because the Technical Services Department had fallen behind in providing services to its internal customers as a result of Complainant's prolonged absence. Second,

Stack had qualifications superior to Complainant's. Based on his own review of Stack's qualifications, Leathers testified that Stack had on-the-job experience in facility operations, had a professional engineering license and a bachelor's degree in mechanical engineering, and had a master's degree in environmental engineering. Leathers also testified that other supervisors at BTE, including Mann, Peterson, Bill Gorman, and Mike McGloin, had told him that Stack appeared to be a much better candidate for the position. Specifically, they told him that Stack had better experience, and academic and licensing credentials.

18. Leathers also testified that he knew that Complainant had performance issues. His knowledge of Complainant's performance problems stemmed from both comments made to him by Mann and Shaker as well as on his own personal knowledge. With respect to the comments he received from BTE's supervisors, Leathers testified that he was told that Complainant's interpersonal and customer service skills with both internal and external customers were not as good as they needed to be. Leathers also claimed that he was told Complainant had problems completing jobs. Regarding his own personal observations, Leathers testified that on or about February 1999, he became aware that the Technical Services Department under Complainant's management had done work on a job for "Sprint" (a pre-existing client of Leather's) in Washington, DC. Leathers claimed that Sprint told him it was very unhappy with the work performed by Complainant's department; and, as a result, Leathers complained directly to Mann about this issue. Although I credit Leathers' testimony that other BTE managers discussed Complainant's work performance with him, I believe his

testimony on this matter should be given little weight since it almost entirely based on hearsay statements.

19. Leathers also testified that prior to Complainant returning from his leave of absence, he made the decision in consultation with Peterson to create a new position for Complainant entitled, "Technical Service Specialist" ("TS Specialist"). According to Peterson and Leathers, they created the new position because they had decided to hire Stack for the position of NTS Manager, but they did not want to lose Complainant's expertise. I credit Leathers and Peterson's testimony on this matter.

20. A written job description for the TS Specialist position was prepared and approved in September 1999, although it remains unclear who at BTE actually drafted the job description. The job description for TS Specialist appeared to be very similar to the job description for NTS Manager, with the exception that the TS Specialist did not have any administrative or supervisory responsibilities. In addition, the TS Specialist reported to the NTS Manager while the NTS Manager reported to the General Manager. Complainant testified that other than the additional management responsibilities, the job description for the TS Specialist position merely "paraphrased" the job description for the NTS Manager. I credit Complainant's testimony on this matter.

21. On September 20, 1999, Complainant returned to work and provided Respondent with a physician's note that limited his work to no more than four hours per day and restricted any prolonged travel. Upon his return, he soon

discovered that Mann had resigned and Leathers had assumed Mann's duties. Complainant then met with Leathers, who subsequently introduced him to Peterson. Complainant testified that Leathers and Peterson then informed him that BTE had hired another person as NTS Manager. He claimed that Leathers stated that Respondent had an urgent need to have a full-time NTS Manager and Complainant had restrictions that prevented him from fulfilling the responsibilities of the position. According to Complainant, neither Leathers nor Peterson inquired about his limitations. Complainant responded by telling them he was recovering rapidly and by the time Respondent recruited a new NTS Manager, he would be able to work full-time. Leathers then informed him that they had finished recruiting and had identified a suitable candidate. Complainant claimed that at no time during this meeting did they discuss his prior work performance. Leathers and Peterson then told him that they had created the position of TS Specialist for him. Complainant testified that either Leathers or Peterson mentioned that as TS Specialist, he would be provided with the "accommodation" of being able to work at home if necessary. Complainant claimed that he construed the reference to "accommodation" as meaning an accommodation to his disability. He further stated that Leathers informed him the TS Specialist position had a salary of only \$50,000 per year, which was both significantly below the \$80,000 he earned as NTS Manager, and less than his initial salary when he first started at BTE in 1993. Leathers acknowledged that he considered Complainant's reassignment to the TS Specialist position as a demotion. In addition, Complainant stated that Leathers and Peterson had informed him that

his assistant Kerri Nelson had submitted her resignation and was going to cease working for BTE by end of the week. Leathers then instructed Complainant to familiarize himself with her work so that he could take over for her when she left. Complainant testified that Nelson was an entry-level employee who had been with BTE for just one year. Complainant testified that the meeting ended after Leathers said he would reconsider what they had discussed. I credit Complainant's testimony.

