

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHERMAN HALL,
Complainant

v.

Docket No. 99130287

LAIDLAW TRANSIT, INC.,
Respondent

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

Appearances: Paul F. Kelly, Esq., and Michael J. Doheny, Esq., for
Complainant.
Larry Besnoff, Esq., and Kara Peischl Zidek, Esq., for
Respondent.

I. PROCEDURAL HISTORY

On February 2, 1999, Complainant, Sherman Hall (“Complainant” or
“Hall”), filed a complaint with the Massachusetts Commission Against
Discrimination (the “Commission”), against Respondent Laidlaw Transit, Inc.
(“Laidlaw” or “Respondent”).¹ In his complaint, Hall alleged that Respondent
discriminated against him on the basis of disability in violation of M.G.L. c. 151B,
§ 4(16).

On July 27, 2000, the Commission found probable cause to credit
Complainant’s allegations. On June 26, 2002, the Commission granted

¹ In the initial complaint, Complainant listed “National School Bus” as the party-respondent. However, the parties have not disputed that “Laidlaw Transit, Inc.”, does business as National School Bus Company, and for all purposes herein, Laidlaw Transit, Inc. was Complainant’s employer.

Complainant's Motion to Amend and Supplement Charge, allowing Complainant to add a claim for retaliation in violation of M.G.L. c. 151B, § 4(4), and to assert additional factual allegations related to his disability claim. On September 10, 2002, the Commission certified the case for Public Hearing. A Public Hearing was held before me on October 2, 3 and 4, 2002, in Boston, 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, Sherman Hall, is a resident of Milton, MA. From 1982 to the date of the Public Hearing, Hall has been employed as a City of Boston school bus driver for Respondent or its predecessors. Hall is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Laidlaw Transit, Inc., provides school bus transportation services to the City of Boston ("City"). Under its contract with the City, Respondent operates and maintains, but does not own, a fleet of buses used to transport school children. The total cost of the City's contract with Respondent,

including direct reimbursable costs (e.g., driver wages, fringe benefits and fuel costs) was estimated not to exceed \$51,149, 625 for fiscal year 2002, and \$53,100,000 for fiscal year 2003. Respondent also employed approximately 800 drivers under the City's contract. I find that Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Pursuant to the contract between the City of Boston and Respondent, the City established the bus routes for Respondent's drivers, including start and ending times, the type of specific vehicles used on those routes, and the length of time each route should take. The vehicles operated by Respondent under the contract included vans, mini buses, half buses, and full buses.

4. The collective bargaining agreement ("CBA") between Respondent and United Steelworkers Local 8751 sets forth the wages, hours, and terms and condition of employment for the drivers employed by Respondent under its contract with the City. The CBA also sets forth the bid procedures by which drivers obtain bus routes. Pursuant to Art. 12, section 7 of the CBA, drivers bid by seniority for each route, which is assigned a specific vehicle by number and type. The City holds the following bids for routes throughout the year: a "preliminary bid" in August or September prior to the start of the school year; a bid in October for changes to the school year bids; and, a bid in June for summer work. Respondent is obligated to mail notifications of the bids to the drivers two weeks prior to the bidding. The notifications must include the dates on which the routes will be posted and their locations; the date, place and time of the annual bid; and, the bidding procedure. If a driver does not report for the bid at the

designated bid time, the driver will be passed over until he or she reports, and will have no claim for routes already bid upon. Once a driver is designated a particular route, Respondent may not take away or change a driver's route or vehicle unless the vehicle requires maintenance.

5. Pursuant to the job description for the position of bus driver, an employee must be able to perform certain physical skills and effort. Specifically, a bus driver:

Must be able to repeatedly climb in and out of a bus. Must possess depth perception to be able to judge distances while driving. Must be able to stoop, kneel, crouch, reach and grasp in order to conduct pre- and post-trip inspections at least twice daily.

Requires constant use of extremities to operate equipment and drive bus (95% of time). Must be able to move quickly in a confined space required in the event of evacuation of students off the bus. Must possess ability to maneuver quickly and safely through emergency bus exits.

6. Complainant testified that in February 1994, he suffered a work-related injury related to the inhalation of fumes while operating a school bus. According to subsequent medical documentation from both Complainant's and Respondent's physicians, this incident rendered him with a diagnosed sensitivity to diesel fumes or narcosis with secondary anxiety associated with driving a school children under these conditions. Complainant further testified that in 1994, he suffered a work-related lower back injury while operating a school bus after being rear-ended by another vehicle. In 1995, Complainant suffered another work-related injury to his right shoulder as a result of having to use a manual bus door that was not working properly. Complainant would continue to occasionally suffer from his orthopedic work-related injuries to his shoulder and

back throughout his employment. I credit Complainant's testimony regarding his history of work-related injuries.

7. For the 1997-1998 school year, Complainant bid and received a route designated "Half Bus 137." Complainant testified that on his dry run prior to the start of the school year he noticed fumes emanating into the bus. He brought this problem to Respondent's attention, and his supervisor allowed him to pick a different bus. Complainant stated that he picked Half Bus 181 and for the remainder of the 1997-1998 school year, Complainant operated Half Bus 181 while performing route 137. Half Bus 181 had an electric door.

8. For the 1998-1999 school year, Complainant bid for and received Half Bus route 129. Complainant again had problems with fumes emanating from Half Bus 129, and Respondent similarly allowed him to operate Half Bus 181 while performing route 129 for the entire 1998-1999 school year.

9. In January 1999, Respondent removed Half Bus 181 from service due to a mechanical problem. Pursuant to the CBA, if a vehicle requires regularly scheduled preventative maintenance or repairs, a spare vehicle is substituted for that period of time. Complainant testified that after Half Bus 181 went down, his supervisor, Norisa Powell, told him the only bus they had left was a mini bus with a manual door.² In response, Complainant claimed he told Powell, "Let me drive it", which she did. Approximately two weeks after he started driving the mini bus, he re-injured his right shoulder from operating the manual door. He

² A mini bus carries up to a maximum of 18 students, while a half bus can carry up to 35 students.

submitted a medical note from his physician, Dr. Bird, which indicated that Complainant was restricted from operating a vehicle with a manual door.

Complainant resumed driving Half Bus 181 after it was repaired.

10. On February 2, 1999, Respondent again removed Half Bus 181 from service for maintenance. According to Complainant, Powell this time invoked a rule that prohibited drivers designated to operate a half bus route from using a mini bus. Consequently, Complainant was unable to work and lost a half-day's day. That same day, Complainant filed his initial charge with the Commission alleging that Respondent discriminated against him on the basis of disability. Robert Timilty, who served as Respondent's Operations Manager at the time,³ testified that Respondent refused to allow Complainant to operate a mini bus with a manual door on this occasion, because it would be contrary to Dr. Bird's restriction that Complainant only operate a vehicle with an electric door. Timilty also claimed that Respondent offered Complainant another half bus to use while Half Bus 181 was being serviced, but Complainant refused to drive a half bus. According to Timilty, the following day, Hall resumed work operating Half Bus 181. I credit Timilty's testimony regarding this particular matter.

11. For the 1999-2000 school year, Complainant bid and received Full Bus Route 164 out of the Readville yard in Hyde Park. Complainant testified that while taking a dry run in Full Bus 164, he noticed fumes coming in the cab. He then asked the branch manager of the Readville yard, Richard McLaughlin, if he could pick another bus from among the spares. According to Complainant,

³ In 2001, Timilty became Laidlaw's General Manager for the City of Boston contract.

McLaughlin gave him a set of keys, told him he was not going to work today, and then said, "I want you to go out and pick a bus that can suit you and you have that bus for the year." Complainant picked Full Bus 151 and then drove that bus on route 164.

12. Complainant testified that after his problems associated with his exposure to diesel fumes first developed in 1994, he regularly left the bus yard early in order to avoid the fumes from the other buses. Richard Jacobs, the Director of Transportation for the Boston Public Schools, testified that the CBA prohibited a driver from leaving the bus yard prior to his or her regularly scheduled start time. Although Jacobs acknowledged that drivers had previously left early notwithstanding the provisions in the CBA, he claimed that over the "last several years" the City has gotten Respondent "to adhere to the contract." Consequently, according to Jacobs, Respondent has vastly improved its efforts to get drivers to leave at their regularly scheduled departure times. Janet Royston, who served as President of Local 8751, likewise testified that drivers previously could leave early without any problems, but in recent years Respondent had disciplined drivers for leaving early. Notwithstanding, both Royston and Steven Gillis, who worked as a bus driver for Respondent and served as a steward in Local 8751, acknowledged that it is still a common practice for some drivers to leave the bus yard prior to their regularly scheduled start time. I credit Jacobs, Royston, and Gillis' testimony.

13. Gillis also testified that Respondent had regularly permitted drivers to switch buses. For example, he testified that he was presently assigned to

operate a route designated for a mini bus, but in the afternoon, he switched buses with another driver who operates a half bus. According to Gillis, his late run has a large number of students that cannot comfortably fit into the mini bus. In addition, Gills testified that Complainant and another driver named Charlie Williams regularly switched buses during the 2001-2002 school year, when Complainant had a problem with his assigned bus. Gillis claimed that “there was no problem with the dispatcher, no problem with the company, so we did it.” Gillis also testified at length about the process in which divers switched to a different bus if they had a problem with their assigned bus. He stated that it’s a “daily practice” for Respondent to switch a driver to a spare bus if the driver’s assigned bus is rendered inoperable. I credit Gillis’ testimony.

14. Complainant testified that on October 22, 1999, presumably as a result of the City’s stricter enforcement of the CBA, McLaughlin told Complainant that he could no longer leave early and, if he did, he would be subject to discipline. As a result of not being allowed to leave early on this date, Complainant claimed that he got sick from fumes generated from the buses in the bus yard. He subsequently submitted to McLaughlin an Employee’s First Report of Injury and a medical note from the Bowdoin Street Health Center. On October 23, 1999, Complainant was examined by Dr. Bird, his regular treating physician. After examining Complainant, Dr. Bird noted that Respondent’s refusal to allow Complainant to leave the yard early “is entirely contrary to prior instructions asking that the patient be allowed to arrive early and leave early to avoid fumes.” I credit Complainant’s testimony regarding this matter.

15. On October 25, 1999, McLaughlin wrote a memorandum to Timilty in which he expressed doubts about Complainant's injuries. Specifically, McLaughlin noted that very few buses are running at Complainant's regularly scheduled start time. McLaughlin also questioned whether Complainant could perform his route safely considering the likelihood that he would be exposed to fumes throughout the day. McLaughlin further recommended that Respondent conduct an independent medical examination ("IME") on Complainant to see if he is capable of driving safely.

