

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
ANTHONY LUSTER,  
Complainants

v.

DOCKET NO. 07-SEM-00149

MASSACHUSETTS DEPARTMENT  
OF CORRECTION,  
Respondent

**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision by Hearing Officer Betty E. Waxman, Esq. in favor of Complainant Anthony Luster. (“Luster”) After an evidentiary hearing, the Hearing Officer concluded that the Respondent, Massachusetts Department of Correction (“DOC” or “Department”) was liable for handicap discrimination in violation of M.G.L. c. 151B, §4(16) for failing to accommodate Anthony Luster’s disability, a chronic foot condition resulting from diabetes, on a more permanent basis and without engaging him fully in an interactive dialogue regarding potential accommodations.<sup>1</sup> The Hearing Officer awarded Complainant \$40,000.00 in emotional distress damages. Respondent has appealed the decision to the Full Commission.

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<sup>1</sup> The Hearing Officer rejected Luster’s claim that the DOC’s monitoring and medical documentation demands constituted harassment based on handicap status in violation of G.L. c.

## STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et. seq.*) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974). See G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See *e.g.*, School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine, *inter alia*, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

## BASIS OF THE APPEAL

The DOC has appealed the decision on the grounds that the Hearing Officer's findings were not supported by substantial evidence and that she erred as a matter of law by finding the DOC liable for handicap discrimination for failing to engage in the interactive process with its employee, Anthony Luster, to determine whether a reasonable accommodation was available for his disability. The DOC argues that the evidence supports a finding that Luster was no longer capable of performing the essential functions of the job of a correction officer and therefore it

was justified in denying his request for a reasonable accommodation. DOC argues that the Hearing Officer's conclusion that it failed to actively engage Luster in an interactive process to determine the possibility of a reasonable accommodation was based upon errors of law and unsupported by substantial evidence. The DOC also argues that the Hearing Officer's award of \$40,000.00 in emotional distress damages was not supported by substantial evidence and is excessive. For the reasons set forth below, we reverse the decision of the Hearing Officer.

Anthony Luster was a Corrections Officer I with the DOC from September 1991 until September 2007, and worked at MCI-Shirley, a medium security correctional institute.<sup>2</sup> The Hearing Officer found that the "primary duty" of a Correction Officer I position is the "care and custody of inmates" sentenced to the Commonwealth's correctional system. According to evidence presented by the DOC, there are seven essential functions of this position: "(1) escorting inmates, patrolling facilities, making head counts and security checks; guarding and directing inmates during work assignments; (2) preventing violence, escapes and suicides; (3) searching for contraband; (4) referring inmates to supportive services; (5) making reports; (6) responding to emergencies with firearms, restraints, and first aid and (7) screening visitors, operating equipment and serving food."

Beginning in 2003, Luster, an insulin-dependent diabetic, started to experience pain in his feet and ankles attributed by his medical care providers to diabetic neuropathy, inflamed toe joints, osteoarthritis of the feet, fallen arches, calluses, bunion and hammertoes.<sup>3</sup> He applied for

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<sup>2</sup> On January 30, 2008, Luster was approved for disability retirement by the State Board of Retirement.

<sup>3</sup> There was conflicting medical evidence about whether the hammertoes and flattened arches were hereditary or as a result of the requirement that Luster wear military-style boots at work

and was allowed to participate in the DOC's Temporary Modified Work Program ("TMWP") on three separate occasions based on medical information provided by his physicians over the next few years, even though he was unable to perform the "primary duty" of his job, which he admitted during his testimony, was the care and custody of inmates.<sup>4</sup> Instead, on each occasion Luster was limited to "incidental"<sup>5</sup> or no inmate contact. See Exhibit 5, Temporary Modified Work Program Policy. The TMWP program, administered by DOC's Worker's Compensation Division, provides Department employees the opportunity to return to work after a work-related injury in situations "where a limited period of modified duty is required for medical reasons" and even though the employee may not be able to perform the essential functions of his or her position temporarily. See TMWP Policy, Exhibit 5. When a facility Superintendent determines that there are TMWP positions available within a facility, they are offered to any employee who is currently receiving workers' compensation benefits for a work-related injury and for whom there is a medical report that states the employee can return to restricted duty with specific listed limitations and that the employee's "need for modified work is not likely to be permanent and should be resolved within 120 days". Id. The medical report must also state if the employee "is

