COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARC KOGUT,
Complainants,

v. DOCKET NO. 08-SEM-01239

THE COCA-COLA COMPANY
Respondent,

Appearances: Timothy Ryan, Esq., and Charles V. Ryan, Esq., for Complainant
Damon P. Hart, Esq., for Respondent

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

On April 30, 2008, Complainant Marc Kogut filed a Complaint charging Respondent, The Coca-Cola Company, with discrimination on the basis of handicap in violation of G.L. c. 151B, §4(16). Complainant alleged that Coca-Cola discriminated against him when it terminated him as a temporary employee and revoked a conditional offer of permanent employment following a pre-employment physical examination that revealed he is blind in his left eye. Coca-Cola denied the allegations of discrimination. The Investigating Commissioner found probable cause to credit the

allegations of the Complaint and conciliation efforts were unsuccessful. The matter was certified for public hearing and a hearing was held before the undersigned Hearing Commissioner on December 1, 2 and 3, 2010. Both parties submitted post-hearing briefs. Having reviewed the parties' submissions and the entire record of the proceedings, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Marc Kogut, resides in Massachusetts with his wife, Heidi, and their young son. (Tr. Vol. I, p. 47-8.) Complainant is permanently blind in his left eye due to an injury from a car accident that occurred in November 1989. He suffered a detached retina in his left eye. (Tr. Vol. I, p.49)
2. Complainant began working for Respondent, The Coca-Cola Company ("Coca-Cola"), as a temporary employee in a machine operator position in Coca-Cola's Northampton bottling production plant in July 2007. (Tr. Vol. I, p. 59, 212.)
3. Coca-Cola contracts with United Personnel Services, Inc. ("UPS") in Springfield as a third party staffing company and UPS placed Complainant at Coca-Cola. Temporary workers at Coca-Cola are employed by and receive all pay and benefits from UPS. (Tr. Vol. I, p. 131-34.)
4. Coca-Cola's Northampton plant employs approximately 172 temporary and full-time employees and produces various lines of non-carbonated soft drinks through high-

speed, high production manufacturing. The plant is approximately 500,000 square feet in size with 100,000 square feet of the space dedicated to production and the remaining 400,000 square feet used as warehouse space. The plant produces 1,500 to 3,000 cases per hour or at least 18,000 to 36,000 bottles per hour. (Tr. Vol. II, p. 10, 110-12, 116; Vol. III, p. 41-42, 120, 142.)

5. The plant operates three production lines for bottling. Much of the line is automated, but on each line there are various stations where the employees on the production floor interact with the product line. At each of these intersections is stationed a machine operator with designated tasks as follows: Level 3 - Depalletizer and/or Case Packer; Level 2 - Labeler Operator; and Level 1 - Filler Operator. The levels are ranked from Level 3, which is the lowest level to Level 1 which is the highest level. (Tr. Vol. I, p. 72; Vol. III, p. 41.)

6. There are two main aisles between the assembly lines. These aisles are used by employees operating forklifts and by workers on foot. (Tr. Vol. II, p. 113-18; Vol. III, p. 64-65.)

7. The job duties of temporary workers differ from those of the full-time machine operators. While full-time machine operators are expected to master the operation of a number of machines depending on their level, temporary workers typically learn to operate a specific machine and temporary workers on the production floor do not operate forklifts in Coca Cola's production plant. Full-time operators also have

maintenance responsibilities that temporary workers do not. Given their greater range of responsibilities, full-time machine operators earn significantly more than temporary production employees. (Tr. Vol. I, p. 159-60, Vol. II, p. 70-72, 144-47, Vol. III, p. 144-49.)

8. As a temporary worker at Coca-Cola, Complainant operated the case packer and depalletizer machines. (Tr. Vol. I, p. 158-59.)

9. Complainant testified that he worked as a temporary employee for about seven months starting in July of 2007. (Tr. Vol. I, p.78).

10. Complainant testified that, while working as a temporary employee, he never had problems on the line. For example, he never had to stop the line for any reason, he sometimes covered for others on break, he was well versed on machine operation and he knew how to call for supplies. (Tr. Vol. I, p.79-81) I credit his testimony.

11. The Northampton plant operates on a 24/7 production schedule with four crews that alternate 12-hour shifts. The production lines cease operation only for maintenance and holidays. (Tr. Vol. II, p. 107; Vol. III, p. 42, 143-44). Four Production Supervisors, one per shift, oversee the production lines for each shift and report to the Production Manager. When Complainant worked at the plant, he reported to Production Supervisor Bill Dermody who in turn reported to the Production Manager at the time, Dennis Williams. Mr. Williams reported directly to the General Manager, James Lane. (Tr. Vol. I, p. 158; Vol. II, p. 105-111; Vol. III, p. 141-42, 150.)

