COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RICHARDO HAYNES,

Complainants

v. DOCKET NO. 05-BEM-00737

GENERAL ELECTRIC COMPANY
Respondent

Appearances: William F. Green, Esq. Commission Counsel for Complainant
Bobby C. Simpson, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On March 22, 2005, Complainant, Richardo Haynes, filed a complaint with this Commission against his former employer, Respondent, General Electric Company, alleging that he had been discriminated against based on his disability in violation of G.L. c. 151B s. 4(16) and the American's With Disabilities Act. Specifically Complainant alleged that after injuring his wrist several times in work related incidents and undergoing surgery to fuse bones in that wrist, Respondent refused to engage him in a discussion about reasonable accommodation, denied him the reasonable accommodation of permitting him to return to work with a lifting restriction and terminated his employment. The Investigating Commissioner issued a Finding of Probable Cause, crediting Complainant's allegations, and efforts at conciliation were

unsuccessful. The matter was certified for hearing and a hearing was held before the undersigned hearing officer on April 8, 9 and 10, 2013. The parties have submitted post-hearing briefs. Following a review of the record and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Richardo Haynes, is an immigrant from Barbados who came to the U.S. in 1990. He began his employment with Respondent General Electric Company as a consumer appliance field technician in the Spring of 1991. He was 46 years old at the time of the Hearing and residing in Hyde Park, Boston. Complainant worked in Respondent's Boston Area Service Zone and was responsible for the service and repair of all GE Manufactured appliances, such as dishwashers, refrigerators, stoves, micro-waves, garbage disposals, washer and dryers, as well as in-wall home and commercial air conditioning units. (Tr. Vol. I, pp. 20-25.)

2. Complainant did not work out of an office, but worked independently initiating his day from his home and driving his company van to service and repair assignments. His service call routes were transmitted to him from a GE dispatcher over an on-board computer located in his company service van. (Tr. Vol. I, pp. 22-23) Complainant's service van contained the various parts that he need for routine repair calls, as well as the tools and accessories required to perform necessary repairs. (Tr. Vol. I, pp. 26-27) Complainant generally worked an eight to twelve hour day and techs typically averaged eight to nine service calls daily. (Tr. Vol. I, 33 121-122)

3. Complainant was an exemplary employee who during his career at Respondent won a number of performance awards. (Tr. Vol. I, p. 29) Prior to injuring his wrist, Complainant's average weekly wage was $1,167.00, and his annual income was approximately $56,000. (Tr. Vol. I, p. 68)

4. During Complainant's tenure, the Boston Area Zone Manager was Patrick Gallagher. Gallagher was a former repair technician who began working in the Boston Area Zone in 1986 and had significant experience in the industry. Gallagher testified that Complainant was issued a "military lap top" or "tough book" which weighs about five to ten pounds, and a tool bag containing various tools such as hammers, wrenches, screw drivers, pliers, and small parts such as fuses that might be needed to complete a job. (Tr. Vol. I, pp. 134-136) Gallagher testified that the tools bags could weigh anywhere from 20 pounds to 65 or 70 pounds. A tech might also be required to carry various tools to move or repair a heavy appliance. These could include an air sled, compressor pump and microwave lift table weighing from 10 to 25 pounds. (Tr. Vol. I, pp.134-137) Gallagher testified about other pieces of equipment Complainant might need to use to complete a job ranging in weight from 15 to 25 lbs. (Tr. Vol. I, pp. 133-137) According to Gallagher the tub in typical washer a tech might be called upon to repair weighed about 20 -25 pounds. (Tr. Vol. I, pp. 146-147) Refrigerators and certain air conditioning units which a tech might have to move in order to accomplish the repair could weigh well over a hundred pounds up to a few hundred pounds and could require brute force to move. (Tr. Vol., I, pp. 141-143) I credit Gallagher's testimony about equipment potentially needed for a job, and about the strength and physicality generally required for the job.