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coupled with the walking and standing requirements of the job. The Hearing Officer found more persuasive the opinion of Independent Medical Examiner, Dr. Hyman Glick, a Board Certified Orthopedic Surgeon, who examined Luster on July 14, 2006 and was of the view that the hammertoes and flattened arches were due to hereditary rather than work-related factors. She concluded that his disability was not work-related.

<sup>4</sup> The TMWP policy specifically recognizes that employees participating in the TMWP program are "not necessarily capable of performing the essential functions of their position, for this limited time period, but this is consistent with the temporary nature and the goal of TMWP". See Exhibit 5.

<sup>5</sup> "Incidental inmate contact" is "interaction with inmates where that interaction is generally limited to coincidental meetings in common spaces" and "specifically excludes the exercise of supervision or care and custody obligation with respect to inmates." See Exhibit 5, TMWP Policy.

capable of having, at the very least, incidental contact with inmates.<sup>6</sup> Id. The facility's supervisor can extend TMWP for another 60 days.<sup>7</sup> If sufficient modified work is available, employees like Luster who have suffered a non-work-related injury, see fn.4, and meet the criteria just outlined may also be assigned to a designated TMWP position, consistent with a facility's operation needs.<sup>8</sup> The positions that have been determined as suitable for TMWP at MCI-Shirley are the pedestrian trap, the SMU Control Room and the facility's towers.

Based on a medical report from Luster's primary care physician Dr. Michael Sheehy, that Luster suffered from diabetes and had developed problems with his feet which prevented him from being on his feet for more than 4 ½ hours per shift, the DOC assigned Luster to modified duty from May 14, 2003 until September 14, 2003, with that restriction and only incidental inmate contact. See Exhibit 3. On September 16, 2003, Luster returned to unrestricted duty. However, as a result of medical information again provided by Dr. Sheehy stating that Luster could not stand on his feet for more than an hour, Luster was granted a second modified duty assignment under TMWP for 120 days, from December 10, 2003 until April 10, 2004, although

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<sup>6</sup> The TMWP policy requires an employee to provide documentation of medical restrictions, if any, on the 60<sup>th</sup>, 90<sup>th</sup> and 120<sup>th</sup> days. It also requires new documentation for every request for TMWP modified work. Luster's complaints about the DOC's constant demand for paperwork seem to arise out of the requirements of the program itself and not for purposes of harassment.

<sup>7</sup> If at the end of 120 days, the employee's medical documentation indicates the need for the modified work to continue, the Superintendent of the facility must determine whether to extend it for another 60 days, based "purely upon the following:" (a) the availability of modified work positions; and (b) medical documentation indicating that the employee will be able to return to full-time, unrestricted duty within those 60 days."

<sup>8</sup> However, if a Superintendent determines that the position is needed for an employee who is currently on industrial accident leave, a non-work-related TMWP will be suspended or terminated and the bumped employee must either return to full duty or be placed on an "appropriate" type of leave. Id.

this time his TMWP restrictions were no standing or walking for more than an hour a day, sedentary as much as possible, no lifting of more than 20 pounds and incidental inmate contact only.<sup>9</sup> See Exhibit 4. On January 30, 2005, Dr. Sheehy submitted a Medical Certification Statement stating that Luster was suffering from “worsening” chronic diabetes that now required daily insulin.<sup>10</sup> See Exhibit 7.