12. When fully staffed, each shift utilizes between 18 and 20 workers, both temporary and

permanent employees. Coca-Cola offered Complainant a full-time position on the night shift in January of 2008. At the time, it was running short-staffed with 11 to 14 people. Mr. Dermody testified that approximately 12 of the workers on the night shift were temporary employees. (Tr. Vol. II, p. 148; Vol. III, p. 150.)

13. Mr. Williams testified that at the time they hired the Complainant, the plant was looking to hire Level 3 machine operators because they were short staffed and needed additional employees on the night shift. I credit his testimony. (Tr. Vol. III., p. 151.)

14. Mr. Dermody testified that he started every work day with a 10-15 minute meeting of the production crew. In that meeting, he would outline production goals for the day and assign employees to the machines on which they would work, including the forklift. (Tr. Vol. II, p. 107-08.)

15. Mr. Dermody and Mr. Williams testified that ordinarily they use one forklift operator per shift taken from the production crew to handle the forklift needs of the entire shift. Occasionally, they would assign a second forklift operator to the shift. I credit their testimony. (Tr. Vol. II, p. 159-60; Vol. III, p. 156-57.)

16. Complainant testified that during his tenure as a temporary employee, Mr. Dermody rotated between two to three (3) regular people on his shift for forklift operation. I credit his testimony and find that Complainant's use of the word "regular," refers to permanent, non-temporary employees. (Tr. Vol. I, p. 82.)

17. Complainant also testified that during his tenure as a temporary production employee,

he never had to stop his machine or shut down his production line due to a lack of material. If he was running short of supplies, he would use the intercom phone located at each machine station and call for assistance or material as needed from the forklift operator. I credit his testimony. (Tr. Vol. II, p. 79-80.)

18. Coca-Cola has outlined the duties of the individual machine operators in a "Job Description," for each of the three levels. While the Job Descriptions for Levels 2 and 3 do not include operation of a forklift under "Operator Essential Functions," the Job Description for a Level 1 machine operator includes, "Operate lift truck" as an essential function of that position and specifies, "Must possess a valid forklift license," under the "Job Requirements" section. The Job Descriptions for Levels 2 and 3 do not include possession of a valid forklift license as a requirement for those jobs. (Ex. 5, 6, and 7.)

19. In 2006, Coca-Cola performed an analysis of the various machines and production jobs and produced written documentation regarding the positions entitled Physical Demand Analysis ("PDA"). The PDAs are a recitation of the tasks and physical demands of the specific machine operator positions and include step-by-step photographs of the machine operators performing the detailed functions of each job. "Vision" is listed as a requirement of all three machine operator positions, but the PDA does not specify visual acuity requirements.

20. The PDA description for the job "Case Packer," which is a Level 3 position, provides: "The Downstream positions are responsible for operating machinery that packs

product into cases and places empty product containers on line. Machines are operated and monitored, and product is inspected, removed from the line, repacked into new cases as needed, and reworked into the line." The PDA description for the job "Labeler Operator," which is a Level 2 position, provides: "The Labeler Operator is responsible for setting up and operating the labeling machine. Labeling Operators are responsible for 2 machines, and will use a console to control the machines, change rolls of labels as needed, clear jams as needed, and clean the area as needed." There is no reference to forklift use or operation in the PDAs for a Level 3 or Level 2 machine operator. However, the PDA for the job "Material Handler," which is a Level 1 position, provides: "The Material Handler is responsible for a variety of tasks in the warehouse including: operating the Palletizer, stocking the Depalletizer, and stacking product. Operators will drive a forklift to load and unload pallets. Approximately 50% of the shift is spent on the forklift." In addition, the Material Handler PDA has various photographs showing an individual operating a forklift while no such photographs exist for the Level 2 or 3 machine operator positions. (Exhibits 17, 18 and 19.)

21. Coca-Cola has forklift training and certification program that complies with standards set by the Occupational Safety and Health Administration (OSHA). While OSHA requires forklift operators to pass an initial forklift certification and a re-certification every three (3) years, OSHA has not promulgated regulations on vision requirements for forklift operators. Instead, OSHA's regulations provide that "[t]he employer shall

ensure that each power industrial truck operator is competent to operate a powered industrial truck safely" and leaves it up to individual employers to maintain standards that would compel compliance with OSHA's general duty clause, taking the risks of the individual facility into account. (Tr. Vol. II, p. 183-84; Vol. III, p. 51-52, 57, 77-82, 89, 97-103, 112, 123; Ex. 10, 11, 12 and 13.)

22. Coca-Cola has also required job applicants to undergo post-offer physical examinations and drug screenings for approximately thirty (30) years. The purpose of the exam is to ensure that the employee can perform safely the essential functions of the specific job. (Tr. Vol. II, p. 167-70.)

