COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
JOHN HENRY,
Complainant

v.

DOCKET NO. 02-SEM-00591

O.K. BAKER SUPPLY COMPANY,
Respondent

Appearances: Michael Facchini, Esq., for Complainant
Timothy F. Murphy, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 30, 2002, Complainant, John Henry, filed a Complaint with this Commission alleging that Respondent, O.K. Baker Supply Company, Inc. discriminated against him on the basis of disability and retaliation when it terminated his employment on January 11, 2002. The Investigating Commissioner found probable cause to credit the allegations of the complaint and subsequent conciliation efforts were unsuccessful. The matter was certified for a hearing, which took place before the undersigned hearing officer on December 4, 5, 6, 2007, and February 15, 2008. The parties submitted post-hearing briefs in April of 2008. Having

reviewed the record in this matter and the post-hearing submissions of the parties, I make the following finds of fact and conclusions of law.[1]

II. FINDINGS OF FACT

1. Complainant, John Henry, is a 48-year old resident of Granby, MA. Complainant worked for Respondent O.K. Baker Supply Company, Inc. for approximately four years as a warehouse worker, starting in September 1998.[2] Stipulated Facts No. 6. Complainant has an eleventh-grade high school education. Before working for Respondent, Complainant worked as a carpenter doing general construction and finish carpentry.

2. Respondent, O.K. Baker Supply Company, Inc., is an employer within the meaning of G.L. c. 151B. Respondent is a wholesale distributor of bakery supplies serving small, independent retail and institutional customers. Tr. Vol. I, 108. From 1999 to 2001, Respondent employed an average of 25 people, including approximately ten permanent and seasonal warehouse workers. Ex. C-1, C-2, C-3.

3. Ira Kaplan was Respondent's owner and president at all relevant times. Tr. 44. Kaplan's father founded Respondent in 1957. Tr. 807. Kaplan has worked full-time at Respondent since 1968. Tr. 809. Kaplan testified he is a hands-on manager who doesn't hesitate to work side-by-side with his warehouse staff. Tr. 146. Kaplan stated that he was exclusively responsible for hiring and firing the warehouse and delivery truck staff, with the exception of a six-month window in 2001 when he was recovering from heart surgery. Ex. C-18, 10-13; Tr. 49.

[1] At the time of the Hearing and until February of 2010, the undersigned served as a Commissioner of the MCAD and was the Hearing Officer in this matter. By way of special designation by the current Chairman of the MCAD, the undersigned retained authority to issue this Hearing Officer decision.

[2] Complainant's year of hire varies widely throughout the record: Complainant testified he started working for Respondent in September 1996 (Transcript at 290, 295, 485), September 1997 (Ex. C-19 at 11, 59; Tr. 290, 295, 485) and September 1998 (Joint Cert. Memo, Stipulated Fact #6).

Kaplan personally interviewed Complainant and hired him as a permanent (non-seasonal) driver's helper and warehouse worker. Tr. 296.

4. Respondent did not give Complainant an employment application to complete and sign until some days after he began working. Tr. 295-296, 298. At the time Complainant was hired and until sometime after January 11, 2002, Respondent had no written job descriptions or employee manuals outlining its policies on vacations, layoffs, terminations, job performance or wage increases. Tr. 48-49, 314-315. Complainant's training was limited to verbal instruction. Tr. 48.

5. When Complainant was hired, Kaplan told Complainant that the warehouse job for which he had been hired required "a lot of heavy lifting." Tr. 297. Complainant's duties included selecting customer's orders from the warehouse supplies and manually loading and unloading delivery trucks, all of which required lifting bakery supplies weighing from 5 to 120 pounds. Tr. 301-302; 719; 297. At times, Complainant drove a forklift to load and unload supplies. Tr. 98, 310. Occasionally, Complainant was assigned as a driver's helper on deliveries. Tr. 254.

6. Complainant worked Mondays through Fridays and occasional Saturdays. Tr. 308, 1023. Complainant routinely started each day at 5:00 a.m. and regularly worked 40 to 70 hours each week. Tr. 308, 1023. He initially split his time between the warehouse and delivery trucks but later performed most of his duties in and around the warehouse. Tr. 320. During his employment with Respondent, Complainant received regular wage increases, starting at $7.00 per hour plus overtime increasing to $12.00[3] per hour plus overtime. Tr. 313-315. Kaplan testified that he valued Complainant as a good employee and a warehouse jack-of-all-trades. Tr.