After submitting several requests for additional TMWP leave that failed to provide a projection or estimate of how long Luster would be on modified duty, when he would be cleared for full/unrestricted duty or whether he could have incidental inmate contact, Luster submitted a medical note dated May 25, 2005, from podiatrist Kevin Moran, D.P.M. for light duty for 120 days and incidental inmate contact.<sup>11</sup> On May 30, 2005, Luster went to MCI-Shirley and represented to Captain Quinlivan that he had been approved for a light-duty assignment, and based on this representation Quinlivan assigned him to the Special Management Unit (“SMU”) Control Room.<sup>12</sup> On the following day, May 26, 2005, Luster reported to work and asked to be assigned to the tower position instead of the SMU Control Room but was told he had to report to

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<sup>9</sup> Neither of these first two medical notes indicated that Luster could have inmate contact. DOC’s duty assignment for the first two TMWP’s limited him to “incidental” inmate conduct, presumably because of his significant ambulation limitations. DOC may also have communicated with Luster’s physician since an additional 20 pound limitation is included for the second TMWP.

<sup>10</sup> Complainant requested and was allowed intermittent leave under the Family and Medical Leave Act (“FMLA”) and a related state policy in order to obtain medical treatment.

<sup>11</sup> This not was not in Complainant’s personnel file during discovery but was included in the record.

<sup>12</sup> This is the first of several noteworthy instances of the Hearing Officer’s refusal to credit Luster’s testimony and adoption of a contradictory version of events. Luster testified that he told Captain Quinlivan that he had not yet been approved for TMWP modified duty and that Quinlivan ordered him nonetheless to work a modified duty assignment. The Hearing Officer rejected Luster’s testimony.

the Control Room. Luster thereafter went home sick shortly after reporting to the Control Room and claimed to have suffered a work-related injury: “[I]ost arch on both feet from wearing boots – ankles swelled up.” He was out of work for five months, from May 31, 2005 to November 1, 2005, and filed a claim for Worker’s compensation.<sup>13</sup> See Exhibit 1.

On August 26, 2005, Luster submitted a request dated August 26, 2005, to wear alterative foot-wear because of his diabetes, neuropathy and foot pain, rather than the Department-issued uniform boots, which was granted. Luster submitted a medical form from Dr. Sheehy dated August 29, 2005, stating that he was experiencing bilateral foot pain that was “recurrent, chronic condition due to diabetes” that rendered Luster “unable to stand for periods of time” and for no more than 15 minutes in his work belt. Dr. Sheehy also said that it was “unknown” when Luster’s condition would end, “unknown” when he could return to a “full schedule” and that he needed to work intermittently for an “unknown duration of time.” Luster was granted thirty days of FMLA leave for physical therapy from August 29, 2005 through September 28, 2005, but was informed that the medical note did not qualify him for the TMWP program because it failed to provide a prognosis for return to duty.<sup>14</sup>

Luster was allowed another four-month TMWP modified duty assignment to the SMU Control Room from November 1, 2005 through March 1, 2006, with no prolonged standing or

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<sup>13</sup> The industrial accident claim was initially denied by the Massachusetts Human Resources Division, but pursuant to a decision of the Department of Industrial Accidents finding that the work boots Luster was required to wear may have contributed to his foot condition, the parties subsequently executed an agreement to cover Luster’s absence from May 31, 2005 to November 1, 2005.

<sup>14</sup> The note also failed to state that Luster had been personally examined by the physician. Throughout this period the DOC wrote Luster to inform him when he failed to qualify for modified duty under the TMWP program because his paperwork was inadequate. Repeatedly Luster was informed that his paperwork failed to specify how long he would need modified duty, a requirements under the TMWP policy.

walking, limited stair use and incidental inmate contact only. See Joint Exhibit 22. Luster was asked to provide updated medical reports every thirty days as required by the TMWP Policy. Luster requested to wear tennis or running shoes based on an October 20, 2005 medical note, due to his diabetic peripheral neuropathy, and once DOC clarified with his medical provider that the need for the accommodation for his medical condition was permanent, the request was allowed. See Exhibit 25.