23. Coca-Cola's anti-discrimination policy forbids discrimination on the basis of handicap and provides, in relevant part, that Coca-Cola will "make reasonable accommodations in the employment of qualified individuals with disabilities...." The policy also directs employees: "Should you have concerns about equal employment opportunity or affirmative action, or feel you have been the subject of discrimination or harassment, please contact your Manager or Human Resources representative." At the time Complainant worked for Coca-Cola, Celine LaSonde was the Human Resources Manager for the Northampton plant. (Tr. Vol. I, 229-30; Vol. II, p. 60-62; Ex. 1.)

24. In 2006, Coca-Cola experienced an increasing number of forklift-related accidents in its plants. These incidents included a serious forklift accident in a Coca-Cola facility in Pennsylvania where an employee's leg was crushed by a forklift, requiring amputation.

(Tr. Vol. II, p. 170; Vol. III, p. 44.)

25. Kristen Sondgeroth, Occupational Health Nurse Coordinator, and her supervisor, Lynn Harper, both employed at Coca-Cola's medical services department in Atlanta, Georgia, worked with Coca-Cola's legal department and outside legal counsel to review forklift safety procedures and governing regulations. As part of their analysis, they considered national statistics on forklift-related accidents, letters of interpretation from OSHA, and State and Federal resources on the physical requirements for forklift operators. Coca-Cola also performed a "benchmarking" exercise to determine how other comparable companies handle physical examinations for job applicants. Based on the findings from this review, Coca-Cola decided to amend its existing policies on forklift operation. (Tr. Vol. II, p. 170-82.)

26. Issued in 2007, the new policy guidelines include a visual acuity requirement that a new employee operating forklifts must: "have visual acuity of at least 20/40 in each eye without corrective lenses or visual acuity separately corrected to 20/40 or better with corrective lenses, distant binocular acuity of at least 20/40 in both eyes with or without corrective lenses, field of vision of at least 70 degrees in a horizontal median in each eye...." Following issuance of this policy, all Coca-Cola job applicants who apply for manufacturing positions that include forklift operation as an essential job function are required to undergo vision testing as part of their post-offer physical examination. (Tr. Vol. II, p. 189-90.)

27. Full-time employees hired before the new standards were implemented in 2007 are not required to meet or maintain Coca-Cola's physical qualification standards for forklift operation. Their only requirement is to pass the forklift re-certification that OSHA requires. (Tr. Vol. II, p. 152; Vol. III, p. 119-24.)

28. Similarly, Coca-Cola allows temporary employees working in their warehouse at the Northampton plant[1] to operate forklifts after they have been certified under OSHA regulations without undergoing a physical examination. (Tr. Vol. II, p. 148-50.)

29. In January 2008, Complainant's supervisor, Mr. Dermody, asked him if he was interested in applying for a full-time position with Coca-Cola. Complainant filled out an application for a full-time machine operator position at the Northampton plant and Mr. Dermody recommended Complainant for full-time employment. (Tr. Vol. I, p. 162-65; Vol. II, p. 147; Ex. 3.)

30. On January 18, 2008, Coca-Cola offered Complainant the position of machine operator, conditioned on his passing a post-offer physical examination, drug and alcohol screening and a criminal background check. (Ex. 2.)

31. On January 22, 2008, Complainant underwent a post-offer physical examination at the Holyoke Medical Center. He informed the physician administering the physical that he was blind in his left eye due to a car accident. Complainant's left-eye blindness is permanent and uncorrectable. The physician documented Complainant's left-eye blindness on the medical exam summary, which was forwarded to Ms. Sondgeroth in

Coca-Cola's Atlanta Headquarters. (Tr. Vol. I, p. 93-95; Vol. II, p. 194; Ex. 16.)

32. On Friday, January 25, 2008, Ms. Sondgeroth and Celine LaSonde, Human Resources Manager for the Northampton Plant, had a telephone conference to discuss the results of Complainant's post-offer physical examination. During this telephone discussion, they conferenced in Ron Vandendolder, Safety, Environmental and Security Manager for the Northampton Plant, and Attorney Elizabeth Finn-Johnson from Coca-Cola's legal department in Atlanta. The group reviewed the essential functions of the position together with the results of Complainant's physical examination and determined that Complainant did not meet Coca-Cola's visual acuity requirements because he was blind in his left-eye. The group concluded that being blind in his left-eye disqualified Complainant from operating a forklift and rendered him unable to safely perform the essential functions of the machine operator position. They also determined that Complainant's impairment would pose a reasonable probability of harm to himself and to others in the workplace. Ms. LaSonde testified that the group did not discuss whether Complainant was a "qualified handicapped individual" or the question of providing a reasonable accommodation to Complainant. Without consulting Complainant's production supervisor or the general Manager at the Northampton plant, Coca-Cola rescinded Complainant's conditional offer of permanent employment and terminated him from his position as a temporary employee. (Tr. Vol. I, p. 241-46; Vol. II, p. 12, 74, 78, 211; Vol. III, p. 84, 96-97.)