5. The field repair technician position is essentially a single person job. Complainant testified that his job was not principally a physical one, and that he did not have to move heavy objects very often. When he was required to move a heavy appliance, there were company procedures in place for calling the dispatcher to arrange for a second technician to be available. These were referred to as two-man jobs and according to Complainant were a rarity. (Tr. Vol. II, p. 324) They might require rescheduling the job or if that was not possible, the customer might be responsible for having the unit in a safe position so that the technician could work on it. (Tr. Vol. I, pp. 25-26, 28-2) Gallagher testified that techs tried to avoid calling for a two-person job, because of the overall negative impact on productivity. (Tr. 130) He also testified that the company measured productivity by the number of service calls that a technician ran on a given day and that the number of completed calls was tied to revenue. (Tr. Vol., I, 121-122)

6. Complainant testified that over time there was an evolution in the industry and that with the increased use of modular replacement parts, appliances became lighter and more accessible and easier to work on. He was also less frequently required to move an appliance. He stated that these factors rendered the field technician's job a less physical one. (Tr. Vol. I, p. 25) I credit Complainant's testimony that the job may have become less physical over time, but find the job still required the use of heavy tools and equipment to repair large often heavy appliances and required significant physical strength.

7. On February 20, 2001, Complainant injured his left wrist while on the job. He was attempting to remove a washer tub to gain access to repair the washer's transmission and accidently struck his wrist with a hammer. In compliance with GE protocol, prior to seeking medical treatment, he reported his injury by leaving phone messages for his supervisor, his manager, the dispatcher in Boston, and the GE care nurse Dee Taylor in Louisville, Kentucky.

(Tr. Vol. I, pp. 30-31; Tr. Vol. II, pp. 255-256) After receiving no response to his messages, in compliance with GE protocol, Complainant sought medical treatment at the Faulkner Hospital Emergency room. He returned to full duty with no follow-up care after being instructed to remain out of work for a couple of days. From February of 2001 to March of 2003 Complainant continued to work his regular schedule as a full service field technician. (Tr. Vol. I, pp. 32-34)

8. On March 27, 2003 Complainant again injured his left wrist while on the job. He was repairing a refrigerator door hinge when the door began to fall and he grabbed the falling door. (Tr. Vol. II, p. 258) He immediately attempted to contact GE care nurse Dee Taylor for permission to receive medical care. He was unable to speak with Ms. Taylor but left a voice mail message with her and went to see his primary care physician for treatment of his wrist. (Tr. Vol. I, p. 34) Ms. Taylor contacted Complainant later that day after he had seen his primary care physician. Complainant testified that she was angry that he had gone to see his physician, stated words to the effect of "you technicians in Boston think you can do as you like," and instructed him to go to Boston Medical Center to be seen there. Complainant complied with her request. He was seen at the Boston Medical Center by occupational nurse Ruth Taylor (no relation to Dee Taylor), who recommended that he wear a splint and go on light duty for a week with a 10 pound lifting restriction and no repetitive pushing or pulling. (Tr. Vol. I, p. 35, 37-38; Ex. C-1) On that same day, Complainant contacted Respondent's Human Resources Department and lodged a complaint against Care nurse Dee Taylor for her abusive treatment of him and insinuating that Respondent might not pay for his treatment, because he felt she was not concerned about his well-being. (Id.) He received no response to his complaint. (Tr. Vol. I, p. 36)

9. GE Care Nurse Dee Taylor scheduled a follow-up visit for Complainant with nurse Ruth Taylor for April 4, 2003. After examining him, Ruth Taylor extended his light duty status for another five days, until April 6, 2003, and suggested that Complainant see an orthopedist, Dr. Drew at Faulkner Medical Center for an evaluation of his injured wrist. (Tr. Vol. I, p. 40; Ex. C-2) Dee Taylor directed Complainant to follow up with Ruth Taylor at Boston Medical Center on April 10, 2003, at which time Complainant received a document that he remain working on Light Duty status working 8 hours per day with a 25 pound weight restriction, as of April 11, 2003, until evaluated by an orthopedist. (Ex. C-3; Tr. Vol. I, p. 42) Complainant returned to work and other than working a shorter day (8 hours as opposed to 12) he continued to perform all of his duties and did so for five and half months, from April 11, 2003 through September 25, 2003. (Tr. Vol. I, p. 42)

