

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ROBERT WELCH,
Complainant

v.

Docket No. 00-230256

THE TRANS-LEASE GROUP, INC.,
Respondent

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

Appearances: Thomas J. Donoghue, Esq., for Complainant
Bradley Pinta, Esq., for Respondents

I. PROCEDURAL HISTORY

On May 15, 2000, Complainant Robert Welch filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against his former employer, The Trans-Lease Group, Inc. ("Trans-Lease" or "Respondent"), claiming it discriminated against him on the basis of disability in violation of M.G.L. c. 151B, § 4(16).

On July 31, 2003, the Commission found probable cause to credit Complainant's allegations. On January 13, 2004, the Commission certified the case for Public Hearing. On April 7, 2004, a Public Hearing was held before me in Springfield, MA. In deciding this matter, I have considered the entire 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, Robert Welch, is a sixty-four (64) year old man who currently resides in Agawam, MA. In 1961, Complainant lost his left foot and ankle in a motorcycle accident and has since worn a below-the-knee (“BTK”) prosthesis. Notwithstanding his condition and his use of a prosthetic device, Complainant has worked consistently as a truck driver for a variety of employers over the past twenty-five years. In November 1999, Complainant applied to Respondent for a job as a truck driver and in February 2000 he began working for the company. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, The Trans-Lease Group, Inc., is a corporation with a place of business in Springfield, MA. Respondent is in the business of leasing qualified, experienced, and duly licensed drivers to operate commercial vehicles for other companies. Although the drivers employed with Respondent operate vehicles for other companies, Respondent paid the drivers’ wages, provided their benefits, and assumed responsibility for complying with all government regulations relative to the employment of each driver, except with respect to providing workers’

compensation. Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Terry Glusko, Respondent's Regional Manager, testified that in November 1999, he received a telephone call from Frank Gentile, the President of Teamsters Union Local 404. Gentile called Glusko to recommend Complainant for an open truck driver's position at Longview Fiber Company. Gentile informed Glusko that he had known Complainant for many years and claimed he was a good and reliable driver. Glusko stated that during the course of their discussion, Gentile never indicated that Complainant had prosthesis or needed a Department of Transportation ("DOT") waiver for his disability. Gentile corroborated Glusko's version of this conversation. Gentile also admitted that he had known Complainant for twenty-five years and had always known that he wore a prosthetic device. However, Gentile testified he was not aware that Complainant needed a DOT waiver to operate a commercial vehicle. He claimed that he had sent Complainant to work as a truck driver for a variety of companies and no employer had ever raised any concerns. In addition, Gentile claimed that other truck drivers who belonged to Local 404 wore prosthetic devices and no employer had ever requested or demanded that any such driver get a DOT waiver. I credit Gentile's testimony.

4. On November 18, 1999, Complainant formally applied to Respondent for a position as a commercial truck driver.¹ Complainant's application made no

¹ Complainant initially claimed he submitted the application in October instead of November. I find this mistake immaterial.

mention of the circumstances pertaining to his amputated limb or his use of a prosthetic device. However, Complainant submitted a "Physical Examination of Drivers" form prepared by Dr. Fernando Jayma, MD, with his application. Dr. Jayma's report, dated November 24, 1998, noted in the "General Comments" section that Complainant had an "artificial (L) leg - fit well." Complainant testified that since 1965, he has had to submit to a Commercial Drivers License ("CDL") physical examination every two years and on each occasion he made the examining physician aware of his prosthesis. He further claimed that he had worked as a truck driver for many different companies and had never experienced any problems with respect to his disability or his use of a prosthetic device. I credit Complainant's testimony.

5. On his employment application, Complainant had indicated that he had previously lost his drivers license for refusing a breathalyzer. Respondent also introduced Complainant's driving record, which indicated that Complainant had participated in a "DWI Alcohol Program" in 1992. Although Respondent presumably introduced this evidence to tarnish Complainant's character and credibility, I find this evidence to be irrelevant to the issue of whether Respondent subjected Complainant to unlawful disability discrimination in 2000. Moreover, I find Complainant's admission of this transgression on his employment application supports the finding that he was forthright and candid with Respondent in his application, especially with respect to the description of his disability ("artificial (L) leg"), as stated on the Physical Examination of Driver form.