22. Complainant testified that shortly after the meeting with Leathers and Peterson had ended, he met with Mann in Mann's office. Although Mann had submitted his resignation in August, he had not yet left the company. Complainant told Mann what had transpired in his meeting with Leathers and Peterson, and Mann appeared to be surprised. When he asked Mann if he was aware of what had transpired, Mann responded, "no." Complainant further testified that Mann acknowledged there had been informal discussions during Complainant's absence regarding the possibility that Complainant was not going to come back to work, but no decisions had been made, and he had not interviewed anyone for the position. Complainant stated that Tony Shaker then appeared at the doorway to Mann's office and stated he needed to see Mann. After Shaker left, Mann told Complainant, "If Tony asks you, just tell him we were bullshiting." Complainant claimed that he thought Mann's remark seemed strange. I credit Complainant's testimony regarding his conversation with Mann;

however, I make no finding as to the truth of Mann's remarks.⁴

23. On September 21, 1999, Complainant again met with Leathers and Peterson. Complainant testified that at this meeting, Leathers informed him that he had decided to offer the NTS Manager position to someone else and expected Complainant to perform the duties of TS Specialist. The next day, Complainant met with Peterson again. At this meeting, he claimed, apparently for the first time, that Mann had previously assured him that he would keep the position open until he returned. Complainant, therefore, insisted that BTE owed him the NTS Manager's position. In response, Peterson told Complainant she would contact Mann. Although I credit Complainant's testimony with respect to

⁴ Mann did not testify at the Public Hearing. Respondent's counsel stated that Mann had been subpoenaed to appear, but he refused to honor the subpoena or attend the Public Hearing. At the time, Mann lived and worked in Rhode Island. In lieu of his live testimony, Respondent offered to submit Mann's deposition transcript *de bene esse*. The matter of Mann's deposition was subject to considerable attention both prior to and during the Public Hearing. On February 20, 2003, prior to the Public Hearing, Respondent served upon Complainant a Notice of *De Bene Esse* Deposition of Mann. The deposition was scheduled to take place on February 25, 2003. Shortly after receiving the Notice, Complainant filed a Motion to Quash. On February 24, 2003, the Investigating Commissioner granted Complainant's Motion to Quash and further ordered, "Should Respondent wish to present testimony of these witnesses, they should be subpoenaed to appear at the Public Hearing in this matter scheduled for March 10-14, 2003."

In apparent defiance of the Commission's order, Respondent nonetheless went forward and took Mann's videotaped deposition on February 25, 2003, even though Respondent's counsel apparently received notification of the Commission's Order with respect to the Motion to Quash before the deposition took place. Complainant's counsel did not attend the deposition. On February 25, Respondent also filed a Motion for Reconsideration of Order Quashing the Notice of *De Bene Esse* Deposition. On February 28, 2003, at a Pre-Hearing and Motion Conference, I denied Respondent's Motion for Reconsideration after hearing arguments from the parties.

Despite my ruling on the Motion for Reconsideration, at the Public Hearing Respondent attempted to offer Mann's deposition transcript as evidence in lieu of Mann's live testimony. Complainant objected and I sustained the objection. However, I allowed the transcript to be marked for identification purposes to preserve Respondent's arguments.

Notwithstanding my ruling at the Public Hearing, Respondent's counsel regularly cited to Mann's deposition transcript in Respondent's Proposed Findings of Fact and Conclusions of Law. Consistent with my rulings in this matter, I have neither considered nor looked at the document. Furthermore, because Respondent's counsel has disregarded the orders of the Commission with respect to this matter, I have not considered and rejected ad hoc any of Respondent's proposed findings of fact or conclusions of law that cited solely to Mann's deposition transcript.

his conversation with Peterson, I decline to credit his assertion that Mann specifically promised him to keep the NTS Manager's job open until he returned.

24. Peterson testified that she then spoke with Mann and he denied making such a promise. I credit Peterson's testimony. At Peterson's request, Mann then addressed this matter in a letter dated September 24, 1999, in which he stated:

Confirming our conversation, there was no guarantee of employment extended by me to Gerry German during his recuperation from his heart attack. In my conversations with Gerry he kept me informed of the status of his condition and his anticipated return to work date. To the best of my recollection, discussions relative to work centered around his medical prognosis, anticipated dates of return, and health/work capacity issues, i.e. initial reduced hours, limited travel, etc. At no time did Gerry ask for any guarantees and no such offers were extended.

Please be aware that his anticipated return to work date continued to change as the severity and changes to Gerry's condition unfolded. Changes in his condition in terms of the damage from the severity of his attack, effects from medication and diagnosis of asthma resulted in a return to work almost five (5) months after his attack v. the five (5) weeks which was the original expectation.