16. On November 17, 1999, McLaughlin wrote another memo to Timilty stating that Complainant had reported he got sick from fumes emanating through the front heater in his bus. McLaughlin noted that Complainant's illness could be related to cleaning fluids and several deodorizers hanging in the area of the driver's seat. He also wrote that "the bus has been checked by myself, and the shop and I don't smell anything that could make him sick, other than his own personal hygiene habits."

17. On November 20, 1999, Complainant provided Respondent with another medical note from Dr. Bird that stated Complainant should be restricted from operating all "International" brand buses because they had fume problems. However, Dr. Bird noted that he could operate GMC buses. In response, on November 22, 1999, Respondent issued Complainant a notice placing him on "paid suspension pending resolution to Mr. Hall's doctor's note. Cannot drive Internationals. Paid suspension until 11-23-99 – 12 Noon will meet to discuss other avenues." Timilty testified that Respondent placed Complainant on leave

since Bus 151 was an International bus and it did not have any GMC buses at the Readville yard. Although Timilty believed someone from Respondent met with Complainant on November 23 to “discuss other avenues”, he had no recollection of any such discussion. Timilty also claimed that Respondent “didn’t know what to do with Mr. Hall at the time” because no jobs were available and all the routes had been designated to other drivers pursuant to the bid procedure in the CBA. Complainant remained on paid administrative leave for eleven months, until October 20, 2000. Timilty testified that while Complainant was on paid administrative leave, he was sure he discussed Complainant’s status, but he could not remember the contents of any conversations. He also acknowledged that Dr. Bird called him “a couple of times”, but he similarly could not recall either the subject or the specifics of their conversations. In addition, Timilty stated that throughout this period, he recognized that Complainant had a medical problem, but he did not regard Complainant as being disabled.

18. While out on paid administrative leave, Respondent directed Complainant to have an IME by Dr. Roston. In his report dated January 6, 2000, Dr. Roston indicated:

[Complainant is able to] return to limited-duty involving no climbing, bending or stooping, limited lifting and limited use of right hand and arm. He should not drive a school bus. However, he may drive a small vehicle such as a van or a car. Mr. Hall should avoid exposure to diesel fumes and when he does return to operating school buses, he should avoid International buses in cold weather when the heater would be in use.

19. On February 11, 2000, Dr. Bird concurred with Dr. Roston and likewise stated that Complainant could drive a van or a car but not a school bus.

Respondent insisted that it attempted to follow Dr. Roston and Dr. Bird's medical opinions; however, it did not operate cars and all of the van routes had been awarded to other drivers pursuant to the bid procedure. Consequently, Respondent continued to keep Complainant on paid administrative leave, claiming it had no open available jobs that complied with his medical restrictions.

20. In June 2000, Respondent's drivers had the opportunity to bid for summer work. Despite being medically restricted to only operating vans, Complainant submitted a bid for a wheelchair bus, which he could not operate because it had a mechanical door. Complainant admitted that he bid for the wheelchair bus because it paid more money than the van routes. Neither party provided any evidence that prior to Complainant submitting his bid, they engaged in any discussion or interactive dialogue regarding possible options for summer work. Throughout the summer, Respondent paid Complainant at the applicable rate associated with the wheelchair bus even though he never operated it. Under these circumstances, I find that Complainant bid on the wheelchair bus, with Respondent's apparent permission, under the assumption that he would not operate this vehicle due to his continuing status on administrative leave.

21. On August 2, 2000, Dr. Bird wrote that Complainant could return to work with restrictions including the necessity of operating a vehicle equipped with a power door. Dr. Bird did not specifically address either the issue of Complainant's sensitivity to diesel fumes, or Dr. Roston's previous restrictions.

22. Although still out on administrative leave, Complainant received a notice regarding his eligibility to bid on bus routes for the 2000-2001 school year. According to Complainant, when he attended the bid, Timilty told him to “bid any way you want. They’re going to pay you anyway.” As a result, Complainant bid on a “standby” route, “for the money.” A standby route typically earns more money than a regular route. Timilty did not recall either speaking to Complainant on this occasion or any other matter pertaining to the August 2000 bid. However, he acknowledged that as of August 2000, he believed Complainant’s status on paid administrative leave was unlikely to change. Respondent paid Complainant the standby route rate until October 20, 2000. I credit Complainant’s testimony on this matter. I also find that Complainant bid on the standby route, with Respondent’s explicit blessing, under the assumption that he would not operate this vehicle due to his continuing status on paid administrative leave.

23. On October 20, 2000, Respondent’s legal counsel notified Complainant by letter that, effective immediately, his status would change from paid administrative leave to unpaid medical leave. In the letter, Respondent specifically stated:

[I]n an effort to ascertain a possible accommodation for you, Laidlaw has continued your employment despite the fact that you are not able to perform the essential functions of your job as a bus driver. Moreover, Respondent has paid you on a weekly basis although it is not required to do so under the law or under the [CBA].

Although Laidlaw certainly understands your desire to return to work, Laidlaw does not have a vacant position available which you are qualified to perform. If you provide Laidlaw with authorization from your physician that you are able to operate a Laidlaw vehicle despite your sensitivity to diesel fumes, Laidlaw will return you to work as a school bus driver. Laidlaw does not have “smaller” or “lighter” vehicles and although it has

and would continue to provide you with a vehicle equipped with a power door, Laidlaw simply does not own other vehicles which would accommodate your medical restrictions.”

Starting immediately upon the receipt of this letter, Respondent will no longer pay you any amount of money until such time as you are medically able to return to work. You may, however, remain on medical leave until such time as you are medically able to return to work.

Timilty explained that Respondent changed Complainant’s status because it did not provide “paid administrative leave” to its employees. Timilty claimed he was not previously aware of this policy until someone brought it to his attention in October 2000.

24. Shortly after Complainant received Respondent’s letter dated October 20, 2000, Gillis and Complainant met with Timilty. Gillis testified that “we argued up and down that Sherman wasn’t requesting a medical leave of absence and the company had no right to put him on a medical leave of absence.” Gillis claimed that Timilty and another person at the meeting on behalf of Laidlaw or the School Department refused to talk with them about it. According to Gillis, they simply stated that they were advised by their attorneys “not to say anything” except to tell Mr. Hall that he was being placed on medical leave. The Union subsequently filed a grievance on Complainant’s behalf. I credit Gillis’ testimony regarding this matter.

25. On October 27, 2000, Dr. Bird authorized Complainant to return to work with the following conditions: “power door only; prefer van or ½ bus – not a requirement for return...; prefer avoiding any bus with exhaust build up in driver cab area.” Despite Dr. Bird’s note, Respondent refused to allow Complainant to

return to work claiming that he was still not medically able to perform the job for the standby position that he bid for prior to the beginning of the school year.

26. On December 9, 2000, Dr. Bird wrote another report clarifying Complainant's limitations pertaining to exhaust exposure. In his note, Dr. Bird wrote:

Mr. Hall has experienced sensitivity to exhaust fume build up, when that built up has been out of the ordinary under the following two specific circumstances: 1. build up in the bus yard in the morning, particularly during the winter months which he has avoided by arriving early, when allowed to do so, as recommended by myself, and, 2. when driving the full sized International vehicles which have demonstrated a tendency for exhaust to be released and to build in the vicinity of the driver's cab based on the experience of Mr. Hall and other drivers as reported to myself. It has been my recommendation in the past that he not drive full size International buses for this reason, and I have offered industrial hygiene assistance to investigate this problem as well as the bus yard exhaust build up problem to assist with furthering our understanding of the nature of the problem and to assist with potential remedies. To date, Laidlaw has not responded to this offer and has not provided requested information pertaining to their own investigation of these concerns. Mr. Hall experiences headaches with nausea as well as varying degrees of light headedness under these two circumstances which is reversed when he is in cleaner air...

It is and has been recommendation for months that Mr. Hall return to driving any bus which does not have an unusual build up of exhaust fumes in the driver's cab as occurred with the International buses he drove in the past. It is also my understanding that newer International Buses, in addition to the GMC buses which did not cause any difficulty in the past, are in the current fleet. It may be that these newer International Buses do not have this problem, but because of a lack of cooperation on the part of Laidlaw in discussing this problem, I have no specific information on this issue. It also continues to be my recommendation that Mr. Hall be allowed to arrive early in the bus yard to avoid exposure to the excessive exhaust build up in the yard at that time. Again, we remain available to discuss and to assist with investigating and remedying these concerns.

27. Notwithstanding Dr. Bird's report dated December 9, 2000, Respondent still insisted that Complainant could not return to work because it did not have a

job that he was medically able to perform. In addition, Respondent continued to assert that Complainant was not medically able to perform the standby route. Nonetheless, Respondent claimed that it “accommodated” Complainant’s medical condition by allowing him to remain on unpaid medical leave.

28. On January 12, 2001, Respondent issued its “Company Step II Grievance Response”, in which it denied Complainant’s grievance. As reasons therefore, Respondent stated that Complainant “has not been fully cleared to return to work, as the doctor’s note makes it clear that he cannot be exposed to exhaust fume build up, and the essential functions of his job as a bus driver are such that such isolation cannot occur.” Respondent further noted, “[I]n the performance of his duties as a bus driver, Mr. Hall could experience exhaust fume build up at many other times throughout the day from which the Company cannot isolate him.” Lastly, Respondent insisted that Complainant’s complaints of headaches with nausea as well as varying degrees of light-headedness, as highlighted in Dr. Bird’s letter, posed a safety risk to the operation of a school bus.

29. On January 20, 2001, Dr. Bird wrote another letter in which in unequivocally cleared Complainant to return to work without restrictions. Timilty testified that he had concerns regarding this letter because Dr. Bird had completely changed his opinion. Consequently, on February 5, 2001, Respondent requested that Complainant be evaluated by Dr. Friedman. On February 26, 2001, Dr. Friedman issued his report in which he essentially concurred with Dr. Bird’s opinion and indicated “there is no evidence at the present time of any impairment or disability. He has reached medical end result.”

Dr. Friedman stated that Complainant is fit to return to his job as a bus driver.