6. On November 18, 1999, Respondent issued Complainant a conditional offer of employment letter. According to the specific terms and conditions of this offer letter, Complainant's employment was "conditional upon the satisfactory results of a medical examination and inquiry." The document further stated:

This conditional offer of employment may be withdrawn based upon your failure to satisfactorily complete the medical examination and inquiry. All offers of employment, including conditional offers of employment, may be withdrawn or an employee may be discharged upon determination by [Respondent] that the applicant or employee provided false information during the hiring process including information obtained by [Respondent] through lawful inquiries regarding the applicant's or employee's health, physical condition or workers' compensation history.

7. Complainant accepted the conditional offer of employment in November 1999, but no vacant truck driver positions were available at this time. A position eventually opened at Longview Fiber in February 2000. Complainant then took and passed both a drug test and a road driving test. On February 8, 2000, Complainant began working for Respondent by driving trucks for Longview Fiber. Pursuant to the provisions of the applicable collective bargaining agreement ("CBA"), a newly hired employee is subject to a 45-day probation period, but at the end of 45 day probationary status, the employee is placed on the seniority list and obtains full benefits retroactive back to beginning of his or her probationary status. Glusko stated that Respondent informed Complainant that upon the successful completion of this probationary period, he would be offered the next full-time driver position available at Longview Fiber.

8. Glusko testified that when he initially reviewed Complainant's Physical Examination of Driver form, he believed Dr. Jayma's "General Comment" stated,

“arthritis (L) leg”, as opposed to “artificial (L) leg.” He claimed he did not take particular notice of the comment because Dr. Jayma indicated in the “Health History” section of the form that Complainant had “no” permanent defect from illness, disease or injury. However, Glusko stated that on February 23, 2000, Respondent’s Director of Safety brought to his attention that Dr. Jayma’s comment appeared to state “artificial”, not “arthritis.” Glusko testified that he immediately became concerned that Respondent faced potential liability for violating DOT regulations. According to Glusko, if Complainant had an amputated limb, he could not operate a commercial vehicle without the requisite DOT waiver. He also stated that he became concerned about certain significant safety-related issues that would arise from a driver with an amputated leg operating a commercial vehicle. I credit Glusko’s testimony regarding the necessity of Complainant having a DOT waiver in order to drive a commercial vehicle. I also accept that the word “artificial” as written by Dr. Jayma on Complainant’s physical examination form is not easily legible. However, I find that Dr. Jayma’s comment is not reasonably susceptible to a different interpretation, especially since the words “fit well” are legible. Thus, I believe Glusko likely failed to either read the physical examination form or closely examine the information stated therein before he hired Complainant.

9. In order to clarify Complainant’s condition, Glusko claimed he attempted to contact Dr. Jayma on February 24, 2000. According to Glusko, he explained the language discrepancy to Dr. Jayma’s nurse who conveyed the information to Dr. Jayma. Glusko testified that at the end of the day, he received a return

telephone call from a nurse in Dr. Jayma's office who advised him that Dr. Jayma could not read his own handwriting and thus could not determine whether or not the word on the document read "artificial" or "arthritis." I decline to credit Glusko's testimony on this matter.

10. Glusko testified that he then decided to contact Complainant directly and, on the evening of February 24, 2000, he called Complainant at his home some time between 6:00 - 6:30 pm. He claimed that a woman (Welch's wife) answered the phone and then gave the phone to Complainant. Glusko stated that after Complainant got on the phone, he specifically asked him: "Do you wear any kind of prosthesis on either your right or left leg?" According to Glusko, Complainant answered: "No, I do not, but I do have bad arthritis in my left leg and it affects my left foot." Glusko claimed that he then stated, "So you are telling me you do not wear any type of artificial limb, because if you do, you never submitted a waiver to us with your D.O.T. physical." Glusko testified that Complainant responded, "Absolutely not." With respect to his testimony regarding this phone conversation, Glusko read from and referred to typed notes that he prepared on June 8, 2000, over three months after the conversation. Glusko prepared the notes at the request of legal counsel after Respondent received Complainant's MCAD complaint. Glusko claimed that these notes were merely a typed version of contemporaneous hand-written notes he had written during the phone conversation with Complainant. He testified, however, that he had discarded his hand-written notes. Considering the clear importance and relevancy of his contemporaneous notes, I refuse to give his typed notes any weight. His

statements on this matter also appeared scripted and, therefore, I discredit his testimony regarding this conversation.