At my request Leslie Baldwin provided me with information on FMLA so that I could understand Gerry's rights as well as the business. As the severity of Gerry's condition became evident and his return to work date continued to extend, I authorized a search for his replacement to protect the interests of the company and its customers.⁵

25. Complainant testified that on or about September 27, 1999, he again met with Leathers and Peterson. At this meeting, Peterson informed Complainant of her conversation with and letter from Mann. Peterson then wrote Complainant a letter dated October 1, 1999, in which she reiterated and formalized Respondent's position. The letter stated:

⁵ I note that in this letter, Mann did not state or imply that he actually told Complainant he was searching for his replacement.

As discussed, we held your position open as long as we could, but due to your five months absence from work, we had to recruit and fill your position due to business necessity.

However, we are glad to offer you a different position with BTE as a Technical Services Specialist, reporting to Mr. Ken Stack, National Technical Services Manager. We believe that this position will provide you with the accommodation you requested for part time work, and also give you the opportunity to work at home if that is a needed accommodation.

The salary for this position is \$55,000 annually, payable weekly. You will be eligible for a monthly car allowance of \$250.00, and a gas credit card. You may continue to use the company phone and computer. Also you will be eligible for 9/12ths of the 1999 Management Compensation Incentive Program, if awarded.

For the next two months, we are willing to continue paying your current salary prorated to the hours worked. We are also willing for you to continue using the company car through October 1999, at which point it needs to be turned in to David Leathers.

The position of Technical Services Specialist may be viewed as an interim position to accommodate your health requirements, or as a regularly scheduled position. David Leathers, Executive Vice President and General Manager, BTE has agreed to discuss other openings (if available) which may suit your qualifications and background after you have returned to full duty.

26. Peterson testified that her reference to an “accommod[ation]” and “health requirements” in the letter referred to the hours of work and travel restrictions placed on Complainant by his physicians. She further stated that her reference to “other openings” related directly to Complainant’s request to Leathers that he be considered for other positions in EMCOR, whether in Boston or elsewhere.

27. Complainant testified that the demotion caused him considerable emotional distress. He claimed that when Leathers and Peterson first informed him that he was being replaced, he was shocked, devastated, and very upset.

He was particularly upset because he had previously received good performance reviews and believed he had both saved Respondent well over \$1 million in contracts and brought in considerable revenue. He claimed he felt that BTE had merely cast him aside. Complainant also testified that the demotion adversely affected his wife. He stated that he and his wife had incurred substantial financial strain from during his period of incapacity. Consequently, as a result of his demotion, Complainant and his wife believed that they would not be able to recover from their dire financial situation. He claimed that his wife became depressed after realizing their financial predicament. In addition, Complainant testified that she suffered from high blood pressure and news of his demotion exacerbated her condition and necessitated the doubling of her blood pressure medication. I credit Complainant's testimony on this matter.

28. Complainant testified credibly that following his return to work on September 20, 1999, he continued to perform the duties of his former position as NTS Manager, as well as the work that had been previously done by his subordinates. Respondent offered no credible evidence to the contrary. In a letter dated October 5, 1999, Complainant's attorney notified Leathers that they viewed Respondent's decision to demote Complainant to be a violation of federal and state anti-discrimination laws with respect to persons with disabilities. Notwithstanding, on October 11, 1999, Stack began working for Respondent as NTS Manager.

29. Complainant testified that he and Stack worked well together as a team. In particular, he stated that Stack respected him, treated him fairly, and never complained about his work. However, Complainant claimed that he and Stack were essentially performing the same job with the sole exception that Stack had administrative responsibilities. Complainant estimated that these administrative duties amounted to only five percent of Stack's duties. I credit Complainant's testimony.

30. On October 18, 1999, Complainant returned to work on a full-time basis without any restrictions. Complainant testified that thereafter his medical condition did not limit or hinder his ability to perform his job or affect his ability to go about his normal daily activities. I credit Complainant's testimony.

31. In December 1999, Complainant's Counsel sent a letter to EMCOR's General Counsel that again requested he be reinstated to his prior position and threatened legal action. In January 2000, apparently in response to the letters from Complainant's counsel, and without notice to Complainant's attorney, Leathers presented Complainant with a letter that contained a written waiver and release of all of his claims. The letter stated:

As an accommodation to your recent illness, BTE is pleased to offer you the full-time position of National Technical Services Specialist at an annual salary of \$60,000, payable weekly; plus a monthly auto allowance of \$350. In addition, upon executing this letter agreement and the Release referred to below and after the expiration of the revocation period referred to in the Release, you shall receive a \$5,000 bonus less applicable withholding taxes. You shall be entitled to three weeks vacation (and other holidays and sick days in accordance with BTE policy).

After Complainant discussed the matter with counsel, he refused to sign the

document.

