

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & GUY DOBLE,
Complainants

v.

DOCKET NO. 05-BEM-01948

ENGINEERED MATERIALS
SOLUTIONS,
Respondent

Appearances:

Brian T. Hatch, Esquire for Guy Doble
J. Allen Holland, Jr., Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 21, 2005, Guy Doble filed a complaint with this Commission charging Engineered Materials Solutions (“EMS”) with discrimination on the basis of age and handicap, in violation of M.G.L. c.151B §4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified to public hearing. A public hearing was held before me on December 2 and 3, 2008. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Respondent Engineered Materials Solutions, located in Attleboro, Massachusetts, was formed in November 2000, at which time it took over the site from its predecessor, Texas Instruments. Respondent is a metals bonding and cladding company that creates thin sheets of various types of metals and under heat and pressure combines metals,

creating a material that it has the properties of both metals. These materials are sold primarily to the construction and automobile industries. Complainant and a number of other employees came to Respondent from Texas Instruments.

2. Complainant Guy Doble resides in North Attleboro, Massachusetts. His date of birth is December 28, 1947. (Ex. R-6) Complainant worked for Respondent and its predecessor, Texas Instruments for almost 35 years from 1971 until April of 2005.

3. Complainant testified that during his years at Respondent he had performed just about every job, including operating a fork lift and nearly every machine.

4. From 1971 until 2000, Complainant worked on the bonding line as a helper to the bonding mill operators. The job required climbing a ladder and using a cutting tool weighing 100 to 150 lbs. In addition Complainant was required to change brushes on the bonding mills, which included getting on his knees to push in the large brushes located at the bottom of the mills. Complainant worked on the bonding line until he had surgery on his knees in 1999. John Devlin, also a former Texas Instruments employee, was Complainant's supervisor from approximately 1998 to 2002. Kirke Calley became his supervisor sometime in 2002 or 2003.

5. Complainant testified that he has suffered from arthritis in his back and knees since the mid 1990's. Complainant had arthroscopic surgery in both knees in the mid 1990s and in 1999 he underwent a second surgery, an osteotomy that helped alleviate the pain in his knees to some degree. However, he continued to have back pain and his knees were sore by the end of his shift. Complainant began seeing a chiropractor in 2000 to help with his pain.

6. Complainant testified that when he returned to work following his 1999 surgery, his then supervisor, John Devlin assigned him to the position of roll change operator, a less strenuous position, in order to accommodate his arthritis. I credit his testimony that Devlin made this assignment to accommodate Complainant.

7. From 2000 until April 19, 2005, Complainant worked as a “roll change operator,” in the roll change area, a satellite support area to the bonding mills. Complainant’s job was to take apart, clean and maintain the 6,000 pound work rolls utilized by the bonding mill operators and have them ready and queued up for return to the bonding mills. This job involved occasional light lifting. At first, Complainant worked with roll change operator Rita Hall, who taught him the job. She left the company a short time later due to illness. After Hall’s departure, Complainant became the sole roll change operator.

8. Complainant was a good employee who consistently received positive performance appraisals. Until 2004, Complainant worked from 6:30 a.m. to 3:00 p.m., five days per week. Complainant was able to perform the duties of a roll change operator although his knees were sore by the end of the shift.

9. Kirke Calley worked for Respondent from approximately 2003 until he was laid off in mid-2008. In 2004 and 2005 Calley was a front end supervisor and was responsible for planning, production, scheduling, budget and other management duties. Calley supervised Complainant in the roll change area and testified that he never had problems with Complainant’s performance.

10. Kerrin Servais has been Respondent’s human resources director for 5 ½ years; previously she held the position of manager to the business section and had worked

for Texas Instruments for 3 ½ years. Servais oversees all personnel issues including administering benefits, negotiating insurance policies, conducting risk analysis, and implementing compensation and staffing decisions. Servais reports to Respondent's CEO Eric Olson. Servais testified that when she came to Respondent from Texas Instruments, Respondent employed 500 people at the Attleboro location and that it currently employs 325 people. Servais testified that Respondent had never denied an accommodation to an employee who was disabled and that Respondent's nurse, Barbara Lewis, would work with employees to find them suitable positions.