11. Contrary to Glusko's testimony, Complainant claimed that he was sleeping when Glusko called him at his home at approximately 8:30 pm, not 6:30 pm. Mary Lou Welch, Complainant's wife, likewise testified credibly that she answered Glusko's call around 8:30 pm and she corroborated Complainant's testimony that he was sleeping when the phone rang. Complainant claimed that after he picked up the phone, Glusko stated, "Somebody told me you have a wooden leg or artificial leg." In response, Complainant responded in a somewhat indignant manner, "No, that's not true." Complainant stated that he responded to Glusko honestly because he does not have an artificial "leg", rather, he has a BTK prosthesis for his missing foot and ankle. He also claimed that this was the first time in thirty-five years that an employer had asked him if he was an amputee. Complainant further testified that he thought Glusko sounded drunk. I credit Complainant's testimony regarding this matter. In particular, I find it highly doubtful that Complainant would deliberately misrepresent his disability to Glusko on this occasion considering he gave Glusko a Physical Examination of Driver form only three months earlier that specifically stated he had an "artificial (L) left" and it "fit well".

12. Glusko testified that after he spoke with Complainant, he remained unsatisfied and wanted "get to the bottom of the matter." Consequently, he decided to send Complainant for another DOT physical at Respondent's expense. Glusko then left a message for Complainant to contact him as soon as

possible. When Complainant called Glusko back, Glusko informed him that he had to go for another DOT physical. According to Glusko, Complainant told him that he misspoke the previous evening. In particular, Glusko claimed that Complainant stated, "Terry, this has been bothering me since last night; I do wear an artificial left foot. It happened many years ago in a motorcycle accident and I did not tell you last night when we spoke on the phone because I feared losing this job." Glusko testified that he then told Complainant to contact him after he logged off duty. Glusko stated that when Complainant called him back at the end of the day, he informed Complainant that he was being terminated as a result of his misrepresentations regarding his physical condition. Contrary to Glusko's testimony, Complainant claimed that when he spoke to Glusko on February 25, 2000, Glusko began the conversation by stating, "You have an artificial limb", and then accused him of lying. In response, Complainant stated that he did not lie because he doesn't have an artificial leg; rather, he has a BTK prosthesis. Complainant testified that Glusko then said he could not drive for Respondent until he got a waiver. Complainant claimed that prior to this moment, he had no idea that he needed a DOT waiver because he wore a prosthetic device. I credit Complainant's testimony.

13. After speaking with Glusko, Complainant claimed he was "shook-up." He then called Frank Gentile and informed him what had transpired. Gentile then called Glusko and they discussed the need for Welch to get a DOT waiver. Gentile testified that at no time during their conversation did Glusko mention or insinuate that Respondent terminated Complainant for misrepresentation.

Moreover, Gentile claimed that Glusko left him with the clear impression that Complainant would be rehired after he obtained the DOT waiver. I credit Gentile's testimony.

14. Complainant testified that on February 28, 2000, he spoke with Fred Gruin, Jr., the Acting Field Administrator for DOT, about the process of getting a waiver. He claimed that Gruin explained the procedure for obtaining the waiver, including the requirement that he get additional physical and mental examinations, and pass another road test. Complainant stated that he then called Glusko to update him on the status of his getting the waiver. Complainant believed, as a result of his conversation with Glusko, that he would still be rehired if he obtained the DOT waiver since Glusko never stated anything to the contrary. I credit Complainant's testimony.

15. On March 3, 2000, Complainant saw Dr. Jayma for another physical examination. Dr. Jayma then prepared and issued another Physical Examination of Driver form. Similar to the form he completed in November 1998, in the "Health History" section, Dr. Jayma indicated that Complainant had "no" permanent defect from illness, disease or injury. Furthermore, in the "General Comments" section, he again wrote that Complainant had an "artificial left leg." However, unlike the earlier document, in the section titled "Medical Examiner's certificate", Dr. Jayma indicated that Complainant was "medically unqualified unless accompanied by a 'medical' waiver."²

² The Physical Examination of Driver form dated November 18, 1998, does not appear to have the same pre-printed comment for the physician to indicate whether the driver is "Medically unqualified unless accompanied by a _____ waiver."