Luster's modified-duty assignment ended on March 2, 2006. On March 6, 2006, Captain Quinlivan notified him that he would need to resume normal duties. Luster went home "sick" that day which was the last day he physically reported to work. Luster filed an industrial accident claim the next day. During the next fifteen months, Luster was granted fifty-two weeks of medical leave under the Commonwealth's Enhanced Family Friendly Benefits (March 6, 2006 through March 6, 2007)<sup>15</sup> and an additional twelve week of FMLA leave (April 1, 2007 through June 6, 2007). On April 18, 2007, Luster's medical leave under the FMLA and EFFBA was extended for the last time through June 6, 2007, at which point he had used his maximum benefits under the programs. During this time Luster had surgery on both his feet.<sup>16</sup>

On May 7, 2007, a month before his leave expired, Luster submitted his first and only request for a reasonable accommodation along with medical documentation from Dr. Pizzuto which was dated May 7, 2007 and stated that Luster had suffered with feet problems for the past three years "with the problem getting worse." See Joint Exhibit 47 and 58. He stated further that Luster "needs to limit his work" at MCI-Shirley to "an area with no inmate contact or that involves repetitive ambulation or stair usage during the day," and that subject to these

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<sup>15</sup> Medical leave was extended to March 31, 2007.

<sup>16</sup> Luster had surgery on his left foot on April 19, 2006 and his right foot on October 5, 2006.



restrictions he could return to work on June 6, 2007.<sup>17</sup> Id. (Emphasis added). Dr. Pizzuto sent a second letter dated May 31, 2007, that acknowledges his receipt of the seven essential duties of Luster's Correction Officer I position from the DOC. However, while retaining the ambulation and stair usage restrictions, this note omits any reference to inmate contact at all and states that [t]his work restriction represents an estimated TMWP (permanent status) duration and again, indicates that Luster will return to work on June 6, 2007. See Exhibit 17. (Emphasis added). The record reveals that on June 29, 2007, after reviewing Luster's medical restrictions and having several conversations with Dr. Pizzuto to verify his restrictions as set forth in his May 7, 2007 letter, the DOC's Office of Affirmative Action denied Luster's request for a reasonable accommodation, stating to him that "[t]he restriction of no inmate contact greatly impacts the essential functions of your position and therefore I am unable to approve your request for Reasonable Accommodation." See Exhibit 19.

Following the expiration of his medical leave on June 6, 2007, the DOC informed Luster he had to return to full duty (or face separation from service or retirement) unless he qualified for TMWP. As a result, Dr. Pizzuto sent a letter in support of a fourth TMWP position for 120 days which was similar to his May 31, 2007 letter except that Luster was restricted to limited repetitive ambulation and could have incidental inmate contact. Also, the reference to "permanent status" was deleted and replaced with the following language: "[t]his work restriction represents modified duty for 120 days, likely to return to full duty at the end of that time."<sup>18</sup> See Exhibit 19. (Emphasis added). The record reveals that Associate Commissioner,

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<sup>17</sup> Dr. Pizzuto recommended either a stationary tower position or perimeter driving position as "best-suited for his problem" indicating further, a "(non-control position).

<sup>18</sup> When informed that Luster needed to request an additional 60 days from his last TMWP as a

Ronald Duval exercising his discretion under the TMWP Policy, declined to grant Luster an additional 60 days of modified duty, accepting the recommendation of DOC's Worker's Compensation Division based on the medical documentation from Dr. Pizzuto<sup>19</sup> and a medical report of Anthony Caprio, M.D. dated January 25, 2007, submitted in connection with Luster's industrial accident claim. In that report, Dr. Caprio stated that Luster "is incapable of returning to his former occupation" and that "for all intensive [sic] purposes he is permanently and partially disabled from his prior occupation and said capacity is more likely than not to be permanent".<sup>20</sup> See Exhibit 7. In a letter dated October 9, 2007, DOC informed Luster that, having found that he was ineligible for a reasonable accommodation or modified duty based on medical documents it had received that indicated that Luster was unable to perform the essential functions required of a Corrections Officer, it would be seeking his termination. DOC also sought involuntary accidental disability retirement on Luster's behalf and on January 30, 2008, Luster was approved for ordinary disability retirement by the State Board of Retirement.

According to the Hearing Officer, Luster asserts that despite his chronic foot pain, he would have been able to perform the essential functions of a Correction Officer I position if granted the reasonable accommodation of an ongoing modified duty assignment with limitations on walking, standing and inmate contact and with regular time off for doctor's appointments.