11. Lisa Doherty has been employed by Respondent for eight years. Prior to that she worked at Texas Instruments for ten years. She has been an HR generalist for five years. Her duties include employee benefits, disciplinary matters, and processing new hires and terminations. Doherty reports to Kerrin Servais.

12. Barbara Lewis has been employed as a registered nurse at Sturdy Memorial Hospital in Attleboro for nine years. In 1999, through a contract between Texas Instruments and Sturdy Memorial and, since 2000, between Respondent and the hospital, Lewis has provided services on-site for 32 hours per week, including performing hearing, vision and heavy metals tests, processing workers' compensation and short-term disability claims, and assisting employees whose conditions require light duty or restrictions. She consults with employees who have suffered work-related injuries or other health problems. Lewis maintains records of those employees who consult with her in a locked file cabinet. She does not share their information with Respondent.

13. Lewis testified that whenever an employee informs her that he cannot perform an aspect of his job, she requests documentation from the employee's physician

and if such information is unavailable, she sends the employee to a physician for examination. She then provides the information to the human resources department so that it may determine whether Respondent can make an appropriate accommodation for the employee. Lewis testified that she never received a request for accommodation from Complainant or medical documentation from Complainant's physician during the course of his employment. According to Lewis, Respondent is a unique company in that it has never denied a request for accommodation from an employee. I credit her testimony.

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14. In 2004, because of an increase in business, Respondent changed its work schedule for all manufacturing department employees, including Complainant, from three eight-hour shifts per day to an alternating work schedule ("AWS") also referred to as a "compressed work week." The AWS is composed of two 12-hour day shifts and two night shifts, each on a two-week rotation. Complainant worked the day shift from 6:00 a.m. to 6:00 p.m. The first week he worked Monday and Tuesday, had Wednesday and Thursday off and worked Friday, Saturday and Sunday. The second week he had Monday and Tuesday off, worked Wednesday and Thursday and had Friday and had Saturday and Sunday off. The other day shift employees worked the opposite schedule. The two nights shifts followed a similar schedule working from 6:00 p.m. to 6:00 a.m. Complainant testified that when he worked the 12-hour shift, his legs were throbbing in pain by the end of the shift.

15. Complainant worked the 12 hour-alternating work shift for a period of 14 months. During this time he never inquired about working fewer than 12 hour shifts, despite being in great pain and despite that fact that the three additional hours in the shift meant there was not enough roll changing work to perform.

16. Complainant testified that he often complained about his pain to Barbara Lewis, whose office was in close proximity to the roll changing area. Complainant testified that Lewis, who checked his blood pressure weekly, suggested he obtain a note from his surgeon recommending him for light duty. Complainant testified that he told Lewis he did not want to work light duty. I credit his testimony that he had these informal conversations with Lewis.

17. Lewis testified that she had known Complainant since 2001 when he came for treatment of a work-related injury and that her conversations with Complainant primarily concerned that injury and a hearing test. Complainant also reported to her that he was taking a new blood pressure medication. (Ex. R-3) Lewis denied that Complainant ever told her that he suffered from arthritis or that he was in pain and her records contain no information regarding that subject. Complainant never told her he was unable to perform his work or that he could not work the AWS or a 12 hour day. While I credit Lewis' testimony that Complainant never made a formal request for an accommodation, I do not credit her testimony that he never discussed his arthritis or his being in pain.

18. Complainant testified that he frequently discussed his pain with Calley and he often complained to Calley about frequently having to climb the stairs to Calley's office. I credit Complainant's testimony that he discussed his arthritis with Calley in casual conversation. Calley did not recall Complainant discussing his arthritis with him.