---

[1] The warehouse is a different facility from the bottling production plant where Complainant worked.

33. Ms. LaSonde testified that she believed a letter dated March 19, 2008 from Ms. Finn Johnson to Complainant's Attorney Ryan stating that the Complainant had applied for and was considered for a Level I Operator with a forklift requirement, was correct. I don't credit this testimony for the reasons stated below. (Tr. Vol. II, p. 22-31.)

34. Ms. LaSonde testified that she believed the Complainant was being considered for a Level I Operator position based on conversations with his supervisor, Mr. Dermody. That might explain why the Level I Operator job description was attached to the March 19, 2008 letter to Timothy Ryan, Complainant's counsel. However, LaSonde's testimony directly contradicts the testimony of Mr. Dermody and others and many of the exhibits that indicate Complainant was being hired for a Level 3 Machine Operator position. I do not credit her testimony as I believe she was mistaken. (Tr. Vol. II, p. 22-31.)

35. Mr. Vandendolder testified that he also met face-to-face with Ms. LaSonde to discuss OSHA's position on medical qualifications with respect to Complainant's employment application. He offered two OSHA letters of interpretation that he reviewed and testified that he relied on these letters to arrive at the collective decision to revoke Complainant's offer. The first letter was written in 1976 by an Acting Regional Administrator for OSHA and addresses vision requirements for forklift drivers. The letter indicates that OSHA regulations do not include vision requirements, but that employers must determine if full vision is mandatory to the company's operations. The

second letter was written in 1998 and addresses the physical qualification of a hearing-impaired employee as a forklift operator. The letter states that OSHA would consider issuing citations to employers on a case-by-case basis under its "general duty clause" when it can be shown that the use of physically disqualified operators is recognized by a particular employer, or by that employer's industry, as a hazard likely to cause death or serious physical harm to employees. This letter also states: "OSHA will make every effort to be consistent with ADA nondiscrimination principles in enforcing the general duty clause, and in particular, OSHA would encourage employers to explore reasonable accommodations that will allow otherwise-qualified individuals to remain on the job while eliminating threats to the health or safety of others in the workplace." (Ex. 8 and 9; Tr. Vol. III, p. 84-85, 90-91, 94, 109.)

36. Mr. Vandendolder testified that he also relied on a letter of guidance that he found in the trade publication, "The OSHA Advisor." The letter, entitled, "Topic: Forklift Operators with Disabilities (esp. Vision)," discusses the issue of physical fitness for forklift drivers. It discusses the Americans with Disabilities Act (ADA) and advises that "a key component of ADA law is the ability of the employer to make a reasonable accommodation for the employee with a disability." The letter provides a "bottom line" with respect to forklift drivers with a disability: "The employer must determine what an employee can safely do and not put that employee or other employees in harm's way. If an employee has a physical limitation, the employer must evaluate that

disability and look for reasonable accommodations." (Tr. Vol. III, p. 97-103; Ex. 10.)

37. Coca-Cola's stated reason for not returning Complainant to his position as a temporary employee was that the company has a policy of not reinstating temporary workers if they fail to become permanent employees in order to maintain product and employee safety. Coca-Cola limits temporary employees to working a total of eighteen (18) months at their assignment. (Tr. Vol. II, p. 62-64.)

38. Complainant testified that he was upset when he learned from the temp agency, United Personnel that he had failed his pre-employment physical examination and was being terminated from his temporary position. On Friday, January 25, 2008, he called Ms. LaSonde, leaving voicemail messages for her. Complainant testified that he left messages for Ms. LaSonde once or twice a day for at least five (5) days, asking her to call him. He testified that neither Ms. LaSonde nor anyone from Coca-Cola returned his calls. I credit his testimony.

39. Ms. LaSonde testified that she did not immediately return Complainant's phone calls because he sounded angry. She further testified that she did not indeed return any of the Complainant's phone calls. On the following Wednesday, January 30, 2008, Complainant's counsel sent a demand letter to Coca-Cola. Ms. LaSonde testified that she did not return Complainant's calls after that date because he had made legal claims against the company. (Tr. Vol. I, p. 98-99, 172-75; Vol. II, p. 81-83; Ex. 32.).

40. Ms. LaSonde testified that had the Complainant passed his physical exam, Coca Cola

would have undertaken a diligent review of Complainant's work history and checked his prior employment before making him a permanent worker. She further testified that she would have not recommended him for hire because he failed to disclose that he was fired from his prior position when he applied for a job with Respondent. (Tr. Vol. I p.76-87) I do not find this evidence relevant to Complainant's handicap discrimination claim in the instant matter.