32. As a result of the demotion, in January 2000, Respondent moved Complainant from an office to a cubicle. Moreover, on February 7, 2000, Respondent cut Complainant' salary from \$80,000 to \$60,000. Leathers testified that he agreed to pay Complainant \$60,000 instead of \$55,000 as earlier proposed in October 1999, after he and Complainant had further negotiated the matter. I credit Leathers' testimony on this matter.

33. Complainant testified that on or about February 7, 2000, he began drawing from his pension from his previous employer (ITT/Sheraton). He stated that he needed to tap into his pension because his reduced salary hindered his ability to meet his financial obligations. He claimed that by choosing an early election on this pension, he received only 50% (\$360/month) of what he otherwise would have been entitled to (\$720/month). In April 2000, following a positive performance review from Stack, Respondent increased Complainant's salary by four percent to \$62,400, retroactive to February 28, 2000.

34. Complainant testified that around March or April 2000, he decided to look for another job because he believed he was in a dead-end position at BTE. He also claimed that he felt embarrassed and demeaned as a result of his demotion, particularly since BTE had assigned him to perform the work that had been previously done by a first-year employee with no experience. In addition, he stated his finances were "very tight" as a result of his reduced salary. Complainant had informed Stack that he was looking for a new job and used

Stack as a reference. After looking for about six months, Complainant secured a job with a New Jersey company, CB Richard Ellis. In early September 2000, Complainant submitted his resignation to Respondent, effective September 15, 2000. Complainant acknowledged that no one at Respondent suggested that he resign or encouraged him to do so.

35. I find that Complainant incurred a loss of approximately \$10,594.95 in wages from February 7, 2000, the date Respondent reduced Complainant's salary to September 15, 2000.⁶ In addition, on November 1, 1999, Respondent deprived Complainant of the use of the company automobile and instead paid him an auto allowance substantially below the value of the use of the car. After taking into account the amount of the auto allowance Complainant received from Respondent from November 1, 1999 to September 15, 2000, I find that Complainant incurred a loss in of \$6,285.00 in the use of the company vehicle.⁷

36. On September 18, 2000, Complainant began working for CB Richard Ellis

⁶ Effective February 7, 2000, Respondent reduced Complainant's salary from \$1,539.00 per week to \$1,154.85 per week, a wage differential of \$384.15 per week. Therefore, for the two-week period of February 7 to February 28, 2000, Complainant lost the sum of \$768.30 in wages. Complainant subsequently received a wage increase to \$1,200.00 per week retroactive to February 28, 2000, a wage differential of \$338.85 per week. He continued to earn this salary until he left the company on September 15, 2000. Thus, for the twenty-nine week period of February 28 to September 15, 2000, Complainant lost \$9,826.65 in wages. Consequently, Complainant lost a total \$10,594.95 in wages from February 7, 2000 until his resignation on September 15, 2000.

⁷ Respondent's W-2 statement to Complainant indicated that Respondent attributed the vehicle as having a value of \$9,200 in taxable compensation. Complainant had the use of the vehicle for ten months (January 1 – November 1) in 1999, a value of \$920/month. Thus, Complainant incurred a loss of \$9,660 for the 10½ month period from November 1, 1999 to September 15, 2000, as a result of being deprived of the use of the automobile. However, after Respondent took the vehicle away from Complainant, it instead paid him an automobile allowance of \$250.00 per month effective November 1, 1999, which was subsequently increased to \$350 per month effective February 2000. Thus, Complainant received a total of \$3,375 (\$250 @ 3 months + \$350 @ 7.5 months), from Respondent in the form of an auto allowance in lieu of the use of the company car. I, therefore, find that Complainant suffered a loss of \$6,285 (\$9660 - \$3,375) after Respondent took back the company vehicle.

in New Jersey.⁸ He earned a starting salary of \$60,000, plus a ten percent bonus. In November 2000, Complainant's salary was increased to \$65,000, plus a ten percent bonus. On November 26, 2001, CB Richard Ellis terminated Complainant's employment for poor performance. Kim Broyles, who supervised Complainant at CB Richard Ellis, testified credibly that Complainant had serious work problems that necessitated his termination. In June 2002, Complainant claimed he started working for Sears Roebuck as a sales associate.

III. CONCLUSIONS OF LAW

Massachusetts General Laws, c. 151B, § 4(16), provides that it shall be unlawful for an employer to discriminate against an employee on the basis of disability.⁹ In this case, Complainant alleged that BTE engaged in unlawful disability discrimination when it failed to provide him with a reasonable accommodation upon his return to work and instead demoted him from NTS Manager to TS Specialist. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) he is a "handicapped person" within the meaning of M.G.L. c. 151B, § 4(17); (2) he is a "qualified handicapped person capable" of performing the essential functions of a particular job within the meaning of M.G.L. c. 151B, § 4(16); (3) who needed a reasonable accommodation to perform his job; (4)

⁸ Respondent noted that German had admitted that some of his statements on his employment application to CB Richard Ellis were "untruthful", including his statement that he left BTE for "relocation." I refuse to give this evidence any weight toward my assessment of German's character or credibility.