19. Calley testified that the roll change job became incompatible with the AWS for scheduling reasons and Complainant was often left with no work to do. For this reason, in February 2005, Calley obtained permission from his superiors and the human

resources department for Complainant's schedule to revert to an eight-hour per day, five day per week schedule. Complainant testified that working the eight-hour day lessened the pain from his arthritis and he told Calley that his "knees and back thanked him" for the change. Calley did not recall Complainant complaining about pain in his knees and back and testified that he had no knowledge of Complainant's health condition. Calley testified that he did not recall Complainant's making such a remark but that he may have done so. I credit Complainant's testimony that he was grateful for the change back to the eight hour per day schedule. I find that the change was made for scheduling reasons and not to accommodate Complainant's arthritis.

20. Michael Andrade, age 54, has worked for Respondent on the bonding line for 30 years. Andrade has worked the AWS since 2005. He testified that Complainant was happy to return to an 8-hour day in 2005 because it was far better for his health. He stated that the lead man and bonding line operators took care of the rolls when Complainant was not at work. I credit his testimony in its entirety.

21. Richard Lane, aged 44 has worked for Respondent 25 years. He confirmed that the milling operators took care of their own rolls when Complainant went home for the day; Lane stated that after Complainant left the company, the operators continued to maintain their own rolls and that for a period of time, no one was assigned the position of roll change operator.

22. In April of 2005, for economic reasons, Respondent underwent a reorganization wherein 42 employees were laid off and other employees were reassigned to different positions. Servais testified that in implementing the reorganization, Respondent considered employees' skills, flexibility, attitude, performance and seniority.

She stated that seniority was considered favorably. In addition, Respondent considered the areas where it needed to reduce the work force. Servais testified that Respondent did not consider Complainant for lay-off because of his experience and good work record and a desire not to lose him. Employees who were laid off in April 2005 received severance packages. Out of 42 persons laid off; three were in their forties, 16 were in their fifties; nine were in their 60s and one was in his 70s.¹

23. Calley was involved in the lay off decisions. He testified credibly that as part of the reorganization, he and his supervisor chose to eliminate the roll change operator position because there was not enough work and the bonding mill operators could handle the duties of that position without much effort. Calley testified that Complainant's age and physical condition were not factors in eliminating his position and Complainant was never considered for lay off because Respondent wanted to keep him on. (Ex.C-2) Calley testified that Complainant was to be assigned as a bonding mill helper where he was to assist the lead person to set up the bonding mill machine. This job involved some lifting and kneeling to slide the brushes into the machine but he was not required to pick up the brushes and would only rarely have to lift up to 50 pounds. According to Servais, there is seating available on the bonding line and there are tools to help employees lift brushes and heavy objects.

24. On the morning of April 19, 2005, before Complainant's shift began, Calley approached Complainant and informed him that his position was being eliminated; that his duties would be performed by the mill operators and that Complainant was being immediately assigned to the bonding line as a bonding mill helper and that he would begin working the 12 hour AWS. According to Complainant, he reminded Calley that his

¹ There was no evidence of the ages of those remaining in Respondent's work force.

previous supervisor had taken him off the mills and placed him in the roll change area because of his arthritis. I credit his testimony. Calley responded that it was the decision of human resources to put him on the bonding mill line. Calley testified that Complainant was very disappointed and unhappy about the change, because he did not like the AWS and did not want to work weekends. I do not believe that this was the primary reason for Complainant's upset, but find he was concerned about his ability to work longer hours at a more difficult assignment.

25. After talking to Calley, Complainant proceeded to the bonding lines where line employees were in the midst of changing the brushes on a milling machine. Complainant testified that he got down on his knees to assist them with pushing the large bottom brushes in and when he finished both brushes he could barely get up off his knees. Calley was walking nearby at the time and Complainant approached him and said he had to call his wife because she did not want him to work a 12-hour shift. Complainant called his wife who told him not to return to the 12-hour shift. Complainant then told Calley "I can't do this any more." Calley responded that there was nothing he could do because he knew of no other available positions and suggested Complainant speak to someone in the human resources office to see if they could work something out. Calley told Complainant he would notify human resources to let them know he was coming. After that interaction, Calley never saw Complainant again.