10. Gallagher testified that before a GE employee who had been injured could return to work, he had to "first be cleared by a GE doctor and then by the card coordinator, who would then inform Gallagher of the status, if it was light duty. (Tr. Vol. I, p. 110) Gallagher also testified that "light duty is triggered when either the GE Care Coordinator or the employee's doctor indicates that the employee has some restriction(s) that must be accommodated for a short-term period. (Tr. Vol. I, pp. 162-163) Gallagher stated they would try to accommodate the injured employee in some way shape or form, by looking at the schedule and perhaps giving that employee certain types of calls that would not require them to stress the injured part of their body or lowering the amount of calls. (Id.) According to Gallagher light duty was not a permanent assignment, but an accommodation made on a temporary basis, to give an injured employee time to recuperate. (Tr. Vol. I, pp. 161-162) The fact that the company considered light duty only as a temporary accommodation was corroborated by Bruce Pierce, a former

president of the International Union of Electrical Workers from 1999 to 2008 representing the Boston Zone Techs and a retired Boston Zone Tech with 37 years of experience. He testified that there "really was… no light duty…you had to be able to do your job or you couldn't do the job," but the company would make accommodations on a temporary basis. (Tr. Vol. II, pp. 338-339)

11. In April of 2003, Complainant was referred to an orthopedic surgeon at Brigham an Women's Hospital, Dr. Barry Simmons. Dr. Simmons recommended a fusion of Complainant's left wrist, and scheduled surgery for Complainant to take place on October 1, 2003. Complainant continued to work on light duty status until September. (Tr. Vol. I, p. 45)

12. On September 25, 2003, Complainant suffered a third workplace injury to his wrist while working on an air conditioner. He contacted GE Care Nurse Dee Taylor, who was unavailable and left her a message regarding his injury. He then went to his primary care physician who placed him out of work until his scheduled surgery six days later on October 1, 2003. (Tr. Vol. I, p. 44) Complainant advised his supervisor Pat Gallagher that he would be out of work for the remainder of the year, and stated in his email to Gallagher that he had attempted several times to also contact Dee Taylor, but received no response from her. (Ex. R-5; Tr. Vol. II, pp. 273-274)

13. On October 1, 2003, Complainant underwent surgery, a fusion of his left wrist, at Boston's Brigham and Women's Hospital. His treating orthopedic surgeon indicated that he would be totally disabled from October 1, 2003 to February 1, 2004, as a result of the surgery. (Ex. R-4) He remained out of work after October 1, 2003, due to the surgery and required rehabilitation. Complainant did not return to work in February but had a further procedure on his wrist on March 31, 2004, for hardware removal. (Ex R-8) During this time Complainant was

receiving long term disability insurance payments. Complainant also filed a worker's compensation claim, based on the fact that his injuries occurred at work. (Tr. Vol. I, p. 47-48; Jt. Ex. 1)

14. On April 30, 2004, orthopedic hand specialist, Dr. Andrew Terrono, conducted an "Independent Medical Examination" of Complainant's left wrist at the request of GE's insurance carrier. That same day Dr. Terrono forwarded a copy of his report to Angela Costa at GE's insurance carrier, Electric Insurance/Sedgewick in Beverly MA. (See Jt. Ex. 1; Tr. Vol. I, p. 51) In his report, Dr. Terrono recommended that Complainant continue in therapy. He also noted that Complainant would never have normal range of motion in his wrist, but stated, "with this operation, most people can get back to even moderately heavy labor." He also stated that Complainant could work as of April 30th with a 20 pound maximum lifting restriction. Dr. Terrono went on to state that Complainant "would probably reach maximum medical improvement within six months and concludes on page four of his report to GE: "…His prognosis, I believe, is good for the ability to return to full function, although he will always have limited motion and some weakness." (Joint Ex. 1) Dr. Terrono's IME report was received by Respondent well before June 1, 2004, the date Complainant sought to return to work.