16. After passing his medical examinations and another driving test, Complainant obtained the necessary DOT waiver, effective March 14, 2000. Complainant testified that after he obtained the waiver, he went to see Gentile at his office. Gentile then called Glusko to arrange an appointment for Complainant to meet with him. On March 17, 2000, Complainant met with Glusko accompanied by his friend and fellow truck driver, Joe Pieciak. At this meeting, Complainant gave Glusko the DOT waiver. According to Complainant, Glusko then stated he could not put him back at Longview Fiber because “we put a guy on yesterday, but we may be able to put you at Stop & Shop.” Complainant testified that Glusko then stated he would get back to him. He further claimed that Glusko never mentioned anything about being terminated. Complainant stated that as a result of Glusko’s statements, he was still under the impression that Respondent would place him in another job since he had obtained the waiver. Contrary to Complainant’s testimony, Glusko claimed that he told Complainant he was terminated and his having obtained the waiver was a “moot point.” I credit Complainant’s testimony regarding this meeting.

17. On or about March 24, 2000, Gentile and Union Steward Gerald Reed met with representatives from Respondent, including Glusko, to discuss pending grievances. During the meeting, Gentile mentioned to Respondent’s representatives that he had expected Complainant to be back at work by now since he had the waiver. According to both Gentile and Reed, Respondent’s representatives responded that they had brought the matter about rehiring Complainant to the President of the company, but they were then told not to

rehire Complainant because the company had “concerns about workers’ compensation.” I credit Gentile and Reed’s testimony on this matter.

18. In response to Gentile and Reed’s testimony regarding the meeting of March 24, 2000, Respondent introduced into evidence a form letter given to and signed by Complainant on November 18, 1999, regarding “Workers’ Compensation Payment Responsibility.” The letter stated that Complainant understands that a “Special Employer”, named “Trucklease Corporation”, would be liable for any workers’ compensation payment for injuries to Complainant arising out of and in the course of his employment with Respondent.

Respondent also introduced a “Driver Service Agreement” between Trucklease Corp. and Respondent, which identified the respective contractual obligations of the two companies, including Trucklease’s agreement to provide workers’ compensation to drivers employed by Respondent. Thus, contrary to the assertions of Gentile and Reed, Respondent claimed that it would not have had any concerns about Complainant’s worker’s compensation coverage. Although I credit Glusko’s testimony that a special employer, as opposed to Respondent, provided workers’ compensation coverage to Complainant, I believe Respondent’s agents still informed Gentile and Reed that it could not employ Complainant because it had concerns regarding workers’ compensation.

19. Although Complainant did not introduce any tax returns or W-2 forms regarding his income, he did produce his “Social Security Statement” prepared by the U.S. Social Security Administration. According to the Social Security statement, Complainant had taxed social security earnings of \$37,136 in 1999.

Complainant testified that after losing his job with Respondent, he attempted to find work where he could in the trucking industry. Complainant had taxed social security earnings of only \$6,901 in 2000; \$5,030 in 2001; and, \$34,786 in 2002. As of the date of the Public Hearing, Complainant was working full-time as a commercial truck driver for Yellow Freight and Consolidated Freightways. I credit Complainant's testimony regarding his earnings.

III. CONCLUSIONS OF LAW

M.G.L. ch.151B, § 4(16) makes it unlawful for an employer to discriminate against an employee on the basis of disability.³ Complainant has alleged that Respondent refused to reinstate him after he obtained the DOT waiver for his prosthetic device and terminated his employment because he was an amputee.