26. After speaking with Calley, Complainant went to the human resources office and spoke to Lisa Doherty. Complainant told Doherty that he had just attempted unsuccessfully to do the milling helper job because arthritis in his back and knees prevented him from working in a kneeling position. He told Doherty that he could do

any other eight-hour job and he could drive a fork lift or do the roll change operator job for unlimited hours, but he could not work 12 hours on the mill. Doherty responded that things were slow and Respondent had no other job to offer him. Complainant then told her that he wanted to resign immediately. Doherty asked him if he was sure he wanted to resign and if he wanted to take some time to think about it. Complainant responded that he had already called his wife, who advised him to quit. Doherty then said she would process the paperwork and printed out a voluntary termination notice which Complainant signed. She reviewed Complainant's pension and 401K benefits with him. Complainant testified that he was hurt that neither Servais nor Calley came to discuss his staying or finding him another position. He testified that he was hurt that despite being a good employee for 33 years, he received no handshake and no "thank you." He stated that everything was happening so fast that he was confused and did not know what to do. I credit his testimony.

27. Doherty testified that prior to meeting with Complainant she was not aware that he had any disability or impairment. Doherty took notes during their discussion which she later typed. She stated that Complainant told her he could not and did not want to work 12 hour days and did not want to work on Sundays. (Ex.R-4; R-5) She testified that she would have taken note of any physical impairments if he had mentioned them at the meeting. After Complainant signed his resignation and left her office, Doherty processed the paperwork necessary for Complainant to receive his pension and 401k benefits. (Ex. R-6) Doherty testified that she did not offer Complainant a severance package because he resigned and was not laid off. Doherty testified that after Complainant resigned, another employee was assigned the bonding mill helper position,

possibly the person who had previously filled the position and was scheduled for lay-off. I do not credit Doherty's testimony that Complainant never mentioned his physical disabilities at the meeting. I otherwise credit her testimony.

28. Servais testified that after Doherty spoke with Complainant on April 19, 2005, Doherty came into her office and told her that Complainant had resigned. Servais took no action at that time. Servais testified that on or about April 20, 2005, Complainant's wife Dianne Doble called Servais and told her that Complainant could not do the bonding mill helper job and should have been given a severance package. She told Servais that she was going to send her notes from Complainant's doctors. Servais told her there was nothing more she could do because Complainant's termination had already been processed and he had voluntarily signed the paperwork. Servais then told Ms. Doble that she had to speak to Complainant directly. Servais testified that Complainant then got on the phone and told Servais that because he had a medical condition, he was unable to do the bonding mill helper job and was upset that his job had been changed. Complainant testified that he also told Servais that he could not work more than eight hours per day. Servais testified that she asked him if he would like to return to the mill helper position and he said no, that he wanted a severance package. Servais told him that Respondent had no other position for him and that Respondent had no record of his having a medical problem with his knees. I credit her testimony regarding her conversation with Complainant. In June 2006 Respondent hired Janet Kennedy, age 51, as a roll change operator.

29. On April 20, 2005, Robert Lambe, M.D. sent a fax to Lisa Doherty as follows: "Guy Doble has severe osteoarthritis which primarily affects his back and knees.

He is no longer able to perform job duties that require strenuous physical effort and long hours.” (Ex.C-5) In a letter of the same date, Chiropractor Necole LaRue wrote: To whom it may concern: “Please be advised that Guy Doble has been under my care since April 10, 2000 for chronic back pain...Based on Mr. Doble’s history I feel that accepting a position with the hours and physical demands of the position recently offered to him would have been detrimental to his back condition.” (Ex. C-6)

30. Doherty testified that Dianne Doble called her one or two days after Complainant’s resignation, to find out if she had received the faxes from Complainant’s physicians. Doherty told her she had received the faxes, and asked her why she sent the letters after Complainant had quit and according to Doherty, she asked Ms. Doble whether Complainant wanted his job back and she said “no.” I credit her testimony.