41. In February 2008, Complainant began working for Palmer Dedicated Logistics, LLC ("PDL"). (Deposition of Frederick R. Kochanek, Jr. ("Kochanek Depo."), at 13-14.)[2] Complainant did not undergo a pre-employment physical when he applied for the position at PDL. (Kochanek Dep. at 21.) Complainant's job duties at PDL include forklift operation and Complainant has been certified to operate a forklift since April 2009. PDL does not require a vision test as part of its forklift training. (Kochanek Dep. at 23.) (Tr. Vol. I, p. 101-07.)
42. Coca-Cola's offer letter to Complainant set forth an initial salary of $16.22 with a raise to $16.72 after ninety (90) days. After Complainant's termination, Coca-Cola hired a new employee who started at a wage of $16.53 on February 12, 2008, with a wage increase in August 2009 to $17.27. That employee had also worked 224.48 hours of overtime.
43. Ms. LaSonde testified that in April 2010 the employees received a 2 ½ % pay increase.

Thus, the approximate wage rate for Complainant's replacement with the pay increase to date would be $17.65 per hour. Total wages earned by the replacement employee are $114,935, broken down as follows:

2008: (46 weeks at $16.53) = 30,745 + 3,853 in overtime = $34,598

2009: (52 weeks at $17.27) = 35,921.60 + 3,852 in overtime = $39,773

2010: (52 weeks at $17.67) = 36,712 + 3,852 in overtime = $40,564

44. Overtime based on the February 2008 through August 2009 figures totaled approximately 2.87 hours per week. Overtime is paid at 150% of the regular wage and based on an average wage rate of $17.27 per hour. The overtime rate is $25.90 per hour. Complainant estimates his lost overtime wages for 156 weeks since his termination to be $11,595.

45. Complainant was out of work for approximately four (4) weeks and started at Palmer Dedicated Logistics in late February 2008. He was hired full time in October 2008 and remains in the position. His earnings were $19, 674 in 2008, $23,624.28 in 2009 and $26,000 estimated in 2010 for a total of $69,298. Thus, Complainant's total lost wages are approximately **$45,636** or $15,000 per year.

46. Going forward, Complainant testified that he is under review for a raise at PDL that would lift him to an hourly rate of $13.00 per hour.

47. Complainant testified that he was emotionally upset and suffered distress as a result Respondent revoking his job offer and then terminating his employment. His feelings

---

2 Mr. Kochanek was unavailable for trial and thus, his deposition was admitted as an exhibit at the hearing.

of anger, sadness and depression about not getting the job continue today. Complainant testified credibly regarding these emotions and was somber and sad when he testified. Complainant also testified that he felt that the permanent position was a dream job with a good company and with good benefits for his family. He testified that after finding out that he was terminated – he felt worthless and crushed. He testified that he went to his doctor and was prescribed anti-depression medication. (Tr. Vol. I p.118-119). I credit his testimony and found it to be credible and compelling. In September 2007, while Complainant was still working for Coca-Cola, he visited his general practitioner, Dr. Niloufar Shoushtari, for several ailments including sleeplessness, dizziness, migraines and depression. At that time, Dr. Shoushtari found that Complainant was suffering from sleeplessness and had other symptoms, resulting predominantly from drinking too many energy drinks and taking sports supplements. Complainant was also diagnosed with moderate-to-severe depression at that time, but Complainant attributes this to his lack of physical well-being and inability to sleep. Dr. Shoushtari prescribed Seroquel and Prozac for Complainant's sleeplessness and depression. I credit his testimony.

48. Complainant testified that after his termination he didn't feel like himself and he felt "sad" and "worthless." The termination put a strain on his marriage and he admits that he began to drink more. Complainant's wife Heidi Kogut also testified that the termination adverse affected Complainant's emotional well-being and that he became

more negative and distant in his relationships. I credit her testimony.

49. As a result of the termination and the distress caused by the firing, which was exacerbated by an income loss, Complainant's doctor has continued to prescribe Seroquel to help him sleep and Zoloft for depression.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4 (16) prohibits discrimination in employment on account of disability. The statute's prohibitions include refusing to hire a disabled individual who is capable of performing the essential functions of the job with a reasonable accommodation. In order to prevail on a claim of handicap discrimination where Complainant alleges failure to hire based on his handicap and the employer's reason for not hiring him is not in dispute, he must demonstrate that he was an otherwise qualified handicapped person who was rejected because of his handicap. See Nagle v. City of Boston Fire Dep't, 18 MDLR 221, 223 (1996), citing, Pushkin v. Regents of the University of Colorado, 658 P.2d 1372, 1385-86 (10th Cir. 1981). If Complainant establishes a *prima facie* case, the burden shifts to Respondent to produce credible evidence showing that Complainant was not a qualified handicapped person or that his rejection was for reasons other than his handicap. Id. Once Respondent presents such evidence, the burden remains with Complainant to prove that Respondent's reasons for failing to hire him were

based upon misconceptions or unfounded factual conclusions and that the reasons articulated for the rejection include unjustified consideration of the handicap itself. Id.