30. Not satisfied with the opinions of Dr. Bird or Dr. Friedman, Respondent sought a third opinion. As reasons therefore, Timilty testified that Dr. Friedman did not provide a medical evaluation of Complainant's back and shoulder problems and, consequently, Respondent wanted Complainant be examined by an orthopedist. Although Timilty insisted that Respondent attempted to get Complainant examined as soon as it received Dr. Friedman's report, Complainant did not see Dr. Bentley until April 5, 2001.⁴ Eventually, in a letter dated April 5, 2001, Dr. Bentley concluded that Complainant is orthopedically fit and capable of returning to work without restrictions. However, Dr. Bentley noted that if Complainant is required to use a mechanical bus door, the likelihood of re-injury will increase. Almost a month later, on May 2, 2001, Respondent notified Complainant that he could return to work to the standby position he bid for in August.

31. On May 7, 2001, Complainant returned to work and rode the standby route, even though the bus had a mechanical door. On May 9, 2001, just days after coming back to work, Complainant re-injured his right shoulder when the mechanical door got stuck. On May 16, 2002, Dr. Bird issued a note indicating that Complainant could return to work but could only operate vehicles without a mechanical door. On May 22, 2001, Respondent determined that Complainant

⁴ Timilty claimed Dr. Bentley caused the delay. The notice that Timilty sent to Complainant, requesting that he see Dr. Bentley, was not dated but sent by certified mail. However, handwriting on the letter indicates the letter was "rec'd 3/31/01", more than a month after Laidlaw received Dr. Friedman's report.

was “not qualified to perform the essential functions of the position of standby school bus driver without posing a direct threat to [himself] or others” and, therefore, it placed him back on unpaid medical leave.

32. Complainant testified that Respondent failed to give him adequate notice of the summer 2001 bid held in June. Timilty testified that pursuant to the CBA, drivers who wanted to bid for summer work must indicate their intention by signing up before the bid. Although Complainant admitted he knew about the procedure, he did not know about the notice being posted until it was too late. The day after the signup sheet had been taken down, Complainant asked Timilty if he could still bid, but Timilty refused claiming it would be unfair to the other drivers and contrary to the bid procedure specified in the CBA. Union President Royston corroborated Timilty’s testimony that drivers must sign up in a timely manner in order to be eligible to bid. I credit Timilty and Royston’s testimony on this particular matter.

33. In September 2001, Complainant bid for and received bus route “HS03”, a half bus with special safety seats and a power door. Apparently, relatively few problems occurred throughout the 2001-2002 school year. However, Complainant claimed that on March 4, 2002, his supervisor Anne Humphrey refused to let him refuel his bus at the Readville yard. Instead, she had his bus refueled for him. Moreover, according to Complainant, Respondent refused to let him leave early. Instead, Respondent arranged for his bus to be parked near the street entrance to the Readville yard. Timilty testified that Respondent made such changes in an attempt to accommodate Complainant’s sensitivity to diesel

fumes. In addition, Respondent allowed him to choose a special parking spot and taxied his bus to that special spot in order to avoid fumes that may have developed in the bus yard. Lastly, Timilty stated that Respondent allowed Complainant to operate a routed bus while his regular bus was repaired even though this assignment violated both Respondents' contract with the City and the CBA. I credit Timilty's testimony regarding the accommodations Respondent afforded Complainant during the spring of 2002.

34. Jacobs acknowledged that when Respondent reported that it had a driver with a disability that needed an accommodation, he would review the particular case on behalf of the City to see whether it could make a change to the provisions of the CBA or allow an accommodation. Jacobs also testified that Timilty requested various work-related accommodations for Complainant over the years. Specifically, he recalled approving Respondent's request to install a special seat in Complainant's vehicle, to permit him to drive a vehicle with an automatic door opener, and to park his bus in a certain location in the bus yard. The only request Jacobs recalled denying pertained to Complainant's request that he be able to leave and return to the bus yard whenever he wanted.

Although Jacobs testified at length about the City of Boston's rationale for strictly enforcing the rule prohibiting drivers from leaving early, he likewise testified that Respondent never specifically requested that Complainant be able to leave the bus yard 30 minutes prior to his regular start time, and had Respondent made such a request, he would have taken it "under advisement." I credit Jacobs' testimony.

35. From May 30, 2002 to June 14, 2002, respective counsel for Respondent and Complainant discussed various accommodations in order to avoid Complainant being exposed to exhaust fumes in the yard. Apparently, both sides agreed that Complainant would be able to park his bus next to the terminal away from the main area of bus yard, and be permitted to leave 20 minutes early in the morning.

36. In June 2002, Complainant attempted to bid on a route for summer work. Complainant stated that he wanted to bid on a mini bus route and use the half bus with the electrical door that he had previously operated on route HS03. However, he claimed that Timilty refused to permit him to bid on any route except HS03. According to Complainant, Timilty said that he had to follow the standard protocol and drive the specific type of bus assigned to each particular route. Timilty had no recollection of this conversation with Complainant. As a result, Complainant stated that he refused to bid for any summer work since he could not operate the vehicle he desired. Neither party provided any evidence regarding the availability of other bus routes designated with vehicles equipped with electric doors.

37. Respondent claimed that on or about May 13, 2002, it learned that Complainant was taking five different types of prescription medications. According to Dr. Egilman,⁵ Respondent's physician, two of these drugs (Klonopin

⁵ Neither Dr. Egilman's report, nor his affidavit were submitted into evidence. However, the affidavit was cited in Respondent's brief as "Ex. 'H' of Laidlaw's Motion for Reconsideration of Probable Cause."

and Trazodone) prevented Complainant from safely operating a school bus.⁶ As a result, by letter dated August 20, 2002, Respondent's counsel notified Complainant's counsel that Laidlaw had decided to prohibit Complainant from bidding on any route for the 2002-2003 school year. Specifically, Respondent stated:

[B]ased on the medical opinion and directive of Respondent's physician, ... Mr. Hall is a direct threat to the children on his school bus, himself, and the general public. Accordingly, please instruct your client that he is ineligible to bid for a school bus route for the 2002-2003 school year. Please let us know when Mr. Hall is no longer taking medication so that Respondent may consider him for an open, available job.

Respondent failed to provide any explanation as to why it waited until August 20, 2002, presumably just days prior to the bid for the 2002-2003 school year, to notify Complainant about its decision when it had information about his medications months earlier.

38. The CBA provides that drivers unable to attend a bid due to illness or other valid reasons may delegate their bidding in writing to another person. In addition, drivers on medical leave of absence are permitted to bid provided the driver has a doctor's certification regarding his or her condition and probable date of return to work. Union President Royston testified that when questions arose in the past about whether a driver is fit to return to work, Respondent and the City allowed the driver to bid and be designated a route, even though the driver might

⁶ According to the Physician's Desk Reference ("PDR"), Klonopin could interfere with cognitive and motor performance and individuals taking this drug "should be cautioned against engaging in hazardous occupations requiring mental alertness, such as operating machinery or driving a motor vehicle." Trazodone is an antidepressant that may produce drowsiness, dizziness, or blurred vision and persons taking this drug "should observe caution while driving or performing other tasks requiring alertness, coordination, or physical dexterity."

not be able to drive until the medical issue was clarified. Respondent did not provide any credible reasons as to why it did not follow this practice with respect to Complainant's desire to bid on routes for the 2002-2003 school year. I credit Royston's testimony.

39. At the Public Hearing, Dr. Egilman opined that Complainant would not have been qualified to drive a bus since October 1999. Specifically, he stated,

Mr. Hall was suffering from or complained of symptoms of dizziness and he was on multiple medications that could cause him to have drowsiness and the combination of his symptoms of dizziness from fume exposures... and medications that he was on, many of which have synergistic side effect. That is, they potentiate each other's side effects, making it more likely that he would have further symptoms of dizziness or drowsiness would indicate to me that he should not have been driving at that time unless and until a more complete evaluation of his ability to drive was performed.

Dr. Egilman based his opinion on his review of many of Complainant's medical records, including the reports from Dr. Bird, and the opinions from Dr. Roston, Dr. Friedman, and Dr. Bentley. However, he did not personally examine Complainant.⁷ Although I credit Dr. Egilman's opinion that the medications taken by Complainant, namely Trazadone and Klonopin, could possibly impair

⁷ Dr. Egilman also testified regarding a "Medical Examination Report For Commercial Driver Fitness Determination" (CDL Medical Report) filled out by Complainant in February 2001. According to Egilman, in the CDL Medical Report, Complainant either falsely or erroneously failed to note that he had experienced symptoms of fainting and dizziness or had problems associated with his arm, shoulder and lower back, and failed to list any medications used regularly or recently. These omissions, in my opinion, do not warrant any special attention, and I believe this testimony is largely irrelevant to the issues at hand. In particular, Dr. Bird, who was very familiar with Hall's medical condition, filled in the remainder of the report and noted Hall's symptoms and ailments related to fume exposure, and his shoulder and back injuries. With respect to the medications Hall was taking, Dr. Bird acknowledged in his letter of September 30, 2002, that he was familiar with the "use of these medications [and] the fact that three physicians were involved in prescribing these medications specifically for the purpose of assisting Mr. Hall with an anxiety condition related to a work event."

his ability to drive a school bus and warrant a more comprehensive evaluation, I am struck by the absence of any definitive opinion that Complainant was actually impaired at any time. On cross-examination, Dr. Egilman acknowledged that he had seen no evidence that Complainant had a positive drug test. He also was not aware of Complainant being symptomatic for dizziness or nauseousness except upon exposure to exhaust fumes in the bus yard or from malfunctioning buses. In addition, Dr. Egilman was not aware of the frequency with which Complainant took these medications.

40. On September 30, 2002, Dr. Bird wrote a four-page single spaced letter to Complainant's counsel in which he expressed serious reservations about Dr. Egilman's opinion and disagreed with Respondent's decision to prohibit Complainant from working as a school bus driver. With respect to U.S. Department of Transportation (DOT), Federal Highway Administration Safety Regulations, Dr. Bird remarked that these regulations:

[S]pecifically and appropriately allows prescribing and treating physicians to decide on the use of a controlled substance on an individual case basis for those operating a commercial vehicle. There are very detailed guidelines pertaining to when there is misuse or problems associated with the use of alcohol or controlled substances which has never been an issue in Mr. Hall's case. The regulations appropriately prohibit commercial drivers from performing safety-sensitive functions when using any controlled substance because of the risk of abuse and associated risks which is why these substances are controlled to begin with, except, when prescribed by a physician who has instructed the patient of the safety of such use. Most importantly, as in Mr. Hall's case, the prescribing physicians and physicians performing DOT history and physical exams must remain attentive to any behavior which demonstrates a potential misuse or problem in the prescribed use of such substances, again, which was never an issue in Mr. Hall's case.

