COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PAMELA ROISTEN,
Complainants

v. Docket No.: 10 BEM 03380

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY
Respondent

Appearances: James Tewhey, Esq. for Complainant
Walter Prince and Joseph Edwards, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 23, 2010, Pamela Roisten ("Complainant") filed a charge of disability and race discrimination with the Massachusetts Commission Against Discrimination ("MCAD") alleging that the Massachusetts Bay Transit Authority refused to let her perform a desk job or other light duty work as a reasonable accommodation while she recovered from treatment for breast cancer.

A probable cause finding was issued on April 20, 2012. The case was certified to public hearing on July 8, 2013. A public hearing was held on December 8, 9, 11, 12, and 18, 2014. The following individuals testified: Complainant, Hyanna Malcolm, Gale Maynard, Ellen Story, Terry Reed, Maryan Portney, Tamieka Thibodeaux, Donna Scott, and Allen Lee. The parties presented forty-seven (47) joint exhibits. Complainant presented four (4) additional exhibits and Respondent presented five additional exhibits.

At the conclusion of Complainant's case, Respondent's Motion for a Directed Verdict was granted on the issue of race discrimination. Following the hearing, Respondent presented a post-hearing brief.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. The Massachusetts Bay Transportation Authority ("MBTA" or "Authority") is mandated by state law to provide public transportation services. The Authority oversees bus operations, heavy rail, light rail, and commuter rail services. In November of 2009, the Authority was placed under the umbrella of the Massachusetts Department of Transportation (MassDOT). A General Manager of the Authority reports to the Massachusetts Secretary of Transportation.
2. Donna Scott, the Authority's Assistant Director of Staffing, administers a lottery system for hiring employees into the following entry-level positions: part-time streetcar motorperson (PTSM), part-time bus operator, part-time customer service agent, part-time train attendant, and full-time track laborer. Applicants complete a paper or online form called a lottery "coupon" for one or more of the five lottery positions. An outside entity uses a computer program to assign randomized numbers to eligible applicants for each lottery position. Applicants are considered for hiring in the order of their lottery numbers. The hiring process consists of taking a test, being interviewed upon passing the test, obtaining a conditional offer of employment if successful in the interview, and receiving a CORI (criminal records) screening. Depending on the position, some candidates must

produce a CDL license or evidence of a satisfactory driving record. Candidates who pass the aforementioned steps are placed on a "hire ready" list in the order of their lottery numbers. When positions become available, candidates are called, in numerical order, for pre-employment physical and drug and alcohol screenings. If they pass, they are hired. Scott estimated that only three out of ten candidates who take an initial test end up on the "hire ready" list.

3. Candidates are informed when they come in to take a qualifying test that: 1) if they are hired for one lottery position, they lose their lottery status for other lottery positions, and 2) if they fail to complete training for a position, they are discharged and not eligible to move to another position. Scott explained that candidates are not allowed to move from one position to another because doing so would displace other candidates waiting to be hired.
4. Complainant is an African American woman who applied to work at the Authority by completing a coupon for the 2007 lottery. Complainant applied for a PTSM position. A PTSM position on the Green Line involves driving trains, performing routine vehicle inspections, collecting fares, and "throwing" switches that change a train from one track to another.
5. In 2009, the Authority notified Complainant that her lottery number had been reached for PTSM and she was entered into the hiring process for that position. She took and passed the qualifying test and successfully completed all background screenings. Complainant was hired as a PTSM on the Green Line on or around November 9, 2009.

6. On November 9, 2009, Complainant signed relevant employment documents and began her eight weeks of training to be a PTSM. Complainant was not eligible to become a member of the Boston Carmen's Union, Local 589 until she completed the eight weeks of training followed by a 120-day probationary period.
7. Training for a PTSM position involves a combination of classroom work (i.e., going over rules, regulations, and Green Line signals) and field training. It consists of learning to drive three different types of Green Line vehicles and taking classes about right of way, flagging,[1] customer service, and the like. The Green Line has a formal training agenda. In order to successfully complete training, individuals must pass all classroom tests with a minimum grade of 70%.
8. Within a few days of beginning her training, Complainant was diagnosed with breast cancer and commenced chemotherapy, surgery, and radiation treatment. Joint Exhibit 3. Complainant went to Human Resources to ask about a leave of absence.
9. Complainant filled out forms for an accommodation under the Americans with Disability Act ("ADA"). Joint Exhibit 4. She checked the box for "Continuous Leave" as her requested accommodation. Joint Exhibit 3.
10. Complainant stopped going to work on November 19, 2009.
11. By letter of December 9, 2009, the Authority informed Complainant that her employment was under review because of her absence from work. Joint Exhibit 5. Complainant was subsequently approved for medical leave under the ADA.