As a threshold matter, Complainant must prove that he is a "handicapped person" within the meaning of the statute. G.L. c. 151B, s.1 (17). The statute defines a "handicapped person" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment. There is no dispute that Complainant is blind in his left eye, that his blindness is permanent and that he is a handicapped person by virtue of a physical impairment which substantially limits the major life activity of seeing. The parties agree that Complainant was not hired because he is blind in his left eye.

The parties disagree about whether Complainant is a "qualified handicapped person" within the meaning of G.L. c. 151B. To be considered a "qualified handicapped person," Complainant must show that he is able to perform the essential functions of the machine operator position with or without accommodation. Thus, the focus of this inquiry rests with the issue of whether the forklift function constitutes an essential function of that particular position and if so, whether the Complainant should have been afforded a reasonable accommodation in order to perform that essential function of the job. For the reasons outlined below, I find that driving a forklift is not an essential function of the entry level position that Complainant applied for and was offered . The MCAD

Handicap Guidelines provide that the essential functions of a job are "those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." MCAD Handicap Guidelines, 20 MDLR (1998). Respondent's analysis of its various machines and production jobs in 2006 and its subsequent "Physical Demands Analysis" (PDA), which documented the physical demands and tasks of the machine operator position accompanied by photographs of the machine operators performing the detailed functions of their specific jobs, illustrate that forklift function is not essential to Level 2 or Level 3 Operators. There is no reference to forklift use or operation in the PDAs for those levels, unlike the PDA for Level 1, which states that forklift operation constitutes approximately 50% of the workload per day and has various photographs showing an individual operating a forklift.

Similarly, the Job Descriptions for Levels 2 and 3 do not include operation of a forklift under "Operator Essential Functions," while conversely, the description for Level 1 includes the words "Operate lift truck" among the list of essential functions for that position and lists a "valid forklift license" among the job requirements. According to the Job Descriptions and the PDAs, forklift operation does not appear to be a requirement of either the Level 2 or Level 3 machine operator jobs at all. I consider the PDAs and Job Descriptions as credible evidence of the essential functions of the machine operator position as well as evidence of Respondent's intent with respect to the essential functions of a machine operator at each level. The best evidence, however, is what duties

Respondent actually required of its machine operators on the job.

The evidence shows that the principal objectives of a Level 3 operator position could be performed without the need to operate a forklift. Complainant testified credibly that he was not expected to drive a forklift and that Mr. Dermody rotated among three (3) regular employees on his shift to operate a forklift. Both Mr. Dermody and Mr. Williams testified that ordinarily one, and occasionally two, forklift drivers are required per shift. Complainant also testified that he never had to stop his machine or shut down his production line due to a lack of material from the fork lifts. I conclude that Coca-Cola has not met its burden of proving that the forklift requirement is functionally related to the Level 3 machine operator position for which Complainant was being considered or necessary for the performance of the essential functions of that position.[3]

Complainant was, therefore, a "qualified handicapped person," capable of performing the job of a Level 3 machine operator with or without an accommodation. Despite my finding to the contrary, even if forklift driving would have been required of Complainant on occasion, Coca-Cola had a duty to engage in an interactive process with Complainant to determine whether there might be a reasonable accommodation that would allow him to perform that duty safely or to exempt him from that duty. Respondent could have determined that, given the number of other available and certified drivers on Complainant's shift, he could be excused from driving a forklift altogether as a

---

[3] There appeared to be some confusion on Ms. LaSonde's part regarding whether Complainant was being considered for a Level 1, 2 or 3 operator. . While Ms. LaSonde's testimony focuses on a Level 1 position, Complainant

form of a reasonable accommodation. Moreover, there was no dialogue with Complainant's hands-on supervisors on the factory floor about the safety implications of Complainant driving a forklift once he became a permanent employee or about his previous experience having driven forklifts in other jobs.

In mistakenly assuming that Complainant would be required to drive a forklift as part of the Level 1 Machine Operator position and determining this was unsafe given his lack of sight in one eye, Respondent revoked his offer of employment. Its HR and medical/safety consultants never met with Complainant or his direct supervisors at the plant to identify and evaluate the actual position for which he was being hired or to discuss possible accommodations, if required. There was no discussion with Complainant or his supervisor regarding the essential functions of a Level 3 machine operator position or whether Complainant was even required to drive a forklift. The evidence suggests that Complainant was not required to drive a fork lift as a Level 3 operator and was able to perform the essential functions of the Level 3 operator position without any accommodation. However, none of these issues were explored prior to Coca-Cola's decision to revoke Complainant's offer of employment. Rather, Coca-Cola based its decision to rescind its offer of employment to Complainant after one conference call among upper level managers and staff who did not work directly with Complainant and who clearly did not even know or was mistaken as to the level position he applied for. Ms.

---

and his supervisors who testified understood that Complainant was being considered for a Level 3 machine operator position.