15. On May 20, 2004, Complainant's treating physician, Barry Simmons, M.D., orthopedic surgeon at the Brigham and Women's Hospital, conducted an assessment concluding that Complainant could perform light duty work and placed a lifting restriction on his "left upper extremity of nothing more than 10 lbs," and noting that he would continue with strengthening exercises. (Ex. R-8) He wrote a note authorizing Complainant to return to work on June 1, 2004 with a ten pound lifting restriction for his left arm. He did not characterize this restriction as temporary or permanent. (Jt. Ex. 2) This note was faxed to Complainant's supervisor at GE in

anticipation of his returning to work on June 1, 2004. (Tr. Vol. I, p. 53) Dr. Simmon's 10 pound lifting restriction was more restrictive that the 20 pound restriction prescribed by independent medical examiner, Dr. Terrono. (Tr. Vol. II, p. 278)

16. Complainant sought to return to work on June 1, 2004. He informed Gallagher that he intended to return to work and Gallagher told him he need to clear his return with Dee Taylor, the GE care nurse. (Tr. Vol. I, p. 149) In the weeks prior to June 1, 2004, in preparation for his return to work, and with the knowledge and assistance of his supervisor, Pat Gallagher, Complainant received from GE a new employee identification badge, new credit card to purchase gas for his GE company van, which had remained in his possession during his recovery period. He also purchased new uniforms and new tools with a company Home Depot card. Complainant restocked his company van with the parts that would be need to service GE appliances. (Tr. Vol. I, pp. 53-54; 149)

17. On the morning of June 1, 2004 as Complainant was in his GE service van and about to begin his first service call, he was called back from the road by his supervisor Gallagher who asked if he had spoken to GE care nurse Dee Taylor. Complainant responded that he had not been contacted by the GE care nurse Dee Taylor since March 27, of 2003, when he first re-injured his wrist on the job. Gallagher then informed Complainant that Taylor had not cleared him for return to work. (Tr. Vol. I, p. 55-56) Gallagher then sent an email to Taylor stating that no one had contacted Complainant to let him know that he was not permitted to return to work on light duty, and noted that she had previously informed Gallagher that someone would speak to Complainant. His email further stated that Complainant had already started his day and had to be sent home. Taylor responded that Complainant was "playing" him, and had been told by Angela Costa, GE's insurance adjuster that the business could not accommodate light duty. She

also stated that Complainant had just found out that his workers compensation claim was being denied due to a pre-existing condition and that his benefits would be ending and therefore he was motivated to return to work, rather than apply for short-term disability. Neither Taylor nor Costa testified at the public hearing and I do not find credible the assertion that Complainant was not genuinely motivated to return to work. Complainant denied that anyone from Respondent, or Angela Costa, ever contacted him regarding his returning to work and I credit his testimony. Complainant also testified that he was not aware that his workers compensation benefits were ever denied, and stated his workers compensation claim was ultimately settled. He recalled there was some issue regarding whether workers comp or short term disability insurance would cover his injury, and at some point he began receiving long-term disability benefits and continued to receive the same amount of benefit per month. (Tr. Vol. II, pp. 374-377; Jt. Ex. 5) Gallagher testified that he did not know who Angela Costa was and did not know if she worked for GE or its insurance company. Gallagher also could not recall speaking to Taylor or Taylor calling him about Complainant's situation. (Jt. Ex. 6; Tr. Vol. I, pp. 154-155)