31. In an undated memorandum entitled “conversation with Kirke” Doherty noted that Complainant never mentioned his handicap to Calley, and that he took every scheduled Sunday off. The memo also stated that Complainant told Calley that he did not want to work on the AWS. (Ex. R-7) Doherty only vaguely remembered the conversation with Calley and only after prompting by Respondent’s counsel.

32. Barbara Lewis testified that after Complainant submitted his resignation, Servais showed her a fax from Complainant’s doctor regarding his physical limitations. Lewis testified that she could not act on the information because Complainant was no longer employed by Respondent, however, if he had not resigned, she could “absolutely” have assisted him by determining his limitations in consultation with him and his physician and working with HR on accommodating his needs. Lewis testified that many employees in the bonding mill helper position have worked limited hours or have been

given lifting restrictions. They have also been assigned helpers or have even changed jobs to accommodate medical conditions. I credit her testimony.

33. Complainant testified that after his separation from employment he became very depressed and frequently cried. He stated that at times when he was really upset, his brother-in-law tried to calm him down. He testified that he felt very bad about his wife going to work while he stayed home, especially after having worked at Respondent for 33 years. As a result of his depression, he started drinking more than usual. I credit Complainant's testimony that the loss of his job was devastating to him.

34. Brian Auclair, Complainant's brother-in-law, lives with Complainant and his wife. Auclair worked at Respondent until 2002 when he incurred an injury. Auclair confirmed that Complainant was very upset and cried after losing his job. Auclair stated Complainant was anxiety ridden and very emotional and had difficulty adjusting to not working at that stage of his life. I credit Auclair's testimony.

35. Dianne Doble testified that on the day of Complainant's separation she came home and found Complainant sitting outside. He was very upset and broke down in tears. She stated that after his separation from Respondent, Complainant was extremely depressed and cried every day when she went to work. She testified that all his life, Complainant has kept everything inside and she could see that he was under a great deal of stress. He would not talk and he did not want to go out in public or go out to parties. He sat in a chair and stared into space and cried; he would watch television without comprehending what he was watching. She described him as desolate. She testified that their children could see the change in him and felt that he lost time with his son when he could have been happy. I credit her testimony.

36. Complainant's salary at Respondent was \$37,065.60 per year for an eight hour position. (stipulated facts) Complainant applied for and received a total of \$12,720.00 in unemployment benefits in 2005. (Ex. C-3)

37. After leaving Respondent, Complainant saw his surgeon who advised him that he would eventually need knee replacements. Complainant sought work through the state Division of Employment and Training and by making telephone calls to prospective employers, whom he advised of his impending knee replacement surgery. After revealing his medical plans to prospective employers, they were not interested in hiring him. I credit his testimony.

38. In October 2005, Complainant had knee replacement surgery on both knees. He was hospitalized for about a week and returned home on October 31, 2005. He testified that a week after the surgery he was diagnosed with a heart condition and was placed on Coumadin, a blood thinner, and could no longer work at any factory job. He testified that at that point the condition of his knees and back prevented him from working more than a couple of hours per day. I credit his testimony.

39. Complainant testified that after his unemployment compensation benefits expired, he applied for and began receiving Social Security Disability benefits in late 2005 or early 2006.

40. In September 2006, Complainant began working part-time as a pool aide at the Attleboro YMCA. He initially worked three hours per day Monday through Friday but had to cut down on his hours and eventually quit altogether because the job was too hard on his knees and back. I credit his testimony.

41. In 2007, Complainant, a combat veteran, decided to seek counseling at the Brockton VA Medical Center in order to deal with issues surrounding his service as a Marine in Viet Nam. Just before his first scheduled visit, Complainant's son tragically died in a car accident. Thereafter, Complainant began treatment with psychologist Virginia Graham at the VA, for grief counseling related to the death of his son and for Post Traumatic Stress Disorder relative to his military service. Complainant testified that he also discussed with Graham the events surrounding his separation from Respondent. Complainant told Graham he was upset and depressed about the treatment he received from Respondent and felt bad that after 33 years on the job losing his job had taken a lot out of him. I credit his testimony. (Ex. C-4)