In the absence of any direct evidence of discriminatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1, 10 (1998); Wheelock College v. MCAD, 371 Mass. 130, 137 (1976). First, Complainant must establish a prima facie case of disability discrimination. In order to prove a prima facie claim, Complainant must establish: (1) he suffers from a handicap; (2) he is a qualified handicapped person; (3) Respondent terminated his employment under circumstances giving rise to the inference that the termination was based on unlawful discrimination

³ 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.

based on his handicap; and, (4) the position he had occupied remained open and the employer sought to fill it. Dartt, 427 Mass at 9; LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997). Contrary to Respondent's assertions, Complainant need not show that Respondent terminated his employment "solely" on the basis of his disability in order to establish a prima facie case of discrimination. Dartt, 427 Mass. at 8-9.

As a threshold issue, Complainant must prove that he is a "handicapped person" within the meaning of M.G.L. c. 151B, § 1(17). In this case, Respondent has not disputed that Complainant suffered from the amputation of his left foot and ankle, which affected the major life activities of walking and driving. Consequently, I conclude Complainant has established that he is a handicapped person under the law.

Next, Complainant must establish that he is a "qualified handicapped person" within the meaning of M.G.L. c. 151B, § 1(16). A "qualified handicapped person" is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his or her handicap. I credited Complainant's testimony that despite the loss of his left foot and ankle in 1961, and with the use of a BTK prosthesis, he successfully worked as a commercial truck driver for twenty-five years. In addition, Complainant successfully operated commercial trucks for Respondent in February 2000 notwithstanding his condition. Lastly, Complainant obtained a

DOT waiver on March 14, 2000, and he was otherwise medically cleared to work as a commercial truck driver.

Respondent argued that Complainant is not a qualified handicapped person because he engaged in misconduct warranting his termination. Specifically, Respondent claimed that Complainant lied about his having an artificial limb during his telephone conversation with Glusko on February 24, 2000. The Commission has held that "a disabled individual cannot be 'otherwise qualified' if he commits misconduct which would disqualify an individual who did not fall under the protection of the statute." Sparks v. Massachusetts Elec. Co., 23 MDLR 181,184 (2003), *citing*, Garrity v. United Airlines, Inc., 421 Mass. 55, 62 (1995), *quoting*, Wilbur v. Brady, 780 F. Supp. 837, 840 (D.D.C. 1992).⁴ Thus, an employer may take adverse action against an employee where the employee's misconduct, as opposed to his or her disability, is the motivating factor for the employer's action. See, e.g., Sparks, 23 MDLR at 184 (employee not a qualified handicapped person by virtue of his having engaged in substantial misconduct when he left the scene of an accident and drove under the influence of alcohol in a company vehicle; lied to the employer about his reasons for leaving early one day; and, falsified documents); Covino v. Town of Framingham Bd. of Health, 19 MDLR 67, 71 (1997) (employee who had emotional outbursts in

⁴ In the recent decision of Mammone v. President and Fellows of Harvard College, Lawyers Weekly No. 12-282-04 (September 20, 2004), the Superior Court held that under Garrity, "an employee is not a 'qualified handicapped person' and therefore not entitled to the protection of the c. 151B 'if he engages in conduct significantly inimical to the interests of his employer and in violation of the employer's rules.'" The court further held that "This is true even where an employee's disability arguably causes the misconduct in question."

the workplace and could not perform his job in a professional manner was not a qualified handicapped person); see *also*, Wilber, 780 F. Supp. at 840 (it is a fundamental requirement of any job that an employee not engage in violent or destructive behavior, and not endanger the health or safety of others).

In this case, however, I found that Complainant did not intend to deceive or misrepresent his medical condition or disability during his conversation with Glusko. Although Complainant admitted that he told Glusko he did not have an artificial or wooden leg, I credited his testimony that he responded in this manner because he only wore a BTK prosthesis for his amputated foot and ankle. I further believe that Complainant responded to Glusko's question in a somewhat indignant manner because he had been sleeping and no employer had ever previously asked him if he was an amputee. Moreover, Respondent failed to introduce any credible evidence that Complainant misrepresented his disability on other occasions. To the contrary, I credited Complainant's testimony that he regularly informed physicians during his mandatory CDL physical examinations that he wore a prosthetic device on his left leg. In fact, the Physical Examination of Driver form that Complainant submitted to Respondent only three months earlier specifically stated that he had an "artificial (L) leg" and the prosthesis "fit well." Furthermore, I discredited Glusko's testimony regarding the telephone call of February 24, 2000. Glusko's version of the conversation appeared scripted and created after-the-fact. Instead of relying on his contemporaneous notes, which he discarded, he read from typed notes created after Complainant had filed suit. Moreover, I credited Gentile and Complainant's testimony that

Respondent asked Complainant to obtain a DOT waiver, which he did. Under these circumstances, Respondent has failed to prove that Complainant engaged in misconduct which would otherwise disqualify him from the protections of the statute. Consequently, I conclude that Complainant has established sufficient evidence that he is a qualified handicapped person within the meaning of M.G.L. c. 151B, § 1(16).