18. Complainant was not permitted to return to work as a field service technician. No one from Respondent ever had a discussion with him regarding the feasibility of light duty as a reasonable accommodation from the time he sought to return to work up until the time of the hearing. (Tr. Vol. I, pp. 56-57) Complainant testified that Dee Taylor never responded to his numerous attempts to contact her after March of 2003 and did not respond to his attempts to contact her in June of 2004. (Tr. Vol. I p. 56; Vol. II, p. 364) He also stated that he did not know who Angela Costa was and that he never spoke with her. (Tr. Vol. II, pp. 273-274) Respondent submitted no evidence to rebut this assertion. I credit Complainant's testimony that no one from

Respondent or its insurer contacted him regarding his not being permitted to return to work. I found Complainant to be a sincere, forthright witness and an earnest individual.

19. Gallagher's testified that he did not know that Complainant was returning to work with any restriction. However, this testimony is contradicted by his email to nurse Dee Taylor on the morning of June 1, 2004 stating that no one has told Complainant that he was not coming back to work on light duty that day. It is apparent from his email to Dee Taylor and the questions therein, and her response to Gallagher that someone at Respondent had decided but had not notified Complainant that he would not be permitted to return to work on light duty. Gallagher testified that in addition to light duty, GE has a Transitional work Assistance program for injured workers, which program's protocols govern injured GE workers who want to return to work. He testified that GE's care coordinator would receive information from a GE doctor prior to clearing an employee to return to work. (Tr. Vol. I, p. 112) The GE supervisors then attempt to find duties that will accommodate the employee's restrictions, including tasks such as riding with new employees and training them on the equipment. (Tr. Vol. I, p. 115-116)

20. In June and August of 2004, Complainant attended follow-up examinations with his Orthopedist, Dr. Simmons. Dr. Simmons' record of the June 24, 2004 reflects that Complainant reported "stiffness and pain with regular daily activities, e.g. driving, lifting objects, 'any two handed tasks'" that his wrist was aggravated by "daily activities, prolonged grasp, lifting, pulling." The number one goal of treatment was to "increase left wrist strength and hand strength to be able to pick up 10# object without pain." (Ex. R-9; Tr. Vol. II, pp. 283-284) Dr. Simmons' record of the August 26, 2004 visit reflect that Complainant indicated that any sort of activity caused discomfort in his left hand and he did not feel he would be able to return to his previous occupation as a Tech as a result of the lifting requirements. Simmons medical

assessment was that he did "not anticipate [Complainant would] regain the ability to perform a job that requires heavy lifting." (Ex. R-10) A form submitted by Respondent that is undated and entitled Disability Management Program- Functional Job Profile indicates it was completed by a GECS care nurse Nina Baker. It states that the Tech job description states that the job is considered "Medium –Very Heavy; Requires exertion of anywhere between 20#-100# of force frequently and may require moving from place to place lifting objects." (Ex. R-1) Gallagher testified that this description was an accurate assessment of the Tech job. (Tr. Vol. I, p. 157) This supports Respondent's assertion that the job of repair technician was a relatively strenuous and physically demanding job.

21. Complainant's left arm lifting restriction remained in place and in November of 2004, Respondent reclaimed Complainant's GE van and property. (Tr. Vol. I, pp. 69; 151-152) Thereafter, Complainant continued to receive long-term disability benefits. (Tr. Vol. I, pp.69-70) Complainant testified that because the company had determined that he could no longer return to work, the long term disability benefit automatically kicked in. (Tr. Vol. I, pp. 70-71) Documentation submitted by Respondent indicates that Complainant's last day worked was September 25, 2004, but Complainant was never notified that he was terminated and only came to understand he was terminated when Respondent reclaimed the company property from him in November of 2004. (Ex. R-2: Tr. Vol. I, pp. 364-366)