[3] Complainant also testified that he earned up to $11.00 per hour but thought he "might have got a raise." Tr. 622.

255. He found Complainant to be dependable, reliable and hardworking, both before and after he was injured and the surgeries that followed his injury. Tr. 897.

7. Complainant testified that the working environment at Respondent was rife with unsafe and illegal behavior. Tr. 568. He stated that the other employees were "animals," that there was "dope, drinking, fights, knives, guns." Tr. 568. Complainant testified that Kaplan was physically present during these types of activities and not only failed to take disciplinary action against workplace infractions, but participated in the drinking and drug activities. Tr. 305-307.

8. On Friday, May 26, 2000, Complainant's right index finger was injured while he was working in the warehouse. Tr. 344. Complainant is right-handed and he was giving direction to a co-worker, Dan Wilson, by pointing to a skid that needed to be moved. Tr. 292, 344. Wilson grabbed Complainant's outstretched right index finger and twisted it, saying, "Don't point at me." Tr. 344. Complainant immediately experienced intense pain in his finger. He left the warehouse for the office, and reported the incident to both Ira Kaplan and Kaplan's wife Donna.[4] Tr. 82, 345. Complainant testified that Kaplan told Complainant to handle the matter himself, specifically telling him to "Stop being a pussy and take him (Wilson) outside and handle it." Kaplan testified that he did not witness the incident and did not know the severity of Complainant's injury. He felt that no disciplinary action was called for and did not investigate the matter further. Tr. 821-822. Since Wilson was a delivery truck driver and Complainant worked primarily in the warehouse, they had little daily contact and Kaplan believed the matter would blow over. Tr. 822.

9. Despite the pain he was experiencing, Complainant did not seek medical attention for the injury until the following Monday, May 29, 2000, when he returned to work and the pain

[4] Donna Kaplan is Ira Kaplan's ex-wife who, while still married to Kaplan, worked at Respondent managing payroll and insurance. Tr. 87, 874.

prevented him from performing his regular heavy lifting duties. Tr. 348-349. He discussed having pain and difficulty moving his finger with Kaplan who agreed Complainant should seek medical attention. Tr. 348, 822. At Kaplan's request, Complainant used his private health insurance to cover the costs associated with the medical examination and tests. Tr. 348-349, 822-823. According to Complainant, Kaplan expressed some concern about his workers' compensation rates rising, if Complainant filed a workplace injury claim. Tr. 349, 837. Kaplan did not file a workplace injury report of Complainant's injury until August 9, 2000. Tr. 82-84; 90-91.

10. Kaplan testified that he did not file a Report of the injury with the Department of Industrial Accidents at the time, because he believed his obligation to do so as an employer was triggered only after an employee was out of work for five consecutive days as a result of a workplace injury. Tr. 824, 926. He testified that if swifter action was required, he left it up to the employees, and that there was a phone number available to employees that was posted at Respondent's place of business, which they could call to report on-the-job injuries on their own. Tr. 924-925.

11. Complainant sought treatment at Bay State Medical Center where doctors determined that he had a fracture-dislocation in his right index finger. Ex. C-12, p. 1. The fracture was treated and his finger was put into a splint that kept the finger slightly bent. *Id.* A few days after treatment at Bay State Medical Center, Complainant met with Dr. Stuber, a hand plastic surgeon. *Id.* On Dr. Stuber's advice, Complainant wore the splint for a week then underwent supervised physical therapy. *Id.* Complainant missed no more than a day or two of work as result of the initial injury. Tr. 356, 888.

12. In the past, Respondent had made light duty available or had permitted limited lifting to employees who were recovering from a sprained back or similar injury. Tr. 137, 862. Respondent, however, generally did not offer light duty unless the injured employee specifically asked for it. Tr. 136-137. In this case, Respondent gave Complainant paid time off to attend physical therapy. Tr. 495. Complainant was also permitted to restrict his heavy lifting duties to those he could perform comfortably. Tr. 492.

13. Complainant's supervised physical therapy was unsuccessful. Tr. 368. He continued to have pain in his finger which made it increasingly difficult for him to perform his heavy lifting duties. Tr. 365. Although Complainant mentioned the pain to Kaplan, Kaplan had no complaints Complainant's performance. Tr. 202-203, 897.