⁹ The use of the term "disability" instead of "handicap" reflects the preference of persons with disabilities to use that term rather than "handicapped" as used in the law. Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686, 688 n. 4 (1996), *quoting*, H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 3, at 26-27 (1990), *as cited in*, 29 C.F.R. § 1630(1)(a), app. at 337

Respondent was aware of the handicap and the need for a reasonable accommodation; (5) Respondent was also aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap; and, (6) Respondent failed to provide Complainant the reasonable accommodation. See, Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at 2-5 (2002) ("Disability Discrimination Guidelines"). If the Complainant meets his burden of satisfying each of these elements, then the burden shifts to Respondent to prove that the reasonable accommodation would pose an undue hardship on the employer's business. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993), Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995); see, Disability Discrimination Guidelines, p. 15. Complainant may then rebut Respondent's evidence by showing that the reasonable accommodation would not impose an undue hardship on Respondent's business.

As a threshold issue, Complainant must prove that he is a "handicapped person" within the meaning of M.G.L. c. 151B, § 1(17). The statute defines a "handicapped person" as one who either (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or, (c) is regarded as having such impairment. See, Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996), Dahill v. Police Department of Boston, 434 Mass. 233, 241 (2001), Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. 56, 61 (1994).

Complainant did not present any credible evidence that he suffered from any pre-existing or long-term physical impairment that substantially impaired one or more major life activities either before his heart attack or after he returned to full-time work without restrictions on October 18, 1999. However, the Commission has long recognized that a “heart condition” is a disability within the meaning of G.L. c. 151B. See, e.g., Talbert Trading Co., 37 Mass. App. Ct. at 61, Bianchi v. Duchess Chemical, Inc., 24 MDLR 168, 170 (2002), Cahillan v. Monsanto Corporation, 18 MDLR 73, 75 (1996), Miller v. Northeast Security, Inc., 17 MDLR 1067 (1995), Mortimer v. Atlas Distributing Co., Inc., 15 MDLR 1233, 1253 (1993). Although short-term, temporary restrictions are generally not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. See, Katz v. City Metal Co., 87 F. 3d 26, 32 (1st Cir. 1996) (interpreting analogous provisions of the ADA). While the permanency or long-term impact of the impairment is an important consideration in determining whether the impairment is substantially limiting, the Commission has recognized that chronic or episodic disorders that are substantially limiting may be handicaps, while isolated medical problems, such as a broken arm that heals normally and illnesses of short duration, usually are not. Disability Discrimination Guidelines, at 3-4; see, Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686 (1996) (temporary disability in which plaintiff fully recovered in one month was not a disability under G.L. c. 151B).

In Katz, the Court of Appeals for the First Circuit held that a heart attack might constitute a disability under the Americans with Disabilities Act. 87 F.3d at

31. Specifically, the First Circuit held that a trier of fact could determine, even without expert medical testimony, that an employee who suffered a heart attack had a condition affecting the cardiovascular system and, therefore, had a physical impairment under the ADA. *Id.* The court noted that it was reasonable to expect that after an employee suffered from a heart attack, the employee's ability to breathe, walk, and work was substantially limited "as might reasonably be expected after any major trauma and resultant medical procedure or surgery." *Id.* at 31-32.

Analogous to the situation in Katz, Complainant testified at length about the heart attack he sustained on April 25, 1999, and the complications that followed including atrial fibrillation and dyspnea. He was unable to work for a period of five months and then returned to work on a part-time basis with restrictions for an additional month. Respondent neither contested that Complainant had the heart attack or the related complications that followed, nor disputed that Complainant's medical condition substantially impacted his ability to work during the period of his leave of absence. See, Katz, 87 F.3d at 31 (trier of fact could conclude that plaintiff had a disability especially given that employer never disputed that plaintiff had a heart attack). Under these circumstances, I find that Complainant had a physical impairment that substantially limited the major life activity of working during the period of April through October 1999.

Even if Complainant could not establish that he had an actual physical impairment that substantially limited his ability to work, I believe Respondent "regarded" him as having such impairment within the meaning of § 1(17)(c). In

June 1999, after Complainant notified Respondent he would be unable to return to work due to medical complications associated with his heart attack, Respondent began searching for his replacement. Respondent submitted that it sought to replace Complainant because it had no expectation that he would be able to return to work in the near future. I believe it is reasonable to infer that under these circumstances, Respondent sought to replace Complainant based upon both its knowledge of his medical condition and its perception that his disability substantially limited his ability to work. Consequently, Complainant has established that he is a “handicapped person” within the meaning of G.L. c. 151B, § 1(17).