22. In February and March of 2005, Drs. Simmons and Talalayevsky both provided reports of their respective medical assessments of Complainant's physical condition to GE Disability Benefits Center for a determination of whether Complainant would continue to qualify for GE Long Term Disability Income. (Ex. R-11-R-15) Dr. Simmons February 25, 2005 statement noted that Complainant was "not able to return to original employment because of

work related injuries." (Ex. R-12) In a March 24, 2005 Functional Capabilities Statement, Dr. Talalayevsky indicated that Complainant could "never" lift, carry, push, or pull using his left wrist, nor could he ever repetitively use his left hands or fingers, or use vibratory tools that required engaging his left wrist. (Ex. R-14) In that same report, Dr. Talalayevsky stated that Complainant's "functional capacities are limited to not using his left wrist only." Id. Complainant remained on GE Long Term Disability up to the time of the hearing and receives benefits of $2,280.54 per month. He continues to have a ten pound lifting restriction applied to his left arm.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. The statute prohibits discrimination against persons with disabilities who are capable of performing the essential functions of the job with an accommodation and requires employers to provide reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship to the employer's business.

A handicap is defined by G.L. c. 151B s. 1(17), as "(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment." See *Dahill v. Police dept't of Boston,* 434 Mass. 233 (2001); *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against discrimination,* 441 Mass. 632 (2004); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR

Appendix (1998) ("MCAD Handicap Guidelines") at p. 2. Complainant had a record of impairment caused by the prior injuries to his wrist, and most certainly could have been perceived as handicapped within the meaning of the statute given his prior injuries, medical leave, request to work light duty and the need for medical leave for surgery to his wrist. For purposes of this case, there appears to be no dispute but that Complainant was disabled as a result of his injuries and I so find. As a result of the required surgery to alleviate the injury to his wrist, he was significantly impaired in his ability to work and to perform other daily activities for a significant period of time.

The disputed issues in this case are whether Complainant was a qualified handicapped individual capable of performing the essential functions of his tech repair job with or without a reasonable accommodation and whether any accommodation, including light duty was feasible given Complainant's physical limitations and the requirements of the job. There is also a question regarding whether or not Respondent engaged in sufficient efforts to determine what if any accommodations might be feasible in this situation, including whether permanent light duty was an option for Complainant.

Respondent asserts that when Complainant sought to return to work in June of 2004, he could not perform the essential functions of the job, because he had a 10 pound lifting restriction imposed by his orthopedic surgeon. At the same time, an independent medical examiner determined that Complainant could lift up to 20 pounds, and stated that most patients who undergo his operation can do moderately heavy labor and that the prognosis for return to full function was good. Respondent apparently took no steps to resolve these conflicting medical reports nor did any of its agents discuss Complainant's limitations directly with him or his supervisor. Based on the report of Complainant's orthopedic surgeon someone in Respondent's

medical/insurance bureaucracy, it is not clear who, determined that Complainant could not perform the essential functions of his tech repair job because of a lifting restriction and thus he was not permitted to return to work in June of 2004 on light duty. The lack of transparency in this decision making process and the failure to more actively involve Complainant and his supervisor are very disconcerting and might, under different circumstances, constitute a violation of the law. However, in this case, there remains a significant dispute about whether Complainant could perform the essential functions of the job with his lifting restriction and whether any accommodation was feasible. (See discussion below)

The essential functions of the job are "those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." In determining whether a job function is essential, the Commission must determine whether removing a given function from the job would fundamentally change the nature of the job in question. See, Commonwealth of Massachusetts, Commission Against Discrimination Guidelines: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP-CHAPTER 151B, III, D. 20 MDLR Appendix (1998).