41. In a medical note dated December 31, 2007, Graham noted: [Complainant] was let go in 2005 when he was unable to perform a different job within the company because of his knee problems...He harbors bitterness about the manner in which he was let go, after being a dedicated worker for 33 years. He is exhibiting symptoms of depression related to the 'blow' to his self-esteem after giving so much to his employer and then being treated in such a disrespectful manner." On February 19, 2008 he reported to his therapist that he was devastated by the treatment he received from Respondent (Ex.C-4)

III. CONCLUSIONS OF LAW

A. Elimination of Position

In April 2005, Respondent underwent a reorganization due to an economic downturn and eliminated some positions, including Complainant's position of roll change operator. Respondent laid off 41 employees and transferred Complainant and other

employees to other positions. There was uncontroverted evidence that Complainant's position was eliminated and that his duties were absorbed by bonding mill workers and that his position was not filled until June 2006. Therefore, I conclude that Complainant has failed to establish that the elimination of his position was in any way a pretext for age or handicap discrimination. ²

B. Handicap

Complainant alleges that after his transfer to a position that he could not perform without accommodation, Respondent failed to consider or take any steps to reasonably accommodate his handicap, resulting in his constructive discharge from employment. To state a prima facie case of discrimination based upon Respondent's failure to accommodate his handicap, Complainant must demonstrate that he is a handicapped person within the meaning of the statute; he is qualified for the position, i.e., able to perform the essential functions of the job with reasonable accommodation; he requested a reasonable accommodation; and he was prevented from performing his job because Respondent failed to reasonably accommodate the limitations associated with his handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

Complainant has established that he is a handicapped person within the meaning of

² However, this does not, as Respondent suggests, end the inquiry. Respondent argues that once it has been shown that the elimination of Complainant's position was for legitimate, non-discriminatory reasons, it has discharged its obligation under G.L.c.151B. I do not concur. Because an employer seeks to reduce its work-force does not mean that its duty to accommodate remaining employees who are disabled ends.

M.G.L.c.151B because of his severe arthritis in his knees and back requiring him to limit standing, sitting and kneeling.

In order to establish that he is a qualified handicapped person, Complainant must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. Once Complainant has identified his disability and requested an accommodation from his employer, it is incumbent on the employer to determine if the accommodations sought are reasonable and to engage in an interactive dialogue with Complainant. Once the employer is placed on notice that an employee needs an accommodation, the employer has an affirmative duty to engage in the interactive process in an attempt to offer some form of reasonable accommodation.

MCAD GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP – CHAPTER 151B, pp.15-16. Mazeikus v.Northwest Airlines, 22 MDLR 63, 69 (2000).

The employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive process of determining one. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; EEOC Notice Number 915.002, 10/27/02.

I conclude that when Complainant informed Lisa Doherty that he was unable to work 12-hour days as a bonding mill helper because of problems with his knees and back, but would work any eight-hour per day job, this was sufficient notice to trigger Respondent's obligation to engage him in the interactive process, in order to determine whether there was any accommodation feasible that would allow Complainant to perform the job he was assigned to, or if any other jobs were available that met his needs.³ Instead of engaging in an interactive process with Complainant, Respondent's H.R. representatives made it clear to Complainant that there were no alternative positions available and no other work he could perform. They then disavowed any knowledge of his disability and asked him only if he wanted to return to the job he had clearly stated he could not do. I conclude that it was this failure to engage in the interactive process that caused Complainant to resign his position. The abrupt manner of Complainant's reassignment to a new job and a new 12 hour shift with no advance notice, no opportunity for him to discuss his disability and resulting limitations and no discussion of whether and how he might be accommodated resulted in his constructive discharge.