Complainant must next prove that he is a “qualified handicapped person”, which is defined as "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 particular job with reasonable accommodation to his handicap." G. L. c. 151B, § 1(16); Russell v. Cooley Dickenson Hospital, 437 Mass. 443, 449-450 (2002). In order to fall within the definition of a “qualified handicapped person”, Complainant must establish that he can perform the essential functions of the position of NTS Manager with or without reasonable accommodations. M.G.L. c. 151B, § 1(16); see, Disability Discrimination Guidelines, at 4. The “essential functions” of the job are those functions that must necessarily be performed by the employee in order to accomplish the principal objectives of the job. Woodason v. Town of Norton School Committee, 24 MDLR 21, 25 (2002); see, Disability Discrimination Guidelines, at 4.

First, I find that Complainant was fully capable of performing the duties and responsibilities of NTS Manager prior to his heart attack and did so in a competent manner. Although Mann's last evaluation of Complainant, just one month prior to his heart attack, indicated that Complainant needed to improve his work performance in a number of areas, the evaluation was generally positive. With respect to Complainant's work "attributes", in almost all areas Mann indicated that Complainant met or exceeded expectations. Mann also indicated, "Gerry has done a good job managing the department during the year dealing with staff changes and budgetary management issues." Although Leathers testified that Complainant's work performance was problematic, Leathers did not supervise him during this period. In addition, Leathers' personal knowledge of Complainant's work was anecdotal and limited to information he obtained from just one of Complainant's many clients. Consequently, I give Leathers' testimony regarding Complainant's work performance little weight.

Second, I credited Complainant's testimony that following his return to work on September 20, 1999, he continued to perform the duties of his former position as NTS Manager, as well as the work that had been previously done by his subordinates. Respondent did not offer any credible evidence to the contrary. Complainant also testified credibly that upon his return to full-time work on October 18, 1999, his medical condition did not limit or hinder his ability to perform his job or affect his ability to go about his normal daily activities; and, again, Respondent did not offer any credible evidence to rebut Complainant's testimony. Furthermore, the evidence supports the conclusion that when

Respondent accommodated Complainant's disability, by allowing him to work part-time during his first month back at work, he satisfactorily performed the essential functions of the job. Based on these circumstances, I find that Complainant was capable of performing the essential functions of the job of NTS Manager upon his return to work on September 20, 1999. Complainant has, therefore, established that he is a qualified handicapped person within the meaning of G.L. c. 151B, § 4(16).

Since Complainant has proven that he is a disabled person who can perform the essential functions of the job as NTS Manager, Respondent is obligated to provide a reasonable accommodation unless it can establish that doing so would cause an undue hardship on its business. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993); see, Disability Discrimination Guidelines, p. 15. As stated above, Complainant claimed that Respondent failed to provide him with a reasonable accommodation when it refused to allow him to remain in the position of NTS Manager on a part-time basis for a limited period of time.

As a starting point, Respondent clearly provided Complainant with a reasonable accommodation when it allowed him to take a leave of absence after he sustained his heart attack. However, the duty to provide a reasonable accommodation is a continuing one. Donohue, 21 MDLR at 207, *quoting*, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). More importantly, Respondent was required to engage in an open and ongoing dialogue or "interactive process" with Complainant about providing a reasonable

accommodation. *Id.*; see, Disability Discrimination Guidelines, at 7-8. The Commission has broadly construed an employer's obligation, once it knows or reasonably should know that an employee needs an accommodation, to "search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee." Forest, 23 MDLR at 117, *quoting*, Mortimer v. Atlas Distributing Co., 17 MDLR 1713, 1715 (1995). As stated in Mazeikus, 22 MDLR at 68-69, "[t]he importance of this interactive process cannot be overemphasized. It is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations."

I find that Respondent had an obligation to discuss possible alternative reasonable accommodations with Complainant before it unilaterally decided to replace him as NTS Manager. Respondent offered no credible evidence that at any time prior to searching for, interviewing, or hiring a replacement for Complainant's position, did it have an interactive dialogue with him regarding a possible reasonable accommodation. Additionally, Respondent submitted no credible evidence that it ever mentioned to Complainant prior to his return to work that it would have to replace him as a result of his prolonged absence.