There is a significant dispute in this case over what constitutes the essential functions of the job and whether Complainant could perform those functions. Complainant asserts that he could perform his job even with a lifting restriction because he had done so with an accommodation for a number of months prior to his surgery, working eight hour days instead of twelve with a limitation on lifting. Complainant also asserts that the nature of the tech job had evolved over the years and that replacement parts were much lighter, more fungible and easier to handle. Moreover, any jobs requiring heavy lifting of an appliance were considered two-man jobs and Respondent's protocol allowed a tech to call in a second person to assist. Complainant

asserts that Respondent had the discretion not to assign him to jobs that were not within his lifting restriction. He also suggests he could have been assigned to ride with and train new repair technicians. According to Complainant any of these options would have been reasonable accommodations.

Respondent asserts that permanent light duty is not a reasonable accommodation because it cannot anticipate the needs of a particular repair job in advance and that techs are frequently called upon to move and or lift very heavy appliances weighing up to hundreds of pounds. Respondent argues that the ability to lift a minimum of 75 pounds is not tangential or incidental to the job, but an essential duty. It also asserts that many of the parts used in repairs and the equipment a technician must carry on a daily basis exceed Complainant's lifting restrictions. Respondent argues that given the nature of the job, frequent heavy lifting and significant physical strength are fundamental requirements of the position which Complainant could not perform. Respondent also asserts that because no accommodation of Complainant's injury was feasible, it was relieved of the obligation to explore such with Complainant.

A reasonable accommodation is defined as "any adjustment or modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position and to enjoy equal terms, conditions and benefits of employment." MCAD Handicap Guidelines, supra. section 11(C); *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 648, n.19 (2004). Accommodations may take many forms including changes in work schedules, and assigned tasks, modifications of job requirements, and provision of adaptive equipment..." MCAD Guidelines supra. at 2C.

The duty to provide a reasonable accommodation requires an employer to participate in an interactive process with a disabled employee who requests an accommodation. MCAD

Handicap Guidelines at VII; *Mammone v. President & Fellows of Harvard College*, 446 Mass. 657, 670 n.25 (2006). *Shedlock v. Department of Correction,* 442 Mass. 844, 856 n. 8 (2004); *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 644 (2004). The interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee, which is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See *MBTA v. MCAD*, 450 Mass 327, 342 (2008); *Daly v Codman & Shurtleff, Inc.,* 32 MDLR 18, 26 (2010); *Mazeikus v. Northwest Airlines*, 22 MDLR 63, 68-69 (2000).

However, the failure to engage in an interactive process is not in itself a violation of G.L. c. 151B. See *MBTA v. MCAD*, 450 Mass 327, 342 (2008) (in context of religious accommodation, no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business) As noted in the above cited case, such a "demonstration, … will often be difficult to make without the employer's having engaged in an interactive process with the employee and having made a good faith effort to explore the options that come out of such a process." *Id.* at 342. Respondent failed to engage Complainant in a discussion of whether it was feasible to permit him to return to work on light duty on a more permanent basis. The issue was never fully explored as part of an interactive process. Complainant argues that the fact that he performed the job with light duty restrictions for almost six months demonstrates that there was no undue hardship to Respondent, and that he could have continued on light duty indefinitely. The fact that he heard from no one at Respondent prior to his attempt to return to work in June of 2004 is

indeed troubling, and such an apparent dereliction of any interactive process merits serious attention by Respondent.

Notwithstanding Respondent's significant failings in this regard, particularly its failure to communicate with Complainant, the fact that Complainant had re-injured his wrist while attempting to work on a refrigerator with a lifting restriction, strongly supports Respondent's argument that it was not feasible for him to accomplish the job safely given his limitations. The fact that he re-injured his wrist twice, suggests a reasonable likelihood that returning Complainant to a strenuous and physically demanding job with his limitations would cause further harm to himself and possibly others. Respondent is allowed to consider such safety risks and may inquire of an employee regarding his limitations, when "an employee wishes to return to work after an injury or illness and the employer wants to determine the employee's ability to perform the essential functions of the job without risk of harm to the employee or others." MCAD Handicap Guidelines at VI, B, 1(c); IX, B, 3. In this case Respondent's contention that it could not reasonably accommodate Complainant for reasons related to his safety and that of other employees is not based on mere speculation. Respondent's insurer did seek an independent medical examination of Complainant to determine his ability to return to the job. While this exam report was significantly more optimistic than that of his orthopedist, it still imposed a 20 pound lifting restriction and gave no indication that the restriction was of short duration. The nature of the job and risks posed by Complainant's limitations support Respondent's position that an accommodation was likely not feasible.