A breakdown in the interactive process by the employer may cause the constructive discharge of the employee. Pearlie Talley v. Family Dollar Store of Ohio, et al, 542 F. 3d 1099 (6th Cir. 2008). Constructive discharge occurs when the employer "materially breaches [an] employee's contract of employment in some manner short of termination" or makes "working conditions so intolerable that the employee feels compelled to quit." Constructive discharge occurs where, "based on an objective

³ Complainant testified that his prior supervisor, John Devlin originally transferred him to the roll change area in 1999, following knee surgery, in order to accommodate his limitations. Whether or not Respondent knew about that accommodation does not alter the fact that Respondent was put on notice of Complainant's handicap on April 19, 2005.

assessment of the conditions under which the employee has asserted [s]he was expected to work, it could be found that they were so difficult as to be intolerable." GTE Prods. Corp. v. Stewart, 421 Mass. 22, 34 (1995). In order to prevail on his claim, Complainant must establish that Respondent made his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. McKinley v. Boston Harbor Hotel 14 MDLR 1226, 1240 (1992). The standard for constructive discharge "is, and should be, a strict one," and requires that an employee must demonstrate that "the threat of physical or psychic harm was so great as to preclude ever returning to work." He must also show that he exhausted all possibilities to continue working and that resignation proved to be the final and only alternative. Id. at 1241. Complainant testified that when Doherty told him that there were no other available positions and faced with immediate re-assignment to a job he could not do, he was confused, upset, and did not know what to do. Knowing that he could not perform the bonding mill helper job for 12 hours a day, and believing that he had no further options, Complainant abruptly resigned his employment. The following day when he sought to discuss some alternative options, Servais told Complainant it was too late for him to provide medical records, yet she nonetheless asked him if he wanted to return to the 12 hour per day position.

The refusal of an employer to participate in the interactive process to explore any reasonable accommodation or to make a reasonable accommodation once one has been identified, is a violation of our discrimination laws. Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination, 441 Mass. 632, 644 (2004). While "there is no obligation to undertake an interactive process if an employer can

conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business,” an employer must provide reasonable accommodation unless it can demonstrate that the accommodation required would impose an undue hardship. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). An employer’s mere contention that it could not reasonably accommodate an employee is insufficient as it is mere speculation. Id. [citations omitted]

Respondent has not offered any evidence whatsoever that the accommodation requested by Complainant, to work an eight-hour day at any number of alternate positions, would have created an undue hardship for the business. On the contrary, at the public hearing Respondent’s head of human resources Kerrin Servais and nurse Barbara Lewis each testified proudly that Respondent had *never* denied an accommodation to an employee and Lewis described Respondent as “unique” in that regard. Lewis testified that if Complainant had not resigned, she could “absolutely” have worked with Complainant, his physician and the human resources department on accommodating his needs. According to Lewis, many employees in the bonding mill helper position had been accommodated with limitations on their working hours, with lifting restrictions; others had been assigned helpers or transferred to other jobs. The day after his resignation, Servais told Complainant that it was too late to accommodate him because his termination had already been “processed.” Complainant’s resignation was treated as a final, irreversible event which precluded further consideration of the matter and any discussion of accommodation. However, Servais simultaneously asked Complainant whether he wanted to return to the helper position, implying that he could have easily

been reinstated. Yet, this offer did not include any accommodation and Respondent was already on notice that Complainant could not perform the position on a 12 hour per day schedule.

I conclude that Respondent's offer to reinstate Complainant to a position he could not perform, after failing to engage in the interactive process or explore any alternative options for keeping him employed, left Complainant with no alternative but to reaffirm his resignation. I therefore conclude that Respondent failed in its duty to explore reasonable accommodation of Complainant's disability which resulted in Complainant's constructive discharge, in violation of M.G.L.c.151B, §4(16).

C. Age Discrimination

Complainant, who was age 59 at the time of his separation from Respondent, argues that he was the victim of age discrimination. I conclude that there is insufficient evidence to establish a prima facie case of age discrimination in this matter. Absent any direct evidence of age discrimination, the only evidence in support of the claim is a list of the employees who were laid off and their ages. While 29 out of the 42 employees laid off were over the age of 40, there is no evidence regarding the ages of employees who remained on the job or were transferred to other jobs as part of the reorganization. Absent such evidence, and given the fact that Complainant was not targeted for a lay-off, I am unable to conclude that age discrimination played any part in his constructive discharge. Therefore, Complainant's claim of age discrimination is hereby dismissed.