I also find that Complainant has established that Respondent terminated his employment under circumstances giving rise to the inference that its action was unlawfully based on his disability. I credited Complainant and Gentile's testimony that Glusko consistently gave them the impression that Complainant would be rehired upon his obtaining a DOT waiver. In particular, they testified credibly that they updated Glusko on Complainant's efforts to get the waiver and at no time did Glusko state that Respondent terminated his employment for misrepresentation. Then, after Complainant got the waiver, Respondent refused to rehire him. According to Complainant, when he gave Glusko the waiver, he told him that his position at Longview Fiber had been filled, but there might be an opening at Stop & Shop. However, a few days later, Respondent's agents told Gentile and Reed that they could not rehire Complainant because they had "concerns about workers' compensation." Considering Respondent's conflicting and inconsistent statements, it is reasonable to infer that Complainant's disability was a motivating factor in Respondent's decision to terminate his employment.

Since Complainant has established a prima facie case of disability discrimination, the burden of production shifts to Respondent to articulate a

legitimate, non-discriminatory reason for its decision to terminate Complainant's employment. Respondent is required to "produce not only evidence of the reason for its action, but also underlying facts in support of that reason."

Abramian, 432 Mass. at 116-117; Wheelock College, 371 Mass. at 136.

Respondent must also "produce credible evidence that the reason or reasons advanced were the real reasons." Wheelock College, 371 Mass. at 138. If Respondent meets its burden of production, then Complainant must show by a preponderance of the evidence that Respondent's action was the product of discrimination based on Complainant's status as a disabled person. Abramian, 432 Mass. at 116-118. Because proof of unlawful discrimination can rarely be established by direct evidence, Complainant may prove that Respondent's discriminatory animus was the determinative cause by establishing that one or more of Respondent's stated non-discriminatory reasons were false, or not the real reasons for its action. Lipchitz, 434 Mass. at 499, 504-505; see, Abramian, 432 Mass. at 118 (finding by jury that at least one of the reasons advanced by defendant was false, in addition to proof of *prima facie* case, sufficient to permit inference that real reason for defendant's action was discrimination). However, Complainant retains the ultimate burden of proving that Respondent's decision to terminate his employment was the result of discriminatory animus. Lipchitz, 434 Mass at 504; Abramian, 432 Mass at 117.

As discussed above, Respondent claimed that Complainant falsely misrepresented his having a prosthesis and, thus, exposed Respondent to potential liability for employing a truck driver without a DOT waiver in violation of

federal safety regulations. As stated in the conditional offer of employment letter issued to Complainant, Respondent had the right to terminate an employee “upon determination by [Respondent] that the applicant or employee provided false information during the hiring process including information obtained by [Respondent] through lawful inquiries regarding the applicant’s or employee’s health, physical condition or workers’ compensation history.” Moreover, even if Complainant did not deliberately conceal his disability, Respondent claimed he was still on probationary status and, therefore, it could terminate his employment without cause. Although I found that Complainant did not deliberately misrepresent his medical condition to Glusko on February 24, 2000, arguably Glusko could have construed Complainant’s statement that he did not have an artificial leg as a falsehood. Therefore, I conclude that Respondent has articulated a legitimate, non-discriminatory reason for its action.