Respondent asserts that even if an accomodation were feasible, the accomodations that Complainant required were not reasonable because they would have required a fundamental restructuring of Complainant's job duties and posed safety risks. An accommodation is not

reasonable if it imposes “undue financial and administrative burdens” on the employer, *Cox v. New England Telephone & Telegraph Co*. 414 Mass. 375, 383 (1993) quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), or requires a “fundamental alteration in the nature of [the] program.” *Id.* See also Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. at 443, 454 (2002) (reasonable accommodation does not require employer to “fashion a new position”); *Beal v. Selectmen of Hingham*, 419 Mass. 535, 541-542 (1995) (employer may refuse to accommodate handicap that necessitates a substantial modification to standards of a job); *Cox v. New England Telephone & Telegraph Co.*, 414 Mass 374(1993) (reasonable accommodation does not require employer to waive or excuse an employee’s inability to perform an essential job function) *Tompson v. Department of Mental Health*, 76 Mass. App. Ct. 586, 596 (2010) (reasonable accommodation does not extend to a fundamental redesign of job with shorter hours on an open-ended basis that effectively reallocates responsibilities to others); *Dziamba v. Warner and Stackpole*, 56 Mass. App. Ct. 397, 405-406 (2002) (reduction in work hours not legally required where granting part-time schedule would require that employer reallocate the employee’s duties and make substantial changes in the job).

Complainant argues that because light duty was available and he was previously allowed to work on light duty for a lengthy period of time prior to his surgery that permitting his return to light duty and extending this assignment as a possibly permanent accommodation was reasonable.[1] Respondent asserts that light duty was available only on a temporary basis to allow injured employees who were recuperating the opportunity to return to work, pending their ability to return to full duty. This type of program is not uncommon in jobs that require physical exertion and that may result in injury to employees. Complainant was extended this

[1] While there is Commission precedent stating that transfer of a disabled employee to vacant light duty positions is an accommodation required under G.L. c. 151B, where the employer has a policy of making light duty positions available, there is a presumption that Complainant can perform the essential functions of that reduced position.

accommodation and permitted to remain on light duty for almost six months, longer than any other employee Complainant cited as beneficiary of light duty and as a comparator. He received workers compensation for the periods that he was unable to work. The unfortunate fact that Complainant badly reinjured himself while on light duty is not insignificant and belies his assertion that he could safely perform the essential functions of the job.

Respondent notes, and I conclude that aside from a permanent light duty position, the only other potential accommodation to Complainant would have been to regularly have other technicians perform the lifting requirement of his job. This would be akin to creating a new position stripped of virtually most lifting requirements, an essential function of the tech repair job, and something Respondent is not required to do. There was also a suggestion that when heavy lifting was required that Complainant could call for a two-person job. However there was ample testimony from a number of witnesses that two person jobs were a significant drain on productivity, were rare and that repair techs did not frequently call for assistance. There was also no evidence the permanent training or teaching positions existed in the tech repair field. Respondent need not provide an accommodation that "necessitates the substantial modification of employment standards." *Beal v. Selectmen of Hingham, supra.* at 542.

Given all of the above, I conclude that Complainant was not a qualified handicapped individual capable of performing the essential functions of the job and that Respondent's failure to grant him light duty as a permanent accommodation was not a violation of G.L. c. 151B.

IV. ORDER

This case is hereby dismissed. The 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 receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 12th day of May, 2014.

Eugenia M. Guastaferri
Hearing Officer