[1] Flagging is a temporary assignment at a construction site which Green Line employees perform on an overtime or emergency basis. The job requires an individual to move his/her arm up, down, and across the chest to signal trains to start and stop. Flaggers must be able to carry orange traffic cones, stand for eight hours a day, hold a flag in each hand, and carry a radio and whistle. Transcript IV at 825-828.

12. On December 11, 2009, the Authority sent a questionnaire to Complainant's physician, Kathryn Ruddy, M.D., seeking information pertinent to Complainant's leave request. Joint Exhibit 6. Dr. Ruddy completed the questionnaire. She answered a question about the duration of Complainant's condition by indicating that there would be "ongoing treatment for 1 year." Id.

13. By letter dated December 15, 2009, Dr. Ruddy notified the Authority that Complainant's chemotherapy would continue for the next five months followed by breast surgery to remove "residual tumor." Joint Exhibit 7. Dr. Ruddy indicated that Complainant would not be able to return to work during the treatment because of the side effects. She asked that Complainant be excused from work until mid-May of 2010. Joint Exhibit 7.

14. During the 2009-2010 period, Ellen Story ("Story") oversaw the Authority's ADA and FMLA policies in her position as Assistant Director for Benefits and Leave Programs. Transcript II at 263. She testified that FMLA leave requires an employee to have worked for the Authority at least 1,250 hours during the previous twelve months but that a medical leave under the ADA has no prior work requirement. Transcript II at 273. According to Story, approximately 1,800 of the Authority's 6,000 employees are out of work each day on ADA/FMLA leaves. Transcript II at 274-276. She testified that when Green Line operators are on leave, their absences are addressed by: 1) assigning other Green Line employees to perform their work on an overtime basis, 2) by paying extra people to perform the work, or 3) by reducing service.

15. By letter of January 8, 2010, the Authority approved Complainant's request for continuous leave as an accommodation for her disability and placed her on a leave of absence through February 1, 2010. Joint Exhibit 8. Complainant was not paid during her leave of absence because she had not accrued any sick time. Transcript II at 379. Complainant was advised that, if necessary, she would be given additional leave in three-month increments up to a maximum of one year of continuous leave. Joint Exhibit 8. While the Authority's Long-Term Leave of Absence Policy does not, in general, permit leaves of absence in excess of one year, requests for extra time off are reviewed on a case-by-case basis. Transcript II at 282-283. According to Assistant Director Story, if an employee submits medical documentation with a "clear" projection that he/she can return to work shortly after the year expires, additional leave will be granted. Transcript II at 283-284.

16. In a letter dated January 21, 2010, Dr. Ruddy notified the Authority that Complainant was not ready to return to work because of the side effects of her chemotherapy and her upcoming surgery. Joint Exhibit 9. Dr. Ruddy asked for an extension of Complainant's medical leave of absence through May 31, 2010. Id. The Authority granted the request. Joint Exhibit 10.

17. In a letter dated May 5, 2010, Dr. Ruddy notified the Authority that Complainant was not yet ready to return to work because of anticipated breast surgery and radiation treatment. Joint Exhibit 11.

18. Complainant inquired about the possibility of returning to work in a desk job or on a light duty basis. Joint Exhibit 11. She was advised that there were no desk

jobs for new employees on the Green Line. According to Assistant Director Story, the Green Line only has desk jobs for supervisors/superintendents and has no light duty jobs. Transcript II at 324, 327, 375-376, 404. Story testified that the Authority does not transfer employees from one position to another as an accommodation for a disability. Transcript II at 408-409.