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to

Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al. 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on Complainant’s credible testimony, and that of his wife and brother-in-law, I am persuaded that he suffered emotional distress as a result of Respondent’s unlawful conduct. Complainant testified that on the day he was forced to resign, he was hurt that neither Servais nor Calley came to talk him about staying on or the possibility of finding him another position. He testified that he felt very hurt that despite his 33 years of longevity with the company as a good and loyal employee, he received no acknowledgement of his service to Respondent. His reassignment happened so abruptly

that he was confused and did not know what to do. Dianne Doble testified that on the day of his separation she came home to find Complainant sitting outside very upset and he broke down in tears. She stated that he cried constantly when she went to work, was extremely depressed and quiet. She testified further that all his life, Complainant has kept everything inside and she could see that he was under a great deal of stress after leaving his job. She stated that he was desolate, refused to talk and did not want to go out in public or socialize. He would sit in a chair and stare into space and cry and would watch television without comprehending what he was watching. She noted that their children also observed the change in him.

Complainant testified that after his separation from employment he became very depressed and frequently cried and that his brother-in-law, who lived with him, tried to console him and calm his anxiety. He testified that watching his wife go to work while he remained at home after 33 years on the job, made him feel very bad. His depression caused him to drink more.

Brian Auclair, Complainant's brother-in-law, testified that Complainant was very upset and cried frequently after losing his job. According to Auclair, Complainant experienced a lot of anxiety and emotion and had difficulty adjusting to not working.

Complainant sought counseling two years after his separation from employment at Respondent. There is evidence that by then, there were other significant factors contributing to Complainant's depression and his decision to seek counseling; the tragic death of his son in a car accident and post traumatic stress stemming from his service in Viet Nam. Notwithstanding these other stressors, Complainant continued to feel bad about the manner in which he lost his job at Respondent, and discussed this with his

counselor, stating that he was upset and depressed about the way he was treated by Respondent. He expressed feeling very bad about losing his job after 33 years of loyal employment, and stated that it had taken a lot out of him. He still harbored bitterness and felt devastated by the disrespectful manner in which he was let go. He continued to exhibit symptoms of depression related to the 'blow' to his self-esteem at having been treated so badly by his employer after many years of loyal service. Therefore, having taken due notice and consideration of the other significant factors that contributed to Complainant's emotional distress some two years after his termination, I conclude there remains sufficient evidence that the depression and anxiety he experienced in the time period immediately following the loss of his job resulted from his termination and that he continued to be affected by this loss for some time. It is clear that the loss of his job was a significant cause of his emotional pain and suffering after his termination and that the loss of his job continues to affect his emotional well being at the present time. I conclude that an award of \$50,000.00 is appropriate to compensate Complainant for the emotional distress he suffered as a direct result of Respondent's unlawful actions.

B. Back Pay

Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Complainant testified that he sought work by going to the Department of Employment and Training and speaking with an employee designated to deal with veterans. He made some telephone calls but was unsuccessful in obtaining employment when he advised potential

employers of his impending knee replacement surgery. In late October 2005, Complainant underwent that surgery, at which time it was discovered that he suffered from a heart condition that would prevent him thereafter from working in any factory job.

Given these circumstances, I conclude that Complainant is entitled to a period of back pay beginning on April 19, 2005, when he was constructively discharged and ending on October 15, 2005, the approximate date of his knee replacement surgery. Complainant's annual salary at Respondent was \$37,065.60 per year for an eight hour position. Based on the prorated portion of his annual salary and the fact that he received \$12,720.00 in unemployment compensation in 2005, I conclude that Complainant is entitled to an award for back pay in the amount of \$5,812.00.

V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B, §5, it is hereby ordered that:

- 1) Respondent immediately cease and desist discriminating on the basis of handicap.
- 2) Respondent pay to Complainant the amount of \$50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) Respondent pay to Complainant the amount of \$5,812.00 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the

complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 8th day of September, 2009

JUDITH E. KAPLAN,
Hearing Officer