Sondgeroth testified that in deciding to revoke the offer of employment to Complainant, no input was sought or received from the production line people who worked with him or knew of his work. Communication with hands-on supervisors and managers who actually do the job and understand its requirements is essential to determining whether an applicant for a job with a known disability is able to perform the essential functions of a position. Given these considerations, Coca-Cola breached its duty to engage in an interactive process with Complainant and his supervisors after learning he was blind in one eye, to determine the exact job he had applied for, what its essential functions were and whether an accommodation, if required, could be extended. Instead, it unilaterally decided that he was not "qualified," and revoked his job offer.

Moreover, Coca-Cola failed to follow through with communication to Complainant after directing the employment agency to notify him that his employment had been terminated. This was in contravention to Coca-Cola's own anti-discrimination policy that encourages an individual who feels wronged to contact his or her own manager or the Human Resources Manager, which Complainant did. Coca-Cola's failure to communicate with Complainant after making its decision to revoke his employment offer or to return his phone calls highlighted the unilateral nature of its decision which was based on the factual misconception that Complainant was required to operate a forklift, and possibly unjustified considerations of his handicap, since safety concerns were not aired with the managers on the ground.

To be sure, an employer may condition an offer of employment to a job applicant on the results of a post-offer medical examination in order to determine whether the employee is capable of performing the essential functions of the job with reasonable accommodation. MCAD Handicap Guidelines, 20 MDLR (1998). However, if an employer disqualifies an individual for a job based on a post-offer medical examination, the exclusionary criteria used must be job-related, consistent with business necessity and necessary for the performance of the essential functions of the job sought. MCAD Handicap Guidelines, 20 MDLR (1998). I find that Coca-Cola did not proffer credible evidence to prove that its vision standards for forklift driving were related to the duties of a Level 3 machine operator position or required for the safe performance of the essential functions of that position, since forklift operation is not a requirement for that job. Based on the evidence, Complainant operated the case packer and depalletizer machines without incident during his tenure as a temporary employee. See MCAD Handicap Guidelines, 20 MDLR (1998); Mass. Gen. L. c. 151B, S 4(16).

Further, I do not accept Coca-Cola's assertion that Complainant posed a risk of future injury to himself or to others as justification for its revocation of Complainant's offer of employment. To establish this defense, Respondent must prove that there is a "reasonable probability of substantial harm" to the employee or others, based on an individualized factual inquiry. MCAD Handicap Guidelines, 20 MDLR (1998); Ryan, 11 MDLR at 1241-42, citing, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985). One conference

call among upper-level employees is not the type of "individualized factual inquiry" this analysis requires. See Martinez v. Resource Recovery Sys., 16 M.D.L.R. 1589, 1603 (1994). Complainant's work history, both at Coca-Cola and afterward, shows that he was a good worker, able to operate the required machinery safely and that his partial blindness did not affect his job performance or poses an imminent safety risk to himself or to others. To make a finding that there is a reasonable probability of substantial harm, there must be more than a potential for increased risk of injury. Ryan, 11 MDLR at 1242. Without taking Complainant's individual capabilities to operate the required machinery into account, Coca-Cola concluded that he was a safety risk when that was not the reality based on the information the company had at the time. This decision is particularly striking because only new hires are required to meet the company's vision standards, while incumbent employees and temporary employees operating forklifts in the warehouse at the Northampton plant are not required to meet these standards. [4]

This fact undercuts safety as a reason for excluding Complainant without taking his individual capabilities into account. Without periodic vision testing for all machine operators, there is no way for Coca-Cola to know whether an employee is operating a machine in compliance with the company's articulated safety standards. More importantly, the notion that once an employee becomes permanent at Coca-Cola – she/he

[4] The fact that existing employees were grandfathered and not disqualified from driving a forklift if they did not meet the new visual acuity standards, raises serious questions about Respondent's assertions that safety was its overriding concern and that allowing Complainant to drive a forklift would pose a serious risk of harm to himself or others in the workplace.

is never obligated to submit to a physical examination, contradicts the Respondent's assertion that safety is the pre-eminent concern for those employees operating heavy machinery in the workplace. OSHA's General Duty Clause, which Coca-Cola incorporated into its regulations, applies to all employees regardless of tenure. The letters of interpretation that Coca-Cola relied upon advise employers to explore reasonable accommodations that will allow otherwise-qualified individuals to remain on the job while taking considerations of health and safety of others into account. Coca-Cola made a decision based solely on medical documents and misconceptions about the nature or limitations of Complainant's disability, instead of rendering an individual assessment of Complainant's capabilities, in light of the duties he would be required to perform, and without weighing the risks and alternatives. Ryan, 11 MDLR at 1241-1244. On this evidence, I find that Coca-Cola revoked Complainant's offer of employment for no other reason than an unjustified and uninformed consideration of his handicap, and that this was a violation of G.L. c. 151B.