19. Complainant underwent a mastectomy on her right breast on May 27, 2010. By letter dated May 28, 2010, Dr. Rachel Freedman wrote that Complainant was about to begin radiation therapy, that she could not be a "subway bus driver" at that time, and that a "return to work date would be late summer 2010." Joint Exhibit 12.

20. On June 7, 2010, the Authority notified Complainant that her continuous leave would be extended until August 31, 2010. Transcript II at 312.

21. On July 9, 2010, Green Line Superintendent Quinten Scott wrote Complainant that her employment status was under review because of her extended absence. Joint Exhibit 14. He instructed her to report to his office on July 16, 2010, told her to bring documentation relating to her absence, and warned her that failure to do so would result in a recommendation of termination. Complainant did not appear. Scott wrote a second letter to Complainant instructing her to appear with relevant documents for a meeting on July 30, 2010 and advising her to contact a union representative. Joint Exhibit 15.

22. By letter of July 26, 2010, Dr. Ruddy wrote that Complainant had undergone a mastectomy on May 27, 2010 followed by seven weeks of daily radiation

treatments and was unable to drive a subway car but could perform desk work. Joint Exhibit 16.

23. Complainant, accompanied by Union Steward Allen Lee, attended the July 30, 2010 meeting but did not bring documents to the meeting. Following the meeting, Complainant was placed on a thirty-day suspension with a recommendation that she be discharged for failing to present the requested documentation relative to her leave of absence. Joint Exhibit 18.

24. Complainant grieved the suspension and recommendation for discharge. Joint Exhibit 19. Even though Complainant was not a member of the Boston Carmen's Union (because she had not completed her training and her probationary period), the Union nevertheless represented her in her grievance.

25. At a step-one grievance hearing, Complainant's discipline was rescinded by Deborah Gies, Division Chief of the Green Line, on the basis that Complainant's leave was covered by the ADA. Joint Exhibit 22.

26. On August 25, 2010, Dr. Ruddy wrote to the Authority to extend Complainant's leave on the basis that Complainant had recently completed chemotherapy and radiation for treatment. Joint Exhibit 21. Dr. Ruddy wrote that she expected Complainant to be ready to drive a trolley in approximately three months. Id.

27. On September 7, 2010, Assistant Director Story wrote Complainant that the Authority would not grant an extension of her leave beyond November 11, 2010 (one year from the beginning of the leave) because of: 1) Dr. Ruddy's failure to provide a date when Complainant could be "reasonably expected to return to work and perform the essential functions of [her] position" and 2) the Authority's

attendance policy requiring that an individual on leave return to work within one year of the initial absence or within a short period of time thereafter. Joint Exhibit 23; Transcript II at 321-323, 327. According to Story, the Authority might have approved an additional six to eight weeks of leave if Dr. Ruddy had provided a return to work date that was "definitive." Transcript II at 346-347.

28. On November 15, 2010, Dr. Ruddy wrote a "To Whom it May Concern" note stating that Complainant "is not able to drive a subway car at this time but she should be able to perform desk work and/or other work that does not require heavy lifting or quick movements." Joint Exhibit 24. Dr. Ruddy's medical notes from November 18, 2010 indicate that Complainant was still experiencing significant right upper arm and shoulder pain and immobility. Joint Exhibit 47 at p. 67. The record also states that Complainant was to see her plastic surgeon in January of 2011 to discuss breast reconstruction. Joint Exhibit 47 at p. 63.

29. On November 18, 2010, the Authority instructed Complainant to attend a meeting on November 30, 2010 to discuss her employment status and to bring union representation and supporting documentation to the meeting. Complainant attended the meeting with Union Steward Lee but brought no documentation about a projected return to work date.

30. On November 30, 2010, the Authority issued Complainant a thirty-day suspension and recommendation for discharge. Joint Exhibit 27. Complainant immediately grieved her suspension and her recommended discharge. Joint Exhibit 28. As relief, Complainant sought a position with the Authority other than PTSM.

31. On December 20, 2010, Complainant filed a claim with the Authority's Office of Diversity and Civil rights alleging race and handicap discrimination. Complainant's Exhibit 4. She also filed the instant complaint with the MCAD on December 23, 2010.