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matter of procedure, Dr. Pizzuto send DOC another letter dated August 9, 2007, that varied only by replacing 120 days with 60 days. See Joint Exhibit 55.

<sup>19</sup> In our view, Associate Commissioner Duval reasonably rejected Dr. Pizzuto's statement in his second letter dated August 9, 2007 that Luster was likely to return to duty at the end of the 60 days.

<sup>20</sup> Dr. Caprio stated further, "I seriously doubt there is going to be further improvement in his overall condition... but I certainly don't think he'll ever return to work as a prison guard. Therefore the prognosis is bleak for him to return to his former occupation."

The Hearing Officer “accepted” this assertion for purposes of analyzing Luster’s claim that he was denied a reasonable accommodation and as a result failed to sufficiently analyze the preliminary question of whether Luster was a qualified handicapped individual in the first place. It is beyond question that in order to state a claim for handicapped discrimination under G.L. c. 151B, § 4(16), a plaintiff must show that (s)he is a qualified handicapped person, that is, someone who is capable of performing the essential functions of the position involved with [or without] a reasonable accommodation.” Labonte v. Hutchins & Wheeler, 424 Mass. 813, 821-22 (1997). See Gauthier v. Sunhealth Speciality Servs. Inc., 555 Supp. 2d 227, 240 (D. Mass. 2008).

The Hearing Officer found that Luster has a disability: chronic foot pain as a result of diabetic neuropathy complicated by other factors such as fallen arches, calluses and hammertoes that “compromises [Luster’s] ability to walk and work.” She also found that Luster and his doctors requested that he be indefinitely excused from inmate contact, walking and stair usage. Despite these findings, she concluded that as a recipient of Worker’s Compensation payments and disability retirement in 2008, Luster was entitled under G.L. c. 152, § 75B (1) to a rebuttable presumption of qualified handicapped status. While it is true that the receipt of disability benefits does not preclude Luster from raising a claim of disability discrimination, Labonte v. Hutchins and Wheeler, 424 Mass. 813, 819-20 (1996), it does not automatically make him a “qualified handicapped” individual. Chapter 152, § 75B (1) states that “[a]ny employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.” This language begs the question of whether

Luster is or is not “capable of performing the essential functions” of the Correction Officer I position, an issue the Hearing Officer did not resolve when she went directly to the reasonable accommodation prong of the analysis.

We have carefully reviewed the DOC’s grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We conclude that the substantial weight of the evidence fails to support a conclusion that Luster was a qualified handicapped individual capable of performing the essential functions of his job within the meaning of M.G.L. c. 151B, § 4(16). See Johansson v. Massachusetts Department of Corrections, Superior Court Civil Action no. 10-2589-H (Brassard, J.) March 31, 2011). See also Labonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997); Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 383-84, (1993). The Hearing Officer, Luster and the DOC were all in agreement that “care and custody” of inmates was the essence of a Correction Officer I’s position. The skill set for the DOC Correction Officer I position describes seven “essential functions,” five involving direct and potentially violent inmate contact (escorting, guarding and directing inmates during work assignments, responding to emergencies, and preventing violence, escape and suicides).

The Hearing Officer cited Johansson v. MCAD, Appeals Court, No. 2005-P-1367, p. 7 (2007), (Rescript Judgment per Rule 1:28 reversing Superior Court and remanding case to MCAD) in support of her conclusion that a Correction Officer I position encompasses a variety of assignments and positions and that the interactive process “might have uncovered an assignment with limited walking and inmate contact” that Luster could perform on an indefinite basis.<sup>21</sup> In that case, after losing at the MCAD, a disabled DOC Corrections Counselor I sought

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<sup>21</sup> Even assuming that Luster’s contact with inmates could have been minimized, it would not

judicial review which resulted in a remand from the Appeals Court to the MCAD for a hearing on whether the DOC could have reasonably accommodated the complainant, who was restricted from any inmate contact by her medical providers. On remand, however, the Full Commission determined that the Complainant was not entitled to a reasonable accommodation (or interactive discussion) because she was not a “qualified handicapped person” since an essential function of DOC’s position of Corrections Counselor I is inmate contact and her medical restriction and refusal to work with inmates rendered her unqualified for the position, a decision affirmed by the Superior Court on judicial review. Johansson v. MCAD, Superior Court C.A. 10-2589-H.