In particular, I find Respondent's lack of honesty with respect to its failure to inform Complainant of its intentions and efforts to replace him to be unconscionable and the antithesis of its obligation to engage in an interactive process.¹⁰ Respondent did not introduce any credible evidence that Mann,

¹⁰ Respondent's egregious attitude toward engaging in an open, interactive dialogue continued well after Complainant returned to work. Specifically, in January 2000, Respondent

Baldwin, Peterson, or Leathers apprised Complainant of its decision to replace him until he returned to work. At a minimum, Respondent should have told Complainant that it could not keep his position open indefinitely, and if he did not return to work by a specified date, it would then need to replace him.¹¹ Although I do not believe Mann expressly promised or guaranteed Complainant that he would keep the NTS Manager position open, I credited Complainant's testimony that Mann never indicated his job was in jeopardy. More importantly, Respondent did not have any discussion with Complainant about any possible accommodations for his disability until he actually returned to work on September 20, 1999. By that time, however, Respondent had already unilaterally decided to replace him with Stack and demote him to TS Specialist. Respondent's unilateral actions are clearly inconsistent with the Disability Discrimination Guidelines, which encourage an employer to work with a disabled employee to identify reasonable accommodations. Kuhn v. The Kimball Companies, 23 MDLR 331, 336 (2001). Respondent's failure to discuss or conduct a reasonable investigation of a means to reasonably accommodate Complainant's disability constituted a failure to provide Complainant with a reasonable accommodation. Consequently, Complainant has established a prima facie case of disability discrimination in violation of M.G.L. c. 151B, § 4(16).

attempted to link its willingness to provide Complainant with a reasonable accommodation with the waiver and release of all his claims.

¹¹ I do not believe it would have been reasonable to expect that Respondent had to provide Complainant with an indefinite leave of absence as an accommodation for his disability. But Respondent still had an obligation to discuss and investigate possible reasonable accommodations. See, Russell, 437 Mass. at 455 (an open-ended or indefinite leave extension would not be a reasonable accommodation under G.L. c. 151B, § 4(16), while a request for a limited extension, setting a more definite time for the employee's return to work, may constitute a reasonable accommodation based on the circumstances).

The burden now shifts to Respondent to prove that the reasonable accommodation would pose an undue hardship on its business. As discussed at length above, Leathers and Peterson testified that Respondent's customers were not getting necessary support services previously provided by Complainant as a result of his absence. They claimed that Complainant failed to give them any assurances that he would be returning to work in the near future and, thus, they were compelled to fill his position out of business necessity. Lastly, Leathers stated that when Complainant returned to work, Respondent had an urgent need for a full-time NTS Manager and Complainant's restrictions prevented him from working on a full-time basis or fulfilling the responsibilities of the position.

Although I believe Complainant's absence likely had some adverse affect on Respondent's dealings with its customers, Respondent offered no specific credible evidence regarding the extent of such problems. In addition, Leathers and Peterson's testimony regarding the effects of Complainant's absence on Respondent's business was based almost exclusively on hearsay information and, therefore, I give their testimony considerably less weight. Moreover, Leathers could hardly determine that Complainant's restrictions prevented him from fulfilling the responsibilities of NTS Manager, when neither Leathers nor Peterson discussed the extent of Complainant's limitations with him prior to making their determination that he could not perform the job. Under these circumstances, Respondent has failed to demonstrate that allowing Complainant to continue to work as NTS Manager on a part-time basis for a limited period would constitute an undue hardship on its business. Therefore, Complainant

has established that Respondent engaged in unlawful disability discrimination in violation of M.G.L. c. 151B, § 4(16).

I do not believe, however, that Complainant has established a claim of constructive discharge. In order to establish constructive discharge, Complainant must demonstrate that Respondent made his work environment so intolerable that a reasonable person would, in his position, feel compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995); Dean v. Massachusetts Turnpike Authority, 23 MDLR 97, 100 (2000). To prove that “intolerable” working conditions existed, Complainant must show that the “working conditions were so difficult or unpleasant that a reasonable person in [their] shoes would have felt compelled to resign.” Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986). Here, Complainant testified that he decided to look for another job because he believed he was in a dead-end position at BTE and he felt embarrassed and demeaned as a result of his demotion. He had also hoped to find a job with a better salary. With respect to his working conditions prior to leaving, Complainant admitted that Stack respected him, treated him fairly, never complained about his work, gave him a positive performance review, and approved a raise. Although Complainant was clearly embarrassed and frustrated about his demotion and his loss of status within the company, he has not presented sufficient credible evidence that that his working conditions were so intolerable that he was compelled to leave. Therefore, he failed to establish that the circumstances underlying his decision to leave the company constituted a constructive discharge.