14. On July 24, 2000, approximately two months after his injury, Complainant underwent surgery on his injured right index finger in attempt to alleviate the pain. Tr. 353. Dr. Stuber performed a volar plate arthroplasty where a button was used, but no pin was inserted in the injured joint. Ex. C-12, p.1. Following the surgery, Complainant resumed work at Respondent wearing a plastic splint that fit around his finger and wrist. Tr. 354.

15. The costs associated with the surgery were covered by Respondent's private insurance plan. Tr. 356. The private insurance provider eventually sought reimbursement from Respondent's workers' compensation insurance plan provider. *Id.* Complainant was out of work for approximately three weeks as a result of the surgery. Tr. 509. Complainant was paid lost wages under Respondent's workers' compensation plan. Tr. 373. He testified that he heard from co-workers that Respondent intended to fire him upon his return because he had filed a workers' compensation claim. Tr. 380-382, 524-525, 1018.

16. Subsequent to Complainant's surgery, on August 9, 2000, Respondent filed an Employer's First Report of Injury or Fatality with the Department of Industrial Accidents. Ex. C-4. The report cited May 26, 2000 as the date of the injury and the cause being a "fellow employee twisted [Complainant's] finger." *Id.* The report indicates that the incident was reported to Respondent's owner, Ira Kaplan, on the May 26, 2000, that it was reported as a work-related injury on July 31, 2000, that the first day of incapacity was July 24, 2000 – the date of Complainant's surgery – and that the fifth day of incapacity was July 28, 2000. *Id.*

17. Complainant returned to work at Respondent in or around August 2000. Tr. 505, 517. Complainant wore a plastic splint that fit around his finger and wrist to immobilize his finger. Tr. 354-355. Dr. Stuber advised Respondent of Complainant's need for light duty in a note Complainant gave to Kaplan or his wife.[5] Tr. 512, 516. Despite undergoing post-surgical physical therapy and wearing the splint, Complainant experienced progressively more pain while trying to perform his heavy lifting duties. Tr. 361, 368. Complainant told Kaplan he was in a lot of pain and asked if he could be assigned to light duty. Tr. 361. Complainant was allowed to operate a forklift temporarily while the regular operator, Jeff Chartier, was out of work recovering from a car accident. Tr. 417, 418. When Chartier returned from leave, Complainant returned to duties requiring more heavy lifting, but was permitted to lift only very lightweight items. Tr. 418. Complainant informed Kaplan that he was in pain and sought to continue driving a forklift, as an accommodation. Tr. 368-370. He continued to wear a plastic splint at work and underwent post-surgical physical therapy, but neither alleviated the progressively increasing pain in his finger. Tr. 366. He worked approximately 12 weeks

[5] Complainant testified that he always delivered his doctors' notes to Kaplan in person but that Kaplan often told him to give them instead to his wife, Donna. Tr. 362-364. Respondent testified almost all notes went directly to his wife, whether delivered by Complainant or faxed to Respondent from Complainant's various doctors. Tr. 893.

following his first surgery before excessive pain exacerbated by the heavy lifting caused him to go out under workers' compensation insurance and undergo a second surgery. Tr. 371-373.

18. On September 27, 2000, Complainant met with Dr. Bruce Leslie to explore additional medical options. Ex. C-12, p.1. Dr. Leslie recommended that Complainant consider either a fusion procedure or amputation of the finger. *Id.* Complainant did not want to amputate his finger unless it was necessary so he opted for the fusion procedure. Tr. 394. Complainant informed Respondent that he would be out for another surgery. Tr. 830.

19. On November 16, 2000, Dr. Wint performed Complainant's second finger surgery – a fusion procedure – to alleviate the pain Complainant was experiencing from the first surgery which had left his finger out of alignment in such a way that his knuckle bones were grinding together. Ex. C-12, p. 2. During this surgery, his knuckle was removed and replaced by pins. Ex. C-12, p. 2. This left his finger in a permanent state of extension. Tr. 619. Complainant was out of work for approximately eight weeks for surgery and recuperation. Tr. 374.