IV. REMEDY

Upon a finding of discrimination, the MCAD is authorized to award remedies to compensate victims of unlawful conduct for damages suffered as a direct consequence of the unlawful discrimination and to ensure compliance with the antidiscrimination statute. G.L. c. 151B, s. 5; Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). This includes an

award of damages for lost wages and emotional distress suffered as a direct and probable consequence of Respondents' unlawful treatment of Complainant. Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976).

A. Emotional Distress

An award of emotional distress rests on substantial evidence if its factual basis is clear on the record. Some factors that should be considered include: 1) the nature and character of the alleged harm; 2) the severity of the harm; 3) the length of time Complainant has suffered and reasonably expects to suffer; and 4) whether Complainant has attempted to mitigate the harm. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004). Complainant must also show a causal connection between Respondents' unlawful actions and his emotional distress. Id. at 576. I am persuaded that Complainant suffered emotional distress as a result of Respondent's unlawful conduct based on his and his wife's credible testimony. Complainant testified that he didn't feel like himself after he was terminated and that he felt sad and worthless. Complainant's wife testified credibly that the termination put a strain on their marriage as Complainant grew more negative and distant and he began to drink more. Complainant continues to take medication to combat sleeplessness and depression, symptoms that were exacerbated by the termination. I find that Respondent unlawfully deprived Complainant of a permanent job that would have brought him financial stability and great satisfaction in the workplace. The loss of the

prospect of full permanent employment with job security, good wages and benefits caused Complainant to suffer emotionally, and exacerbated his insomnia and depression. Based on the evidence and I find that Complainant is entitled to an award of emotional distress damages in the amount of $75,000.

A. Lost Wages

After Coca-Cola revoked Complainant's offer and terminated his temporary employment, Complainant found another position in approximately four (4) weeks. He started working at Palmer Dedicated Logistics in late February 2008. I conclude that but for Coca-Cola's discriminatory revocation of their offer of employment to Complainant and its termination of his temporary employment, Complainant would have been hired and continued to work at Coca-Cola as a full-time Level 3 machine operator for an indefinite period of time. He expressed his excitement at the prospect of working for a world class company with the job security, good wages and benefits that he would have earned at Coca-Cola. Complainant was out of work for approximately four (4) weeks and testified that his lost wages during that time were $45,636. Which includes the breakdown of his pay with overtime for years: 2008, 2009 and up to hearing in 2010. It also includes overtime of $11,595 and the subtraction of his mitigating wages through the years. I conclude that this figure is reasonable and that Complainant is entitled to recoup that amount of damages for lost wages. I decline to limit or waive an award for back pay

based on Respondent's assertion that it would not have hired Complainant based on information he excluded from his employment application about his termination from a previous job, information that Coca-Cola acquired only during the discovery phase of this matter and which is after-acquired evidence sought and acquired as part of the litigation of this matter. I do not believe that Coca-Cola would have revoked Complainant's offer, given that his good record of performance and his supervisor's satisfaction with his work as a temporary employee. Respondent clearly thought sufficiently highly of Complainant to offer him full time employment . At any rate, what if anything Coca-Cola would have done in hindsight, had they even sought or received such information is highly speculative, and will not affect my ruling as to backpay.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, I conclude that

1) Cease and desist from engaging in discrimination based on handicap;

2) Pay to Complainant, Marc Kogut, the sum of $45,636.in damages for lost wages, with interest thereon at the rate of 12% annum from the date the Complaint was filed until such time as payment is made, or until this order is reduced to a court judgment and post judgment interest begins to accrue.

3) Pay to Complainant, Marc Kogut, and the sum of $75,000. in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the

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

4) Conduct thorough training sessions providing an overview of c. 151B's anti-discrimination provisions but emphasizing handicap discrimination, for all supervisory and managerial employees and specifically those managers with the authority to make hiring decisions or who participate in discussions and decisions regarding reasonable accommodations as follows:

   a. An initial training session must be provided that is at least four (4) hours in length. All supervisors and managers are required to attend. Respondent shall repeat the initial training at least one time within two years of the initial training for new supervisors who are 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. The training may be provided by the Commission, may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course, or may be provided by a trainer who is approved by the Commission's Director of Training. The training shall take place within sixty (60) days of selection of a trainer.

   c. At least thirty (30) days prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval

and provide notice of the date and time of the training. If the Commission decides to send a representative to observe the training, Respondent will allow the Commission representative unfettered access.

d. Within thirty (30) days of completion of the training, Respondent must submit to the Commission's Director of Training the following information signed and dated by the trainer: the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of the training.

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

This constitutes the final order of the Hearing Commissioner. Any party aggrieved by this Order may file a Notice of Appeal to the Full Commission within ten (10) days of receipt of this Order and a Petition for Review to the Full Commission within thirty (30) days of receipt thereof.

SO ORDERED this 29th day of March, 2012.

Sunila T. George

Sunila Thomas-George
Hearing Commissioner