41. With respect to the particular medications at issue, Dr. Bird stated:

The question was raised in the deposition whether the combination of Trazadone and [Klonopin] posed a risk in terms of safety in Mr. Hall's case. As stated Mr. Hall did not experience residual sedation in the morning on this dose of Trazadone and never experienced sedation when on [Klonopin] at low dose. He has maintained a stellar driving record in terms of safety throughout his long career as a school bus driver. The two medications are of differing classes and do not escalate the risk of misuse or addictive behavior associated with higher doses of benzodiazepines.

It is entirely appropriate the Mr. Hall continue to use these medications prescribed by his treating physicians while driving any vehicle including school buses. The issues of possible sedation have been reviewed with Mr. Hall recently by myself as in the past and have never been an issue for him.

42. According to Complainant's tax records, he earned \$40,806 from Respondent in 1997; \$36,653 in 1998; \$35,517 in 1999; and, \$32,139 in 2000. He also received unemployment compensation totaling \$6,635.00 during the period he was on unpaid administrative leave. In 2001, he earned \$20,295 from Respondent and \$16,287 from another employer, Brinks, for a total of \$36,582. Complainant began working for Brinks in April 2001 and, as of the date of the Public Hearing, he continued to work for Brinks one day per week. In late August 2002, after Respondent refused to let him bid on a route for the 2002-2003 school year, Complainant began working as a bus driver for Washington Group International, Inc., earning a total of \$5,260.32 during his first four weeks of employment.

43. Pursuant to the applicable provisions of the CBA, bus drivers received the following hourly wage rates:

July 1, 1998 -	\$16.06
September 1, 1999 -	\$16.54

September 1, 2000 - \$17.04
September 1, 2001 - \$17.64
September 1, 2002 - \$18.26

44. The bus route selected by Complainant in the fall of 1999 (Full Bus 164) carried 49.24 hours per week. Consequently, Complainant's average weekly wage was \$890.84 (\$661.60 straight time plus \$229.24 overtime) for the 1999-2000 school year. The standby route Complainant bid for in the fall of 2000 carried approximately 56 hours per week. Therefore, Complainant's average weekly wage was \$1,090 per week (\$681.60 straight time plus \$404.96 overtime) for the 2000-2001 school year.

45. During the course of his employment, Complainant also had the opportunity to earn extra income from Respondent doing "charter work", which typically involved transporting school children on athletic or field trips. During the periods Complainant was on paid and unpaid leave, he did not have the opportunity to earn this extra income. However, Complainant did not present any credible evidence on the amount of charter work he typically performed each year while actively working.

46. Complainant testified that Respondent's alleged unlawful treatment caused him significant emotional distress, claiming "[i]t took my life [from] me." Furthermore, he stated that being placed on unpaid leave was particularly "hard" since he needed the income to pay his mortgage and bills. Although he received unemployment, Complainant still claimed to have financial problems, since "unemployment only gonna [go so far]." Complainant further testified that

Respondent's refusal to allow him to work made it "rough" for him emotionally and it continued to be hard since Respondent has still not allowed him to return to work. He stated "I thought all that was behind me when I went to work in August [2002, but] it came all back again... I don't wish this on nobody to go through what I went through." In addition, Complainant acknowledged that he continued to take medication to control his anxiety that he first began experiencing after his first exposure to diesel fumes in 1994. I credit Complainant's testimony regarding the emotional distress he suffered as a result of Respondent's actions.

III. CONCLUSIONS OF LAW

A. DISABILITY DISCRIMINATION

Pursuant to Massachusetts General Laws c. 151B, § 4(16), it is unlawful for an employer to discriminate against a person on the basis of handicap. In this case, Complainant alleged that Respondent failed to reasonably accommodate his disabilities on numerous occasions. In order to establish a prima facie case of disability discrimination for failure to provide reasonable accommodations, 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) 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 by 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. Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995). In the alternative, Respondent can demonstrate that it could not provide the reasonable accommodation because it would pose a "reasonable probability of substantial harm" to himself or others. Ryan v. Town of Lunenburg, 11 MDLR 1215, 1242 (1989), citing, Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985). Complainant may then rebut Respondent's evidence by showing, respectively, that the reasonable accommodation would not impose an undue hardship or that his disability would not create a direct threat to the safety of himself or others.

As discussed in detail below, I find that Complainant has established that Respondent unlawfully failed to provide reasonable accommodations on numerous occasions in violation of M.G.L. c. 151B, § 4(16).

1. HANDICAPPED PERSON

As a threshold issue, Complainant must prove that he is a "handicapped person" within the meaning of M.G.L. c. 151B, § 4(17). The statute defines a "handicapped person" as one who (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); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 3 (1998); Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. 56, 61 (1994).

In his post-hearing brief, Complainant acknowledged that “there was no testimony at the hearing from Mr. Hall about whether his medical conditions substantially limited one or more major life activities.”⁸ Notwithstanding, Complainant argued that he is a handicapped person under the law as a result of both having a record of a physical impairment and being regarded by Respondent as having such impairment.

In order to establish a “record of impairment” within the meaning of G.L. c. 151B, § 4(17)(b), Complainant must show that he has a past record or medical history of a physical or mental impairment that substantially limited one or more life activities, even though the impairment may no longer exist. Disability Discrimination Guidelines, at 3. As stated above, Complainant did not provide any testimony at the hearing about whether his medical conditions substantially limited one or more major life activities at any time during his life. Consequently, Complainant cannot establish that he has a “record of impairment.”

⁸ In his post-hearing brief, Complainant stated that he had previously argued at the Commission, in a “Memorandum of Law in Support of His Opposition to Respondent’s Motion for Reconsideration of Probable Cause”, that his medical conditions had the effect of substantially limiting one or more major life activities. Without restating those arguments, Complainant merely “incorporated them by reference” in his brief. Absent any credible evidence introduced at the Public Hearing regarding whether Complainant’s medical conditions actually limited one or more major life activities, I decline to address that issue.

However, I believe Complainant has established that Respondent regarded him as having such impairment within the meaning of G.L. c. 151B, § 1(17)(c). Disability Discrimination Guidelines, at 3; see, Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. at 61 (employer terminated employee based on its perception of employee's impairment). In Dahill v. Police Department of Boston, 434 Mass 233, 241 (2001), the Supreme Judicial Court emphasized the distinction between the first prong, which protects only those persons with actual physical or mental limitations, and the third "regarded as" disabled prong, which "protects those persons who, whether actually impaired or not, may be the victims of stereotypic assumptions, myths, and fears regarding such limitations." Moreover, in Williams v. Town of Stoughton, 13 MDLR 1385, 1415-1416 (1991), the Commission noted that 45 C.F.R. 84.1, et seq. (interpreting Section 504 of the Rehabilitation Act of 1973) defined "regarded as having an impairment" as meaning a person "(a) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation, (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (c) has none of the impairments [defined in the definition of physical or mental impairments] but is treated by a recipient as having such an impairment."

Respondent has not contested that Complainant suffered from various work related medical conditions, including: sensitivity to diesel fumes with secondary anxiety, and back and shoulder injuries. He also received regular

medical treatment for these work-related ailments, submitted numerous doctors' notes to Respondent, and made numerous requests to Respondent for accommodations as a result of his medical conditions. In response, Respondent typically acknowledged that Complainant had a medical condition and often provided Complainant with an accommodation, including: allowing him to substitute buses when he complained that fumes emanated into the cab of the bus, assigning him to choose special parking spots, "taxiing" his bus to the parking spots, allowing him to leave early on occasion, purchasing and installing a special seat cushion in his bus, honoring his doctor's request that he not operate a bus with a mechanical door, and placing him on paid administrative leave after Respondent allegedly could not provide any other reasonable accommodations for his ailments. *Compare, Winsmann v. Choate Health Management, 2002 WL 129029, at 8-9 (Mass. Super., April 26, 2002) (employer did not regard plaintiff as being impaired where employer had no knowledge of plaintiff's diagnosis, or that plaintiff even had any diagnosis, and no direct evidence existed that it ever thought or believed that plaintiff suffered from any physical or mental condition of any kind).*

Although Respondent admitted that it knew Complainant had a medical condition, it argued that it did not regard Complainant as being disabled. In addition, when Respondent provided Complainant with various accommodations, it claimed that it was merely attempting to comply with Dr. Bird's numerous work restrictions. Generally, a finder of fact is under no obligation to make a specific finding that an employer perceived the employee as being substantially limited in

a major life activity, for purposes of determining whether an employer regarded an employee as having an impairment under G.L. c. 151B, § 1(17)(c). Talbert Trading, 37 Mass. App. Ct. at 61, see *also*, Dahill, 434 Mass. at 241; Smith v. Pinkerton's, Inc., 15 MDLR 1687 (1993), Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226 (1992). However, I find that Respondent regarded Complainant as having multiple physical impairments that substantially limited the major life activity of working. Specifically, Respondent took various adverse actions against Complainant when it determined that he was incapable of working as a result of his medical conditions. For example, Respondent placed Complainant on administrative leave on November 22, 1999, and then unpaid medical leave on October 20, 2000, because it believed his diagnosed sensitivity to diesel fumes, as well as his orthopedic problems related to his back and shoulder, posed a safety risk to the operation of a school bus. In addition, Respondent refused to let him bid on a bus route in August 2002, because it believed the medications he took for his medical conditions posed a direct threat to himself and others. Clearly, Respondent took such adverse actions based on both its knowledge of the history of Complainant's medical conditions and its perception that his disabilities substantially limited his ability to work. Under these circumstances, Complainant has established that Respondent regarded him as substantially limited in the major life activity of working; and, therefore, he is a "handicapped" individual within the meaning of G.L. c. 151B, § 1(17)(c).

2. **QUALIFIED HANDICAPPED PERSON CAPABLE OF PERFORMING THE ESSENTIAL FUNCTIONS OF THE JOB**

In order to fall within the definition of a “qualified handicapped person”, Complainant must establish that he can perform the essential functions of his job as a school bus driver 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.

In this case, for approximately 20 years, Complainant worked as a school bus driver for the City of Boston. He stopped operating a bus only after Respondent unilaterally decided that it could not meet the medical restrictions imposed by both his own and the company’s physicians. However, notwithstanding his sensitivity to diesel fumes and his back and shoulder problems, Complainant continued to operate a school bus proficiently from 1994 to November 1999 and then from September 2001 to June 2002. The evidence also clearly showed that when Respondent accommodated Complainant’s disability, such as allowing him either to switch buses or to leave the bus yard early, he satisfactorily performed the essential functions of his job.