20. Workers' compensation insurance covered the cost of Complainant's second surgery-related medical expenses. Tr. 373. Workers' compensation insurance also covered his lost wages. Tr. 373. According to Complainant, while he was recuperating, he again heard from co-workers that Respondent intended to fire him when he returned to work, allegedly because he had gone out on workers' compensation. Tr. 530, 1018.

21. Complainant returned to work sometime around January of 2001, following his second surgery. Tr. 569-570. He experienced greater pain following the second surgery than he did following the first. Tr. 386. The nerves in his finger were so sensitive that all he had to do was touch something with his finger and pain would shoot up to his shoulder. Tr. 384. He found it most painful to lift warehouse goods but any contact with the finger caused him some degree

of pain. Tr. 385. Doctors attempted to relax the nerves by injecting medication directly into his finger but the targeted nerves did not respond and the medicine caused Complainant to break out in hives. Tr. 386. Complainant tried to change his work habits to avoid painful contact with his injured finger but was unable to do so. Tr. 387. Within one and a half weeks after returning to work, Complainant's experienced such significant pain that he found it difficult to perform his regular heavy lifting duties. Tr. 389.

22. As a result of the increasing pain, Complainant asked Kaplan if he could be assigned to light duty. Tr. 388. Kaplan acknowledged that Complainant was experiencing pain but testified that that essentially there was no light duty available in his warehouse worker job. Tr. 387-388, 563. Complainant continued to experience excruciating pain when his finger made contact with any object. Tr. 384. Three months later, in or around April of 2001, Complainant went out on a workers' compensation leave as a result of the pain in his finger and again received lost wages through workers' compensation benefits. Tr. 392, 403.

23. After much deliberation, Complainant returned to Dr. Leslie's office in September 2001, requesting that the doctor amputate his right index finger. Ex. C-12, p. 2. Complainant had tried the other recommended medical treatments but still was not able to function normally. Tr. 393-394. He noticed he was already bypassing the finger when he was writing and was not using it in his regular day-to-day activities. Ex. C-12, p. 2. He testified that his finger, in its then permanently fused position, interfered with his ability to do heavy manual labor and to perform other daily tasks, such as those involving personal hygiene, and was also an impediment to enjoying his hobbies, such as hunting. *Id.* He stated he could no longer pull a gun trigger or pull back a bow while hunting. Tr. 473. Complainant also could not perform certain fine finish carpentry, which he had regularly done for friends and family before the accident. Tr. 560. He

testified that he wanted to get back to work and resume a normal life and believed amputation was the best course of action left to him. Tr. 394. Complainant informed Kaplan's wife Donna of his plan to have his finger surgically removed and later informed Kaplan. Tr. 702. He told them that the pain was simply too severe, that he couldn't take it any more, and that he wanted to return to work and resume a normal life. Tr. 840.

24. In or around November 2001[6], Dr. Leslie surgically removed Complainant's right index finger at the MP joint. Ex. C-12, p. 2. Following the surgery, Complainant was immobilized for a short while then began physical therapy. *Id.* Complainant met with Kaplan at some point during his recovery to inform Respondent that he wanted to return to work. Tr. 915. Kaplan told him he would need a doctor's medical release before he could take him back. Tr. 915. Kaplan said he was looking forward to his return. Tr. 703.

25. On December 10, 2001, Dr. Leslie saw Complainant to evaluate his post-surgical progress. Ex. C-12, pp. 2-3. Dr. Leslie found Complainant recovering at an expected pace and determined that he could return to work at Respondent on January 11, 2002 with no medical restrictions. *Id.* Dr. Leslie gave Complainant a medical note to give to Respondent that summarized his findings. Ex. C-8.

26. Until this time, Complainant had personally hand delivered most of his doctor's notes to Respondent. Tr. 363-364. Occasionally he delivered them directly Kaplan but usually Kaplan told him to give them to Kaplan's wife, Donna. *Id.* Complainant's doctors also faxed copies of their medical notes to Respondent in lieu of Complainant delivering a hard copy. Tr. 695. On or shortly after Christmas day of 2001, Complainant personally delivered Dr. Leslie's December 10, 2001, note to Kaplan to inform Respondent that he would be returning to work on

[6] Complainant testified the surgery was in November 2001. Tr. 404. Respondent stipulated to the surgery being in November 2001. Tr. 397. Complainant's surgeon stated in a letter to Complainant's counsel that the surgery took place on October 19, 2001. Ex. C-12, p. 2.