32. Complainant's grievance was denied at steps one and two. Joint Exhibits 30 & 31. At the third-step grievance hearing, the Authority's General Manager issued a decision dated May 12, 2011 which referred the grievance back to the Authority's Labor Relations Department with instructions to "settle it." Joint Exhibit 32.

33. Complainant's Union Representative Terry Reed and Respondent's Labor Counsel Maryan Portnoy, with the concurrence of Respondent's General Manager, agreed to settle the grievance by transferring Complainant into a customer service position. Customer service positions were, by that time, being eliminated through attrition[2] and no longer filled by the lottery but were sometimes used as a vehicle for settling grievances. Joint Exhibit 45; Respondent's Exhibit 4. Complainant was offered a customer service position but did not accept it because the proposal did not include back pay. Joint Exhibit 40.

34. Once Union Representative Terry Reed informed Labor Counsel Portnoy that Complainant would not return to work without back pay, Portnoy initiated Complainant's discharge. On September 20, 2011, the Authority discharged Complainant. Joint Exhibit 33.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent violated the prohibition against handicap

[2] Unlike collector positions which were eliminated with the advent of "CharlieCards," customer service jobs were not considered light-duty positions.

discrimination contained in M.G.L. c. 151B, sec. 4(16) by failing to reasonably accommodate her disability. The statute requires employers to accommodate qualified handicapped individuals unless the employer can demonstrate that an accommodation would create an undue hardship. See 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, during her treatment for breast cancer, satisfied the criteria for handicap status, to wit: one who has an impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2. She was a "qualified" handicapped employee because, apart from her medical treatment beginning in 2009, she was capable of performing the essential functions of her job as a PTSM on the Authority's Green Line. Her ability is evidenced by taking and passing a qualifying test for PTSM, successfully completing background screenings for the position, being hired as a PTSM on the Green Line, and beginning eight weeks of training for PTSM, all prior to being diagnosed with breast cancer.

The dispute centers on whether Complainant received a reasonable accommodation for the disability she incurred shortly after being hired by the Authority. The specific question is whether the Authority was legally required to provide Complainant with a leave of absence or a transfer into another job for the more than one-year duration of her treatment for and recovery from breast cancer and to provide her with back pay to cover

the period of her absence from work. I conclude that these accommodations were not reasonable under the circumstances of this case and that the Authority was not legally required to make them available to Complainant. See Cargill v. Harvard University, 60 Mass. App. Ct. 585, 588 (2004) (whether an accommodation is reasonable presents significant issues of disputed material fact).

An 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, 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 at 2C.

Accommodations are not deemed reasonable, however, if they require a fundamental alteration of a job such as the waiver of an essential job function, a transfer into another position, or the fashioning of a new position. See 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 need not make substantial modifications to standards of a job); Cox v. New England Telephone & Telegraph Co., 414 Mass 374 (1993) (employer need not waive an employee's inability to perform an essential job function); Tompson v. Department of Mental Health, 76 Mass. App. Ct. 586, 596 (2010) (employer need not redesign job by providing shorter hours and reallocating important duties to others); Dziamba v. Warner and Stackpole, 56 Mass. App. Ct. 397, 405-406

(2002) (employer need not make substantial changes to job involving reduced hours and reallocated duties).

Complainant's request for a transfer into a light-duty or different job involving fewer physical demands does not conform to the above requirements because it would have involved a fundamental alteration of the job for which she was hired -- that of PTSM. In any event, the job she sought – flagging – is not a light duty position that Complainant could have performed while recovering from breast cancer treatment. The evidence establishes that flagging is neither less demanding than a PTSM position nor a discrete job. Rather, it is a temporary assignment at a construction site which Green Line employees perform on an overtime or emergency basis. The job requires an individual to move his/her arm up, down, and across the chest to signal trains to start and stop. Flaggers must be able to carry orange traffic cones, stand for eight hours a day, hold a flag in each hand, and carry a radio and whistle. As a result of her physical incapacity, Complainant would not have been able to perform flagging work even if it were a discrete position.