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission has broad discretion to fashion remedies best to effectuate the goals of G. L. c. 151B. Conway v. Electro Switch Corp., 825 F.2d 593, 601 (1st Cir. 1987). College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 170 (1987). This includes an award of compensatory damages designed to make the aggrieved party whole, and damages for emotional distress suffered as a direct and probable consequence of Respondent's unlawful discrimination. Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988); College-Town, 400 Mass. at 169 (1987); Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 315 (1976). Complainant seeks to recover damages for back pay, front pay, loss of the use of a company vehicle, and for the emotional distress he suffered as a direct and probable result of Respondent's unlawful discrimination.

A. LOST WAGES AND LOSS OF COMPANY VEHICLE

Complainant is entitled to back pay stemming from Respondent's unlawful discrimination. Specifically, he is entitled to recover his lost wages from the date his salary was reduced as a result of his demotion on February 7, 2000, until he voluntarily left the company on September 15, 2000. Consequently, Complainant shall be awarded back pay in the amount of \$10,594.95.¹² In addition, Complainant is entitled to compensation for the loss of the use of the company automobile from November 1, 1999 to September 15, 2000, in the amount of

¹² See note 6, *supra*.

\$6,285.00.¹³

However, I do not believe Complainant is entitled to lost wages for the period after he voluntarily left Respondent for other employment since he has failed to establish a claim of constructive discharge. In addition, I do not believe front pay would be appropriate in this case. The Commission and the courts have long held that given the speculative nature of front pay, such an award will be made only in very limited instances, such as where the discriminatory act occurs near an individual's retirement date or where comparable positions would be difficult to find. Williams v. New Bedford Free Public Library, 24, MDLR 171, 173 (2002) (Full Commission), Kealy v. City of Lowell, Dept. of Public Schools, 21 MDLR 19, 24 (1999), Madden v. Town of Falmouth Harbormaster Waterway Dept., 15 MDLR 1949, 1967-1968 (1993). Although Complainant was fifty-four years old at the time he left Respondent, he failed to provide credible evidence that he had no likelihood of future earnings. In fact, Complainant left Respondent for a comparable position at another company, albeit at a slightly reduced salary. Moreover, Complainant's inability to obtain a comparable position in the future would just as likely be the result of his termination from his subsequent employer for poor performance. An award of front pay would, therefore, be too speculative in absence of sufficient evidence that as a result of Respondent's unlawful discrimination, Complainant had no opportunity for future earnings.

¹³ See note 7, *supra*.

B. EMOTIONAL DISTRESS

Complainant is also entitled to monetary damages in compensation for the emotional distress he suffered as a direct and probable result of Respondent's unlawful discrimination. Buckley Nursing Home, 20 Mass. App. Ct. at 182.

Complainant testified credibly that the demotion caused him considerable emotional distress. He claimed that when Leathers and Peterson first informed him that he was being replaced, he was shocked, devastated and very upset. Complainant was particularly troubled by the demotion because he had previously received good performance reviews, bonuses for his commendable work, and regular wage increases. He claimed he felt as if Respondent had merely cast him aside. Moreover, Complainant testified credibly that after the demotion he felt embarrassed and demeaned, particularly since Respondent had assigned him to perform work that had been previously done by a first-year employee with no experience. In addition, he testified credibly that he and his wife suffered substantial financial strain as a result of his heart attack and the demotion caused them to fear that they would never be able to recover from their dire financial situation. Although I credited Complainant's testimony regarding his wife's emotional stress, she is not a party to this action and, therefore, her damages are not compensable in this action. Notwithstanding, I conclude that Complainant is entitled to an award of \$55,000.00 in damages in compensation for the emotional distress he suffered as a direct and probable consequence of Respondent's unlawful conduct.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent, Building Technology Engineers, Inc., is hereby ordered:

1. To pay Complainant, Gerald German, within sixty (60) days of receipt of this decision, \$10,594.95 in back pay, and \$6,285.00 for the loss of the use of company vehicle, for a total of \$16,879.95, plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
2. To pay Complainant, Gerald German, within sixty (60) days of receipt of this decision, the sum of \$55,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. To conduct basic annual training sessions on disability discrimination for all managers and supervisors employed by Respondent in Massachusetts. With respect to such training:
 - a. Each training session for managers and supervisors must be at least six (6) hours in length. All managers and supervisors, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for

the next five (5) years, for all new supervisors and managers who were hired or promoted after the date of the initial training session.

- b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified disability discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.
- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who

attended each training session, and the date and time of each training session.

e. In the event that Respondent's company is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's business (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

iv. Respondent continues to retain an interest in the successor entity.

f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

4. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent

fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 14th day of November, 2003.

EDWARD R. MITNICK
Hearing Officer