Respondent has raised various arguments in support of its position that Complainant is not a qualified handicapped person under the law. First, with respect to placing Complainant on administrative leave in November 1999,

Respondent argued that he could not perform the essential functions of his job as a bus driver because he could not tolerate bus fumes. In particular, Respondent emphasized that he became dizzy, nauseous, light-headed, faint, and anxious upon exposure to such fumes. I find this argument to be without merit and unsupported by the evidence. The evidence strongly supports the finding that Complainant maintained an excellent driving record in terms of safety throughout his long career as a school bus driver. More importantly, when Respondent has accommodated Complainant's medical condition related to his sensitivity to diesel fumes, he has operated a school bus proficiently and without problems. For example, Complainant testified credibly that when he left the bus yard early to avoid diesel fumes from the other buses, he was asymptomatic and operated his bus without problems. Stated differently, although Complainant did complain of dizziness and nausea either when he operated certain malfunctioning buses or when he could not leave the bus yard early, these problems did not occur when Respondent provided reasonable accommodations. Dr. Bird also noted, in his letter dated December 9, 2000, that Complainant only became symptomatic under these two particular circumstances, "which is reversed when he is in cleaner air." Lastly, Respondent has not provided any credible evidence that Complainant suffered these symptoms at any other times except when these two particular events occurred.

Second, Respondent argued that from October 2000 to May 2001, Complainant could not perform the essential functions of the job as a "standby" route driver. Contrary to Respondent's contention, I believe it would be unfair

and misleading to use the “standby route” as the basis for determining whether Complainant could perform the essential functions of his job as a bus driver. As stated above, in June 2000, Complainant bid on a wheelchair bus for summer work because it paid more than the other routes. Even though Complainant could not operate the wheelchair bus due to his medical limitations, Respondent allowed him to bid on this bus and then paid him at the higher rate associated with this route.⁹ Consistent with this precedent, Complainant testified credibly that at the bid for the 2001-2002 school year, Timilty told him to “bid any way you want. They’re going to pay you anyway.” Thus, Complainant bid on the standby route simply because it paid more than other routes. I believe the evidence clearly established that at the time Complainant submitted his bid, neither he nor Timilty had any expectation that he would actually operate the standby route. Under these circumstances, it would be unjust to use the standby route as a basis for determining whether Complainant was a qualified handicapped person.

Third, while I credited Respondent’s premise that the effects from fume exposure, as well as from prescription medication, *could* have rendered Complainant unable to perform the essential functions of the job as a bus driver, no credible evidence exists to support the conclusion that either the effects from his exposure to diesel fumes or the synergistic effects from these medications actually rendered him impaired at any time, or posed a “reasonable probability of substantial harm” to himself or others. As stated above, when Respondent has accommodated his requests to avoid fume exposure, Complainant has been

⁹ As discussed in detail below, Respondent clearly should have engaged in an interactive dialogue with Complainant prior to submitting his bid.

asymptomatic. Furthermore, with respect to Complainant's prescription medications, Respondent's expert, Dr. Egilman, acknowledged that these drugs would not *per se* render him unfit to drive a school bus. Dr. Egilman also admitted that the DOT Federal Highway Administration Safety Regulations specifically allowed prescribing and treating physicians to decide on the use of a controlled substance on an individual basis for those operating a commercial vehicle. More importantly, Dr. Bird stated that no evidence of a problem or inappropriate use of these medications existed, and Complainant never demonstrated any unsafe driving behavior as a result of his use of these drugs. Although I believe Respondent justifiably became concerned when it discovered Complainant took these medications, its worries were essentially alleviated when Dr. Bird wrote, "It is entirely appropriate Mr. Hall continue to use these medications prescribed by his treating physicians while driving any vehicle including school buses." I, therefore, find that Complainant's use of certain prescribed medications did not render him incapable of performing the essential functions of the job as a school bus driver. Consequently, Complainant has established that he is a qualified handicapped person within the meaning of G.L. c. 151B, § 4(16).

3. REASONABLE ACCOMMODATIONS

Once Complainant has established that he is a disabled person who can perform the essential functions of his job, Respondent is obligated to provide a reasonable accommodation unless it can establish that doing so would cause an undue hardship on its business or Complainant's disability posed a reasonable

probability of substantial harm to himself or others. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993); Ryan v. Town of Lunenburg, 11 MDLR 1215, 1242 (1989), see, Disability Discrimination Guidelines, p. 15. As an initial matter and as discussed in detail above, Respondent does not dispute that it was well aware of Complainant's medical conditions. In addition, Respondent has acknowledged making numerous accommodations for Complainant's medical conditions in an attempt to comply with the limitations requested by his physician. While Complainant admitted that Respondent occasionally made accommodations to his disability, he argued that it failed to provide reasonable accommodations on numerous other occasions. Each of these incidents will be discussed separately. See, Forest v. Wal-Mart, 23 MDLR 110, 118 (2001), *quoting*, Soto-Ocasio v. Federal Express Corp., 150 F.3d 14 (1st Cir. 1998) ("cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior").

a. **February 2, 1999 – Refusal to Provide a Substitute Vehicle**

On February 2, 1999, Respondent removed Complainant's vehicle, Half Bus 181, from service for maintenance. Complainant claimed that his supervisor then arbitrarily refused to allow him to operate a mini bus merely because he was designated to operate a half bus route. With respect to this particular incident, I credited Timilty's testimony that Respondent refused to allow him to operate a mini bus "with a manual door" because it would be contrary to Dr. Bird's restrictions that he only operate a vehicle with an electric door. Timilty also claimed that Respondent had offered Complainant another half bus to use while

Half Bus 181 was being serviced, but Complainant refused to drive a half bus. According to Timilty, Complainant went back to operating Half Bus 181 the next day after it was returned to service.

Under these circumstances, I find that Respondent's refusal to allow Complainant to operate a mini bus with a manual door on this occasion did not constitute an unreasonable refusal to accommodate his disability. In addition, I believe Complainant acted unreasonably by insisting that he had to operate a mini bus without first exploring whether any of the spare half buses would be acceptable. Moreover, Complainant has not presented any credible evidence that Respondent could have offered any other reasonable accommodation on the one day that Half Bus 181 was out of service.

b. October 1999 – Refusal to Leave the Bus Yard Early

I credited Complainant's testimony that after he became sensitive to diesel fumes in 1994, he began leaving the bus yard early in order to avoid fumes that built up in the yard at his regular start time. However, in October 1999, Respondent began strictly enforcing its work rules and refused to allow him to leave early. As a result, on October 22, 1999, Complainant became ill from exhaust fumes when he was forced to leave at his regularly scheduled start time. Complainant subsequently submitted a note from Dr. Bird, dated October 23, 1999, that specifically requested that Complainant be permitted to leave early to avoid fume exposure. Respondent refused the request, claiming it would violate the provisions of both the CBA and Respondent's contract with the City of Boston. Complainant's supervisor, Richard McLaughlin, also doubted the

veracity of Complainant's claims. Although McLaughlin did not discover any fume problems, Respondent apparently did not take any quantifiable tests. In addition, Respondent did not arrange for an IME to refute Hall's report of injury. Rather, McLaughlin hypothesized that deodorizers and cleaning fluids made him sick and then pronounced, "I don't smell anything that could make him sick, other than his own personal hygiene habits."

I believe Respondent wrongfully failed to provide a reasonable accommodation when it unilaterally decided to prohibit Complainant from leaving the bus yard prior to his regular start time. See, Donohue v. Sodexho-Marriott Services, Inc., 21 MDLR 204, 207 (1999) (employer's unilateral determination to cease long standing reasonable accommodation was improper). The Commission has recognized that modifying an employee's work schedule is an appropriate reasonable accommodation depending upon the circumstances. Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000); see, Disability Discrimination Guidelines, at 7-8. Although Respondent's contractual obligations are certainly factors that may be considered for purposes of determining the reasonableness of any accommodation, these obligations neither erased nor displaced Complainant's rights as a disabled individual under the law. Heraty v. Atlas Oil Co., 15 MDLR 1143,1164 (1993). In addition, Respondent acknowledged making accommodations for Complainant that violated the literal provisions specified in the CBA. For example, Timilty admitted that in 2002, Respondent allowed Complainant to operate a routed bus while his regular bus was being repaired even though this assignment violated Respondent's contract

with the City and the CBA. Moreover, while Respondent insisted that it had to follow the specific provisions of the CBA, it apparently did not consider the anti-discrimination provisions contained therein. Specifically, Art. 5, § 2 of the CBA states: “The Company further agrees that it will not discriminate against any employee or applicant for employment on the basis of disability as defined by State and Federal discrimination laws... in regard to any position for which he or she is qualified.”

The duty to provide a reasonable accommodation is also a continuing one. Donohue, 21 MDLR at 207, *quoting*, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). In particular, 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

prohibit him from leaving early. Its rush to judgment is 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). In October 1999, Respondent clearly had sufficient information about Complainant's sensitivity to diesel fumes. In particular, after Complainant became sick on October 22, 1999, and then received Dr. Bird's note dated October 23, 1999, Respondent should have either allowed Complainant to continue to leave early or, at a minimum, discussed with him and his physician any other possible reasonable alternative.¹⁰ Under these circumstances, I believe Complainant's request to leave early was reasonable especially since Respondent had allowed him to do it previously for many years.

Respondent also failed to produce any credible evidence that allowing Complainant to leave early would cause any undue hardship to its business. Factors to be considered in determining whether a particular accommodation posed an undue hardship include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and, (3) the nature and costs of the accommodation. See, Disability Discrimination Guidelines, at 9.

Respondent asserted that allowing Complainant to leave early would violate the provisions of the CBA and its Contract with the City and, thus, pose an undue hardship on its operations. I find this argument unpersuasive. Although

¹⁰ Two and a half years later, in June 2002, the parties did engage in an interactive dialogue and jointly agreed that Hall could leave the yard 20 minutes early as a reasonable accommodation to his condition.