Here, the Hearing Officer concluded that the credible evidence produced at public hearing in this case “indicates that [while] most correction officer positions involve inmate contact, walking, and standing . . . these attributes are not the primary features of each and every correction officer assignment.” She relied on the temporary modified assignments under the DOC’s TMWP Policy to demonstrate this; and stated further that it was “possible” than an interactive process might have uncovered an assignment that met Luster’s restrictions. However, the DOC explicitly states in its Policy that employees participating in the program “are not necessarily capable of performing the essential functions of their position” and “consistent with the temporary nature and the goal of TMWP” are allowed to work for a short duration until they can return to active duty. The TMWP Policy specifically differentiates “incidental inmate contact” that is limited to “coincidental meetings in common spaces” from inmate contact required for “the supervision and care and custody of inmates”-- as the “primary duty” of the

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render the core function of inmate contact nonessential to the Correction Officer I position. See Cox, 414 Mass. at 387 (affirming the decision of a Superior Court judge who found that even though a function rarely occurred, it “is not unforeseeable that this skill would be necessary during an emergency, or even from time to time.”)

Correction Officer I position. See Exhibit 5. Any permanent position that limits or eliminates inmate contact is no longer a Correction Officer I position, but a new and different job. An employer is not required to accommodate a handicapped employee by transferring the employee to a new or different position. See Fiumara v. Harvard University, 526 F. Supp. 2d 150 (D Mass, 2007) aff'd May 1, 2009 (unpublished). The DOC is not required to allot the temporary TMWP position permanently to handicapped corrections officers who are no longer qualified for their jobs. Such a decision would lead to the end of the program and frustrate the laudable goal of providing injured employees with an opportunity to return to work on a temporary, modified basis until full recovery from a work or non-work-related injury, even if they are unqualified, albeit temporarily, to perform the Correction Officer I position.<sup>22</sup> Luster benefited from the TMWP program and was able to participate for three separate 120 day periods with limited or no inmate contact and other restrictions despite the reluctance and repeated failure of Luster's medical providers to state with any precision the duration of his restrictions and when he could return to active duty. After almost four years of medical leave, industrial accident leave and modified positions, the DOC insisted on this information (which is required under the program) before allowing Luster his fourth TMWP position. Instead, Luster for the first time applied for a reasonable accommodation supported by medical documentation with the explicit permanent restriction of "no inmate contact", which was denied after DOC consulted with his medical provider and verified his medical restrictions, because "[t]he restriction of no inmate contact greatly impacts the essential functions of your position."

We conclude that the substantial weight of the evidence supports a conclusion that an

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<sup>22</sup> Presumably the Commonwealth saves money through this program and injured workers are paid where otherwise they would either be paid only a percentage of their income or no income at all.

essential duty of the Luster's job is inmate contact and that the medical prohibition on inmate contact set out in various medical reports is unassailable evidence that Luster is not a "qualified handicapped person" and has therefore failed to make out a prima facie case of handicap discrimination. See Johansson, Superior Court C.A. 10-2589-H (an essential element of a Correction Counselor I position is inmate contact and DOC employee's medical restriction of no inmate conduct rendered her an unqualified handicapped person). While the DOC was generous in giving modified duty assignments to Luster under its TMWP program, this program was expressly temporary in nature and reserved for persons who were not permanently restricted from performing the essential functions of their job. Chapter 151B, § 4(16) does not require that an employer create a new position when an employee is not capable of performing the duties of his former position, which is what permanent placement in a TMWP job would entail. See Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 453, 454 (2002).

#### ORDER

For the reasons set forth above, we hereby reverse the decision of the Hearing Officer. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within thirty (30) days of receipt of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED this 5th day of April , 2012

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Julian Tynes  
Chairman

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Sunila Thomas George  
Commissioner

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Jamie Williamson  
Commissioner