Notwithstanding, Complainant has established that Respondent’s decision to terminate his employment was the product of discrimination based on his status as a disabled person. In particular, Complainant has shown, through Glusko’s inconsistent and conflicting statements, that Respondent’s stated non-discriminatory reason was false and not the real reason for its action. Complainant admitted that Glusko accused him lying on February 25, 2000, but thereafter, Glusko continually left Complainant and Gentile with the impression that Respondent would place him in a job after he obtained the DOT waiver. In addition, I credited Complainant and Gentile’s testimony that Glusko never stated the company had terminated him for misrepresentation. Moreover, when

Complainant gave Glusko the waiver on March 17, 2000, I credited his testimony that Glusko told him that his position at Longview Fiber had been filled, but another position might be available. However, days later, Respondent's agents, including Glusko, told Gentile and Reed that it would not rehire Complainant because the company had concerns about workers' compensation. Although Respondent attempted to show that its agents would not make this comment since a "special employer" was responsible for paying Complainant's workers' compensation premiums, I do not find this evidence persuasive. Furthermore, while I credited Glusko's testimony about the necessity of Complainant obtaining a DOT waiver, Glusko also stated that he had concerns about the significant safety-related issues that would arise from having a driver with an amputated leg operating a commercial vehicle. Thus, I believe Respondent likely avoided rehiring Complainant based on its perceived belief that his disability would increase the likelihood of an accident or injury on the job. See, Dartt, 427 Mass at 10 (refusal to hire individual because he has previously filed for workers' compensation benefits may constitute unlawful handicapped discrimination based on its perception of the individual as a disabled person). Consequently, I find that Complainant's status as a disabled person primarily motivated Respondent's decision to terminate his employment. Under these circumstances, I conclude that Respondent engaged in unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, § 4(16).

IV. REMEDY

M.G.L. c. 151B, § 5 authorizes the Commission to fashion remedies to make a complainant whole, including awarding back pay and emotional distress damages. Stonehill College v. MCAD, 441 Mass. 549, 576 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985); College-Town v. MCAD, 400 Mass. 156, 168-169 (1987).

First, Complainant is entitled to back pay as a result of the unlawful termination of his employment. As discussed above, I credited Complainant's testimony that in 1999 he earned at least \$37,136. In 2000, he earned \$6,901 and, thus, suffered a wage loss of \$30,235. In 2001, he earned only \$5,030, resulting in a wage differential of \$32,106. Lastly, in 2002, he earned \$34,786, and thus lost \$2,350.00 in wages. Consequently, Complainant is entitled to a total of \$64,691.00 in back pay representing his lost wages from the time of his termination in February 2000 through 2002.

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 conduct. However, Complainant offered no credible evidence of suffering any emotional distress. In Complainant's post-hearing brief, counsel stated, "While there has been no actual evidence of emotional distress, it is reasonable to conclude that termination is sufficient to warrant damages for emotional distress. However, punitive damages will accomplish the same result." Contrary to Complainant's position, the Commission lacks the authority to award punitive damages. In the recent decision in Stonehill College, the Supreme

Judicial Court reemphasized that “emotional distress damages should not be improperly considered, or awarded, as a substitute for punitive damages.” 441 Mass. at 575-576. In addition, the court held that “[e]motional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered” and “a finding of discrimination or retaliation, by itself, is no longer sufficient to permit an inference of, or a presumption of, emotional distress.” *Id.*, at 576. Under these circumstances, I decline to award any emotional distress damages.

V. ORDER

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

1. Respondent, The Trans-Lease Group, Inc, shall pay Complainant, Robert Welch, within sixty (60) days of receipt of this decision, the sum of \$64,691.00 in back pay, 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. Respondent The Trans-Lease Group, Inc., shall pay the Commission, within 60 days of receipt of this decision, a civil penalty in the amount of \$10,000.00.
3. Respondent, The Trans-Lease Group, Inc., shall conduct basic annual training sessions on unlawful disability discrimination for all managers

and supervisors, including any employees vested with supervisory authority. With respect to such training:

- a. Each training session for managers and supervisors must be at least four (4) 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 notify the Commission's Director of Training of its decision to select either the Commission or a private trainer to conduct the initial training sessions. If a private trainer is selected, the trainer must be selected from the list of trainers who have completed the Commission-certified 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. If Respondent has selected a private trainer to conduct the initial training sessions, 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. 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.

- d. In the event that Respondent's business 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.
- e. 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 12th day of October, 2004.

EDWARD R. MITNICK
Hearing Officer