Jacobs testified credibly about the City of Boston's rationale for prohibiting drivers from leaving early, he likewise testified that Respondent never specifically requested that Complainant be able to leave the bus yard 30 minutes prior to his regular start time, and he would have taken such a request "under advisement." Additionally, as stated above, Respondent's contractual obligations did not erase or displace Complainant's rights to a reasonable accommodation as a disabled individual under the law. Consequently, I conclude that Respondent's unilateral refusal to allow Complainant to leave the bus yard early and its failure to engage in any interactive dialogue with Complainant about any possible reasonable accommodation, constituted a violation of M.G.L. c. 151B, § 4(16).

c. November 22, 1999 – Placement of Complainant on Paid Administrative Leave

Complainant alleged that Respondent wrongfully failed to provide him with a reasonable accommodation for his disability when it placed him on administrative leave. Specifically, on November 20, 1999, Complainant provided Respondent with a note from Dr. Bird stating that Complainant could not operate International buses because of exhaust fumes, but could operate GMC buses. In response, on November 22, 1999, Respondent placed Complainant on paid administrative leave "pending resolution to doctor's note", since it did not have any GMC buses for him to operate at the Readville yard or any other available positions. Although Respondent insisted that it could not provide the accommodations requested by Complainant's physician, it nonetheless contended that placing Complainant on administrative leave was a reasonable accommodation. Under these circumstances, clearly no meaningful interactive

dialogue took place as Respondent simply took the position that it had no other choice but to put Complainant on leave. As succinctly stated by Timilty, “[we] didn’t know what to do with him at the time.”

Respondent has argued that it could not comply with the accommodations requested in Dr. Bird’s note of November 20, 1999, without suffering an undue hardship since it had no “available” buses at the Readville yard that complied with Dr. Bird’s restrictions. It also contended that it could not reassign Complainant to another route since all of the other bus routes had been designated to other drivers pursuant to the seniority-based bid procedure specified in the CBA.

I find Respondent’s argument unsupported by the evidence. First, Respondent failed to offer any credible evidence that it considered or investigated the possibility of obtaining a bus that complied with Dr. Bird’s restrictions from any of the other bus yards that it controlled and operated under the City of Boston contract. More importantly, Respondent apparently did not consider or investigate the possibility that Complainant could switch routes with another driver who operated a bus that complied with Dr. Bird’s limitations. I agree with Respondent that involuntarily assigning Complainant to another route previously designated to another driver would constitute an undue hardship, since this accommodation would upset the seniority rights and legitimate expectations of its non-disabled employees. However, Respondent apparently did not consider asking other drivers if they would voluntarily agree to switch routes with Complainant. For example, Steven Gillis testified credibly that bus

drivers often switched buses, apparently with Respondent's expressed or implicit approval. Moreover, as discussed above, Respondent often granted accommodations that were inconsistent with the literal provisions of the CBA. Under these circumstances, Respondent clearly had a duty to engage in an interactive dialogue with Complainant and his union representatives, where a possible reasonable accommodation, such as voluntarily asking other drivers to switch buses, could have been investigated. Consequently, Complainant has established that Respondent failed to provide reasonable accommodations in violation of M.G.L. c. 151B, § 4(16), when it unilaterally placed him on paid administrative leave.

d. **January 2000 – Complainant Capable of Returning to Work with Restrictions**

After Respondent placed Complainant on paid administrative leave, it continually failed to either encourage or foster a discussion of other possible reasonable accommodations. Instead, Respondent simply scheduled Complainant for an IME with Dr. Roston. On January 6, 2000, Dr. Roston indicated that Complainant is able to "return to limited-duty involving no climbing, bending or stooping, limited lifting and limited use of right hand and arm. He should not drive a school bus. However, he may drive a small vehicle such as a van or a car. Mr. Hall should avoid exposure to diesel fumes and when he does return to operating school buses, he should avoid International buses in cold weather when the heater would be in use." On February 11, 2000, Dr. Bird concurred with Dr. Roston and likewise stated that Complainant could drive a van or a car but not a school bus.

Respondent claimed that it attempted to follow these medical restrictions, but it would be infeasible to provide the accommodations requested by Complainant since it did not operate any cars and all of the van routes had already been awarded to other drivers pursuant to the seniority-based bid procedure in the CBA. Respondent again has not submitted any credible evidence that it engaged in a dialogue with Complainant or his physicians regarding possible alternatives after it received Dr. Roston and Dr. Bird's opinions. Moreover, as stated above, I found Respondent's argument that it could not provide a reasonable accommodation without violating the seniority rights provided in the bidding provisions of the CBA to be without merit. It could have posted a request or solicited other drivers to voluntarily switch buses with Complainant. Consequently, I conclude that Complainant has established that Respondent violated M.G.L. c. 151B, § 4(16), when it failed to provide Complainant with a reasonable accommodation when it continued to keep him on paid administrative leave through the remainder of the 1999-2000 school year.

e. June and August 2000 – Complainant's Bids for Work

In June and August 2000, respectively, Respondent refused to allow Complainant to operate a vehicle, but allowed Complainant to bid for bus routes that he could not operate due to his medical restrictions. On both occasions, after Respondent designated these routes to Complainant, it paid him at the higher rates associated with each particular route. Specifically, in June 2000, Complainant bid on a wheelchair bus, which he could not operate because the vehicle had a mechanical door. However, neither party introduced any evidence

that prior to the bid, they engaged in an interactive dialogue regarding bus routes that possibly complied with Complainant's medical restrictions. As discussed in detail above, Complainant clearly bid on the wheelchair bus solely because it paid a higher rate than the other routes.

Similarly, in August 2000, Respondent allowed Complainant to bid on a standby route that would not accommodate his medical limitations. Again, Complainant bid on the standby route "for the money." As previously discussed, I credited Complainant's testimony that prior to this bid, Timilty told him "bid any way you want. They're going to pay you anyway." This conversation obviously did not fall within the meaning of an "interactive dialogue" about a reasonable accommodation for Complainant's disability.

I find that on both occasions, Respondent unlawfully failed to provide Complainant with a reasonable accommodation. In particular, it clearly failed to investigate, discuss, or offer Complainant any other alternative to remaining on paid administrative leave. With respect to a possible reasonable accommodation, I credited Union President Janet Royston's testimony that in the past, Respondent has allowed drivers to bid on and then be designated a route even though questions existed about the driver's medical condition. Consequently, Respondent should have engaged in a dialogue with Complainant prior to the bids about available bus routes that complied with his medical restrictions. If any questions still existed about his medical limitations, then Respondent could have either obtained medical documentation from Complainant's physicians or subjected him to an IME.

Respondent also has failed to produce any credible evidence that providing this reasonable accommodation would have posed an undue hardship to its business. In particular, it failed to establish that it had no routes or buses that complied with Complainant's medical restrictions. Notwithstanding, Respondent argued that Complainant acted unreasonably by submitting bids for buses that he could not operate and, therefore, it cannot be deemed to have failed to offer any reasonable accommodations. I disagree. As discussed in detail above, at the time of these bids, neither Complainant nor Timilty had any reasonable expectation that Complainant would operate these vehicles. In fact, Timilty explicitly endorsed Complainant's decision to bid on the standby route "for the money." Consequently, I find that in June and August 2000, Respondent unlawfully failed to offer Complainant reasonable accommodations in violation of M.G.L. c. 151B, § 4(16), when it failed to engage in or foster any interactive dialogue with Complainant regarding a possible reasonable accommodation that would have enabled him to drive a vehicle that complied with his medical limitations.

f. **October 2000 – Complainant Placed on Unpaid Medical Leave**

On October 20, 2000, Respondent unilaterally discontinued Complainant's "paid" administrative leave and placed him on "unpaid" medical leave. As reasons therefore, Timilty testified that Respondent discovered, nine months after the fact, that it did not have a policy, procedure, or contractual provision allowing it to provide Complainant with paid administrative leave. Again, Respondent submitted no credible evidence that it engaged in an interactive

dialogue with Complainant prior to this decision. Instead, Respondent merely notified Complainant of its decision by letter from Respondent's legal counsel. Furthermore, when Gillis and Complainant met with Timilty to discuss this matter, I credited Gillis' testimony that Respondent's representatives simply stated that they were advised by their attorneys "not to say anything" except to tell Mr. Hall that he was being placed on medical leave.

As stated above, the duty to provide a reasonable accommodation is a continuing one. Here, Respondent's unilateral decision to cease paying Complainant constituted a failure to provide a reasonable accommodation, particularly since it admitted that it initially placed him on paid leave as an accommodation to his medical condition. Moreover, Respondent has failed to establish that keeping Complainant on paid administrative leave would have constituted an undue hardship. Its realization that it did not have any policy for paid leave did not justify unilaterally discontinuing it, especially since it had paid Complainant for the previous eleven months. More importantly, considering that Respondent had over 800 employees under its contract with the City of Boston, and received more than \$50 million dollars from the City for its contracted services, Respondent cannot credibly argue that continuing to pay Complainant would have caused an undue financial hardship. Consequently, Respondent violated M.G.L. c. 151B, § 4(16), when it unilaterally placed Complainant on unpaid medical leave and otherwise failed to provide him with a reasonable accommodation for his disability.

g. October 2000 – May 2001 - Complainant Medically Cleared to Return to Work

Beginning in the fall of 2000, Respondent showed an increasing unwillingness to allow Complainant to return to work despite receiving medical notes authorizing his return to work. Specifically, on October 27, 2000, only days after Respondent requested an authorization to return to work, Dr. Bird stated that Complainant could return to work provided he operated a vehicle with “power door only; prefer van or ½ bus – not a requirement for return...; prefer avoiding any bus with exhaust build up in driver cab area.” In response, Respondent simply determined that that Complainant was not able to medically perform the job for which he bid prior to the beginning of the school year, namely the standby route.¹¹ On December 9, 2000, Dr. Bird again wrote to Respondent clarifying his restrictions. He stated:

It is and has been my recommendation for months that Mr. Hall return to driving any bus which does not have an unusual build up of exhaust fumes in the driver’s cab as occurred with the International buses he drove in the past... It also continues to be my recommendation that Mr. Hall be allowed to arrive early in the bus yard to avoid exposure to the excessive exhaust build up in the yard at that time.

In his letter, Dr. Bird also noted that he had offered Respondent industrial hygiene assistance to investigate the fume problem both in the International buses and in the bus yard “to assist with furthering our understanding of the nature of the problem and to assist with potential remedies. To date, Laidlaw has not responded to this offer and have not provided requested information pertaining to their own investigation of these concerns.” Respondent did not offer

¹¹ As stated above, Respondent allowed Complainant to bid on the standby route “for the money” and not with the expectation that he would actually drive that bus.

any credible evidence to refute Dr. Bird's allegations regarding its lack of cooperation.