Despite the fact that the Authority was not legally obligated to transfer Complainant into a different position, the Authority did, in fact, offer Complainant a customer service position as a means of settling her claims against the agency. As of 2010, such positions were being eliminated, but the Authority was willing to make one available to Complainant. Complainant, however, refused to accept the position because it was not accompanied by an award of back pay. Complainant offered no rationale for the monetary demand. When Complainant left training in November of 2009 in order to begin treatment for breast cancer, she had accrued no sick or vacation time. Under these

circumstances, the Authority reasonably refused to pay Complainant for the more than one year during which she remained out of work for medical treatment.

In addition to a customer service position, Complainant might have received additional leave had she provided more specific information about when she would be able to return to work. Ellen Story testified credibly that the Authority would have granted Complainant an additional six to eight weeks of leave beyond the approved one-year period had she provided reasonable documentation that she could have returned to work at the conclusion of the extra time. Instead of providing such assurance, Complainant's physician, Dr. Ruddy, only advised the Authority on August 25, 2010 that she "expected" Complainant to be ready to drive a trolley in approximately three months. Dr. Ruddy did not specify a return to work date. This communication was followed by correspondence on November 15, 2010 stating that Complainant "is not able to drive a subway car at this time." The November 15th letter likewise failed to specify a return-to-work date.

Story acknowledged that Dr. Ruddy may not have known that a "date certain" for returning to work was required, but the fact remains that the Authority wrote to Complainant on September 7, 2010 that she was being denied additional leave beyond a year because her physician was "unable to determine when you may be reasonably expected to return to work . . . ." Joint Exhibit 23. The Authority informed Complainant that her employment was subject to termination unless she could "return to duty within one (1) year . . . or within a short period of time after said date." Joint Exhibit 23. This correspondence was sufficient to place Complainant on notice that the Authority required a projected return-to-work date in order to hold open her job for more than one year. No

such date was provided by Complainant's physician.

Based on the circumstances outlined above, I conclude that the leave of absence sought by Complainant was too protracted and indefinite to constitute a reasonable accommodation. See Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443 (2002) *citing* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (open-ended, indefinite leaves are generally not considered to be reasonable under c. 151B). The determination as to whether a leave of absence constitutes a reasonable accommodation depends on the type and cost of the requested accommodation as well as the employer's overall size and type of operation. See MCAD Guidelines at II, B (1998). There is unrebutted evidence in the record that approximately one-third of the Authority's workforce remains out of work each day on FMLA and ADA leaves and that these absences lead to increased operating costs and/or the canceling of service. Based on this evidence, it cannot be disputed that the leaves negatively impact the effectiveness and operating budget of the Authority. Accordingly, the Authority was not required to hold open Complainant's position on an indefinite basis once her year-long leave expired.

It is noteworthy that when Complainant left work to begin breast cancer treatment, she had only been employed by the Authority for nine days and was still in her training period. Assistant Director Story could not recall another instance in which an employee requested and received a continuous leave prior to completing training and a probationary period. After being out of work for one year, Complainant's doctors were still unable to determine when Complainant might be able to resume her PTSM training. These factors set Complainant's case apart from instances in which medical leaves have been deemed reasonable. See Thompson v. Premier Diagnostic Services, Inc.

___MDLR ___ (2015) (where employee sought several extra weeks of leave after a three-week leave of absence and was summarily terminated, the requested accommodation deemed reasonable); Santagate v. FGS, LLC, 36 MDLR 23 (2014) (where employee sought two to four additional weeks of leave after a three month leave of absence, the requested leave was deemed reasonable).

It also bears noting that the Authority communicated with Complainant and her doctors on an ongoing basis throughout her illness. In doing so, the Authority satisfied its obligation to participate in an interactive process designed to identify the precise limitations imposed by Complainant's disability and the potential adjustments that might overcome the limitations. See MCAD Handicap Guidelines at VII; Daly v Codman & Shurtleff, Inc., 32 MDLR 18, 26 (2010); Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). The process failed, not because of a lack of good faith on the part of the Authority, but because Complainant refused any accommodation that did not include back pay.

Based on the foregoing I conclude that Respondent did not violate M.G.L. c. 151B, section 4(16) in terminating Complainant.

IV. ORDER

The case is hereby dismissed. 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 11th day of November, 2015.

Betty E. Waxman, Esq.,
Hearing Officer