Although Respondent may have had legitimate concerns about Dr. Bird's recent change of opinion with respect to Complainant's medical condition, it determined, apparently without any recent medical evidence or opinions to the contrary, that Complainant "has not been [sic] fully cleared to return to work, as the doctor's note makes it clear that he cannot be exposed to exhaust fume build up, and the essential functions of his job as a bus driver are such that such isolation cannot occur." Respondent further claimed, again without any specific medical documentation to support its position, that Complainant's complaints of headaches with nausea as well as varying degrees of light-headedness "[posed] a safety risk while transporting school children."

Respondent's intransigence over allowing Complainant to return to work reached its height in 2001. Specifically, on January 20, 2001, Dr. Bird wrote another letter in which he unequivocally cleared Complainant to return to work without any restrictions. At this point, Respondent understandably had good reason to schedule Complainant for an IME considering Dr. Bird had again changed his opinion regarding Complainant's status. However, on February 26, 2001, Dr. Friedman issued an opinion in which he concurred with Dr. Bird and stated "there is no evidence at the present time of any impairment or disability. [Complainant] has reached medical end result [and fit to return to his job as a bus

driver].”¹² After receiving Dr. Friedman’s medical opinion, Respondent again failed to engage in or foster any discussion or interactive dialogue with Complainant regarding a possible reasonable accommodation. Instead, Respondent sought out a third medical opinion from Dr. Bentley regarding Complainant’s back and shoulder problems since Dr. Friedman’s evaluation did not specifically address those injuries. Not surprisingly, in a letter dated April 5, 2001, Dr. Bentley concluded that Complainant was orthopedically fit and capable of returning to work without restrictions, but he noted that if Complainant uses a mechanical bus door, the likelihood of re-injury to his shoulder would increase. Almost a month later, on May 2, 2001, Respondent eventually accepted the mountain of medical opinions and allowed Complainant to return to work to the standby position he bid “for the money” in August 2000. Although Timilty testified that Respondent was not responsible for the delay in getting Complainant examined by Dr. Bentley, I nonetheless find the delay to be unconscionable. The problems associated with getting Complainant examined by Dr. Bentley clearly did not excuse Respondent from its obligations to investigate and discuss a possible reasonable accommodation with Complainant after it received notices from both Dr. Bird and Dr. Friedman clearing his return to work.

Although Respondent may not have been able to comply with Dr. Bird’s medical restrictions contained in his note of October 27, 2000, it failed to show how it would be infeasible to comply with the reasonable restrictions stated in Dr. Bird’s letter of December 9, 2000; namely, that Complainant return to driving any

¹² Although Laidlaw emphasized that Dr. Bird’s kept “flip-flopping”, I am struck by the degree to which the opinions from Complainant and Respondent’s physicians, at least up to this point in time, are largely congruent.

bus which does not have an unusual build up of exhaust fumes in the driver's cab and he be allowed to leave the bus yard early. In addition, Respondent has failed to establish that allowing Complainant to return to work after it received Dr. Bird and Dr. Friedman's opinions would have constituted an undue hardship. In particular, after it received Dr. Friedman's note dated February 26, 2001, Respondent had no credible medical documentation that supported its contention that Complainant could not return to work. Although Respondent arguably had the right to seek an additional orthopedic evaluation of Complainant's shoulder and back ailments, in the meantime it should have either allowed Complainant to drive a vehicle or placed him on paid administrative leave pending the orthopedic IME.

I also find Respondent's argument that allowing Complainant to drive during this time period would constitute a reasonable probability of substantial harm to himself or others, to be without merit and unsupported by the evidence. To satisfy this standard, Respondent must gather and obtain substantial information regarding the Complainant's work and medical history and may not make a determination based upon subjective evaluation or speculation as to risk. Martinez v. Resource Recovery Systems, 16 MDLR 1589, 1603 (1994), Moreau v. City of Haverhill, 15 MDLR 1782, 1808 (1993), Williams v. Town of Stoughton, 13 MDLR 1385, 1419 (1991), Ryan, 11 MDLR at 1248. The potential for risk, including increased risk of injury, without more, is insufficient to establish a reasonable probability of substantial harm. Yates, 17 MDLR at 1512, *citing*, Ryan, 11 MDLR at 1248. Moreover, an employer's "concern" for an employee's

safety based upon its observation of his impairment and its impact on his ability to do the job, does not satisfy this standard. Martinez, 16 MDLR at 1603.

After it received Dr. Bird's letters dated, respectively, December 9, 2000 (allowing Complainant to return to work with limited restrictions) and January 20, 2001 (clearing Complainant to return to work without restrictions), Respondent lacked credible timely medical documentation from which it could form a reasonable objective conclusion that Complainant's return to work would pose a probable substantial risk of harm to himself or others. Moreover, any perceived risk of harm was essentially alleviated after Dr. Friedman cleared him to return to work on February 26, 2001. Under these circumstances, I find that Respondent's failure to engage in any interactive dialogue regarding his request for accommodations, coupled with its complete unwillingness to allow Complainant to return to work during the period of December 9, 2000 to May 7, 2001, constituted unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, § 4(16).

h. June 2001 - Refusal to Allow Complainant to Bid for Summer Work

Complainant alleged that Respondent unreasonably failed to allow him to bid for summer work in June 2001. Specifically, Complainant testified that Respondent failed to give him adequate notice of the summer 2001 bid held in June. Timilty testified that pursuant to the CBA, drivers who wanted to bid for summer work were required to sign up before the bid. Although Complainant admitted he knew about the procedure, he did not know about the notice being posted until it was too late. The day after the signup sheet had been taken down,

Complainant asked Respondent if he could still bid, but Timilty refused claiming it would be unfair to the other drivers and contrary to the bid procedure specified in the CBA. In particular, Respondent argued that it complied with the letter of the CBA regarding the bidding procedure and it would be infeasible to reopen the bidding process simply because Complainant failed to comply with the applicable time procedures. Union President Royston corroborated Timilty's testimony that drivers must sign up in a timely manner in order to be eligible to bid.

Here, Complainant has failed to establish that his failure to sign up for the bid in a timely manner was attributable to Respondent's actions. Moreover, he has failed to show a causal connection between his failure to bid and his handicapped status. Lastly, I agree with Respondent that it would constitute an undue hardship for it to reopen the bidding process under these circumstances. Complainant has, therefore, failed to establish that Respondent engaged in unlawful discrimination in this particular occasion.

i. **June 2002 – Refusal To Allow Complainant To Bid For Summer Work**

Complainant again claimed that Respondent prevented him from bidding for summer work in June 2002. Specifically, he testified that he wanted to bid on a mini bus route, but use the half bus (HS03) he had operated without problems during the 2001-2002 school year. Complainant stated that Timilty refused to allow him to bid on the mini bus route because the mini bus had a mechanical door, which Complainant could not operate due to his medical restrictions. According to Complainant, Timilty insisted that he could only operate the type of vehicle assigned to the specific route, namely, a mini bus. In response,

Complainant simply refused to bid on any work.

Although Respondent likely should have engaged in a more interactive dialogue with Complainant about a possible reasonable accommodation to his medical condition, Complainant has not presented any credible evidence that Respondent precluded him from bidding on any half bus routes that complied with Dr. Bird's restrictions. Under the law, an employer need not provide the best accommodation available or the accommodation specifically requested by the employee. Rather, in determining the type of reasonable accommodation required for an employee, the employer must provide an accommodation that is effective for its purpose. Disability Discrimination Guidelines, at 7. Under these circumstances, I believe Complainant's outright refusal to bid on any route unless he got what he specifically requested was unreasonable. Complainant, therefore, has failed to establish that Respondent's alleged refusal to allow him to bid for summer work in June 2002 constituted a violation of M.G.L. c. 151B, § 4(16).

j. **August 2002 – Refusal to Allow Complainant to Bid for the 2002–2003 School Year**

Respondent refused to allow Complainant to bid on any routes for the 2002–2003 school year after it discovered that he was taking certain prescription medications. Specifically, on or about May 13, 2002, Respondent learned that Complainant was taking five different types of prescription medications. It claimed two of these drugs (Klonopin and Trazadone) prevented him from safely operating a school bus. Three months later and presumably just days prior to the bid for the 2002-2003 school year, Respondent notified Complainant's attorney in

a letter dated August 20, 2002, that “based on the medical opinion and directive of Respondent’s physician [Dr. Egilman],¹³... Mr. Hall is a direct threat to the children on his school bus, himself, and the general public. Accordingly, please instruct your client that he is ineligible to bid for a school bus route for the 2002-2003 school year.”

I believe Respondent wrongfully refused to allow Complainant to bid for work. First, Respondent took such action despite the fact it had no medical documentation that stated he was “impaired” from driving a school bus. In particular, it had no such medical information from either the physicians who prescribed these medications or from any doctor who actually examined Complainant. Certainly, after Respondent became aware that Complainant was taking possible “impairing” medications, it would have been amply justified in placing Complainant on leave pending a clarification of this issue. It could have then resolved any questions regarding these medications either by obtaining medical documentation from Complainant’s physicians, or by scheduling him for an immediate IME. However, Respondent neither solicited such documentation, nor conducted any such examination.¹⁴ Rather, consistent with its past actions, Respondent unilaterally decided that Complainant was incapable of operating a vehicle and, thus, ineligible to bid for work for the entire 2002-2003 school year.

Second, Respondent produced no credible evidence that Complainant did not satisfactorily perform his duties while taking these medications. In fact, the record does not contain any evidence indicating that Complainant failed to

¹³ Dr. Egilman’s report or affidavit was not submitted into evidence but cited in Respondent’s brief as “Ex. ‘H’ of Laidlaw’s Motion for Reconsideration of Probable Cause.”

¹⁴ As discussed above, Dr. Egilman did not personally examine or evaluate Hall.

perform his job satisfactorily.

Third, after it received Dr. Bird's letter dated September 30, 2002, it still wrongfully refused to reinstate Complainant, or schedule an IME, despite Dr. Bird's unequivocal opinion, as his treating physician that "it is entirely appropriate the Mr. Hall continue to use these medications prescribed by his treating physicians while driving any vehicle including school buses. The issues of possible sedation have been reviewed with Mr. Hall recently by myself as in the past and have never been an issue for him."

Once Respondent became aware that Complainant took medications that might have possibly impaired his ability to drive, it should have investigated and sought further information regarding the possibility of impairment, and then facilitated, defined, and discussed a possible reasonable accommodation with Complainant instead of merely prohibiting him from working. For example, as discussed above, it could have allowed Complainant to bid on and be designated a route, and then placed him on temporary leave pending either an IME or a clarifying opinion from his own physician. Thus, he could have returned to operating his designated vehicle after the issues regarding his medications were resolved. Moreover, Respondent's failure to notify Complainant of its decision until just days prior to the bid, when it had this information at least three months earlier, seems particularly egregious. Instead of investigating and researching a possible reasonable accommodation as soon as it had this information, Respondent appeared to have obtained Dr. Egilman's opinion largely for purposes of this litigation, as opposed to defining any possible reasonable

accommodation.¹⁵ Complainant has, therefore, established a prima facie case of disability discrimination as a result of Respondent's refusal to allow him to bid for a bus route prior to the 2002–2003 school year.

I also find that Respondent has failed to establish that it would have suffered any undue hardship by allowing Complainant to bid on and be designated a route prior to clarifying and investigating the degree of any impairment caused by his medications. As stated above, had Respondent allowed Complainant to bid on a route, he would have been able to resume work on his designated route without upsetting anyone's seniority rights once his medication issues were resolved.

Moreover, Respondent has failed to establish that allowing Complainant to bid under these circumstances would create a reasonable probability of substantial harm. Although I am sympathetic to Respondent's position that it must impose stringent health, medical, and physical standards for bus drivers consistent with the law, Respondent has not produced sufficient credible evidence that Complainant at any time presented a "reasonable probability of substantial harm" to either himself or others.¹⁶ Ryan, 11 MDLR at 1242. As stated above, the potential for risk, without more, is insufficient to establish a reasonable probability of substantial harm. Respondent's expert witness, Dr. Egilman, acknowledged that the medications at issue did not *per se* render Complainant unfit to drive a school bus. Dr. Egilman also admitted that the

¹⁵ Complainant apparently first became aware of Dr. Egilman's opinion when counsel received his affidavit attached to Laidlaw's Motion for Reconsideration of Probable Cause.

¹⁶ Although Massachusetts, pursuant to 540 CMR 2.15, has stringent regulations regarding the qualifications for bus drivers, the regulations do not prohibit individuals from working as bus drivers if they are taking certain medications under the supervision of a physician.

federal regulations with respect to a CDL license allowed drivers to perform safety sensitive functions when using medications prescribed by a licensed physician provided the medications do not render the driver “impaired.” In this case, Complainant’s work history demonstrated that he performed his duties satisfactorily despite taking these medications. Respondent has also failed to produce credible evidence that showed Complainant’s symptoms of dizziness, light-headedness, or nausea were attributable to either the medications or the synergistic effects of these medications on his sensitivity to diesel fumes. To the contrary, the record shows that when Respondent has provided a reasonable accommodation to Complainant to avoid diesel fumes, he has been asymptomatic. Lastly, I give Dr. Bird’s opinion, as Complainant’s treating physician, substantial weight. Dr. Bird clearly articulated, “it is entirely appropriate that Mr. Hall continue to use these medications prescribed by his treating physicians while driving any vehicle including school buses.”

Consequently, I conclude that Respondent engaged in unlawful discrimination on the basis of handicap in violation of M.G.L. c. 151B, § 4(16), when it unilaterally refused to allow Complainant to bid for work for the 2002-2003 school year.

B. RETALIATION

M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B, or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. Kelley v.

Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997); see, Sexual Harassment Guidelines, at 25-28. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelly, 22 MDLR at 25, *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of any direct evidence of retaliatory 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). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliator, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelly, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

In this case, Complainant filed his charge with the Commission on February 2, 1999. On November 22, 1999, Respondent placed him on paid administrative leave; on October 20, 2000, it placed him on unpaid medical

leave; and, in August 2002, it refused to allow him to bid for work. Consequently, Complainant has satisfied the first three criteria necessary to establish a prima facie case of unlawful retaliation. However, I do not believe he has proven a causal connection between the protected activity and the adverse employment actions.

As discussed above, I found that Respondent engaged in unlawful discrimination on the basis of disability when, on various occasions, it failed to engage in an interactive dialogue regarding his disability and then failed to provide Complainant with a reasonable accommodation. However, Complainant has failed to provide sufficient evidence that Respondent's failure to provide a reasonable accommodation was the product of retaliatory animus. See, Lipchitz v. Raytheon Co., 434 Mass 493, 504; Abramian, 432 Mass at 117 (employee retains the ultimate burden of proving employer's adverse action was the result of retaliatory animus). For example, I believe Respondent's refusal to allow him to bid for work in August 2002, as well as its decision to discontinue his paid leave in October 2000, resulted from its ignorance of the obligation to engage in an interactive dialogue regarding a possible reasonable accommodation, as opposed to any other nefarious motive. In addition, although Respondent decided, albeit without sufficient reasons, that Complainant posed a direct threat to himself or others, Complainant has not produced any credible evidence from which I could infer that this action resulted from unlawful retaliatory motives.

Moreover, I found that Respondent's refusal to allow Complainant to bid for a route in June 2001 resulted from Complainant's failure to submit a bid in a

timely manner and not the result of any culpable conduct by Respondent's supervisors. In addition, Respondent clearly did provide some reasonable accommodations to Complainant after he filed his complaint. Lastly, although Complainant complained about a variety of minor actions, such as Respondent's decision to refuel his bus, he has not presented any credible evidence that Respondent took such actions in retaliation for his complaint. I, therefore, conclude that Complainant has failed to establish that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4).

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 affirmative relief, 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). For the reasons discussed below, I believe Complainant is entitled to affirmative relief, lost wages, and emotional distress damages.

A. AFFIRMATIVE RELIEF

Although Respondent never formally terminated Complainant's employment, it refused to allow him to bid for a route for the 2002-2003 school year and, thus, effectively prohibited him from working for the entire school year. For these reasons, Respondent shall allow Complainant to bid on all future bus routes. Prior to operating any vehicle, Respondent may either obtain necessary medical documentation from Complainant's physicians or subject Complainant to a medical examination similar to those given to other employees, to ensure that he is still capable of performing the essential functions of the job as a school bus driver and, if necessary, for purposes of defining and investigating any possible reasonable accommodations.

B. LOST WAGES

Complainant is entitled to back pay stemming from Respondent's unlawful discrimination. Specifically, he is entitled to back pay for the period he was placed on unpaid medical leave. Complainant remained on unpaid status from October 20, 2000 until he returned to work on May 7, 2001, a period of 28 weeks. Complainant presented credible evidence that the standby route he bid on for the 2000-2001 school year, worked approximately 56 hours per week and had an average weekly wage of \$1,090.56 per week. Complainant, therefore, lost a total of \$30,535.68 in wages from Respondent during this period. This amount, however, should be offset by his earnings from unemployment compensation

(\$6,635.00) and from other employment (\$1,714.40).¹⁷ Consequently, Complainant is entitled to an award of back pay for the period of October 20, 2000 to May 7, 2001 in the amount of \$22,186.28.

Complainant would also be entitled to back pay as a result of Respondent's unlawful refusal to allow him to bid for work for the 2002-2003 school year. However, prior to the beginning of the school year, Complainant began working for Washington Group International, Inc. Pay stubs for the pay periods ending September 1, 2002 to September 22, 2002, indicate that Complainant earned an average weekly rate of pay of \$2,011.73 from Washington Group, which is substantially higher than the average weekly rate he would have likely have earned from Respondent.¹⁸ Consequently, I decline to award any back pay for this period.

Although Complainant lost the opportunity to earn extra income doing "charter work" during the periods he was on paid administrative leave and unpaid medical leave, I decline to make an award for this extra income. As reasons therefore, Complainant failed to provide any reliable credible evidence on the frequency in which he did charter work in the past and, therefore, any award for lost "charter work" would be highly speculative.

¹⁷ Hall testified that he began working for Brinks on April 7, 2001, and continued to work for Brinks, approximately 2-3 days per week, for the rest of 2001 (38 weeks). His 2001 W-2 statement from Brinks showed that he earned \$16,286.77. Consequently, he had an average weekly wage of \$428.60. Thus, for the period of April 7, 2001 to May 9, 2001, Hall earned approximately \$1,714.40 ($\428.60×4 weeks) from Brinks.

¹⁸ Complainant did not submit any credible evidence regarding what his average weekly wage would have been for the 2002-2003, or what his actual average weekly wage was for the 2001-2002 school year. Using 56 hours as a rather high estimate of hours that Complainant would have worked and using the hourly wage rate set forth in the CBA effective September 1, 2002, I calculated an estimated average weekly wage of \$1,168.64 (40 hours straight time x \$18.26, plus 16 hours overtime x \$27.39) for the 2002-2003 school year.

C. 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. He provided credible compelling testimony on how his inability to work affected him emotionally, claiming that his life has been "rough", particularly when he did not receive any income from Respondent and had difficulty paying his mortgage and bills. In addition, Complainant became sick in October 1999 after Respondent refused his reasonable request that he continue to leave the bus yard early to avoid the exposure to diesel fumes. Complainant also acknowledged that as of the date of the Public Hearing, he continued to take medication to control his anxiety that he began experiencing after his initial exposure to fumes in 1994. I believe that Respondent's refusal to allow him to leave early in October 1999; its unilateral decision placing Complainant on paid administrative leave in November 1999; its unilateral decision to place him on unpaid medical leave in October 2000, and its refusal to let him bid on work for the 2002-2003 school year, greatly exacerbated his preexisting anxiety for which he sought medical treatment and took medication. I, therefore, conclude that Complainant is entitled to an award of \$75,000.00 in damages in compensation for the emotional distress he suffered as a direct and probable consequence of Respondent's unlawful conduct.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent, Laidlaw Transit, Inc., is hereby ordered:

1. To allow Complainant, Sherman Hall, to bid on all future bus routes.
Prior to operating a vehicle, Respondent may obtain necessary medical documentation from Complainant's physicians or subject Complainant to a medical examination similar to those given to other employees, to ensure that he is still capable of performing the essential functions of the job as a school bus driver and, if necessary, for purposes of defining and investigating possible reasonable accommodations.
2. To pay Complainant, Sherman Hall, within sixty (60) days of receipt of this decision, the sum of \$22,186.28 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.
3. To pay Complainant, Sherman Hall, within sixty (60) days of receipt of this decision, the sum of \$75,000.00 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.
4. To conduct basic annual training sessions on disability discrimination for all managers and supervisors employed by Respondent and working under its contract with the City of Boston. 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 agency is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's agency (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.
- 5. 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 27th day of June, 2003.

EDWARD R. MITNICK,
Hearing Officer