January 11, 2002. Tr. 411-412. Kaplan took the note but did not advise Complainant that there might not be work available for him. Tr. 412-413, 845-846. Kaplan did not tell Complainant that he already had a full crew in place or that the customary post-holiday slowdown could mean less work was available and that there might not be an opportunity for him. Tr. 422, 845-846.

27. Complainant testified that while he was out on leave after the amputation, Complainant learned again from co-workers that Respondent intended to fire him, which Complainant believed was for his having filed a workers' compensation claim and continuing to receive workers' compensation benefits. Tr. 382,1017-1018. On or around January 8, 2001, Complainant went in person to Respondent's place of business to confirm his January 11, 2002, return to work. Tr. 421. Complainant testified that Kaplan told him he couldn't wait to have him back at work. Tr. 703-704. According to Complainant, on this occasion and at all times prior, when the subject of Complainant's return to work had arisen, Kaplan told Complainant how much he looked forward to having him back on the job. Tr. 704. Complainant testified that Kaplan did not tell him there had been a drastic decline in business but, instead, told Complainant he'd see him when he arrived on January 11, 2002. Tr. 422.

28. On January 11, 2002, at approximately 5:00 a.m., Complainant reported for work at Respondent. Tr. 428. Kaplan met Complainant in Respondent's parking lot and told him that he only had sufficient work for his current crew and that Complainant should file for unemployment benefits because there was no job for him. According to Complainant, Kaplan said he only had enough work for "his guys." Tr. 428-430. The conversation lasted less than five minutes and Complainant left. Tr. 850.

29. Complainant was certain he had been fired because of his handicap and in retaliation for having filed a workers' compensation, and for "stirring things up" by complaining about the alcohol, drugs and the violent atmosphere at Respondent. Tr. 382, 695, 696. Complainant testified he left feeling ambushed and angry by Respondent's refusal to take him back because Kaplan knew he had been out on workers' compensation long enough that he wouldn't qualify for unemployment benefits. Tr. 429. Also, Kaplan had met with him just days before but never indicated there was a slow-down in business. According to Complainant other employees told him that business had not slowed down. Tr. 422-423, 429, 850.

30. Kaplan testified that he had no problem with Complainant returning to work. Tr. 847. He stated that the customary post-holiday slowdown meant that he only had limited work available and he already enough men to cover the work he had. Tr. 860. He stated that he didn't tell Complainant this when they met previously to discuss Complainant's returning to work because he really wasn't thinking about it then. Tr. 860. Kaplan stated that the day Complainant presented his return to work note from Dr. Leslie it was a traditionally quiet, post-holiday work day and even then he had more than enough help. Tr. 860.

31. A few hours later on the morning of January 11, 2002, Complainant returned to Respondent to collect his personal belongings and something he had loaned a co-worker. Tr. 430. Complainant testified that while at the workplace, co-workers, Kelly Grout and John Slater, told Complainant that Kaplan had reported firing him that morning. Tr. 434-435.

32. Upon leaving the building Complainant encountered some of his co-workers standing outside on the loading dock. Tr. 431. Complainant was talking to some of them when co-worker, Wayne Maynard, dropped his pants and underwear and exposed himself to Complainant, telling Complainant to "get the fuck out of here" because "you're fired." Tr. 432.

Maynard's actions aroused laughter among some of the men, leaving Complainant feeling humiliated and angry as he left Respondent's property. Tr. 432, 438. Complainant alleged that Kaplan was present at the scene, witnessed this incident, and laughed along with the others. Kaplan denied knowing that Complainant had returned to the worksite and denied having been present or witnessing Maynard's antics. Tr. 432, 437, 851. I do not credit this testimony by Complainant.

33. Prior to January 11, 2002, while Complainant was out of work on workers' compensation, the warehouse staff joined the Teamsters' Local 404. Tr. 443-444. Complainant had no interaction with the Teamsters during the period leading up to unionization. *Id.* After Respondent's warehouse workers were unionized, Complainant signed a union membership card when asked to do so. Tr. 532. Teamsters Local 404 contacted Complainant after January 11, 2002. Tr. 442. Complainant testified that he was told by a union representative that he had been wrongfully terminated for union activity and the union could help him get his job back if he signed an affidavit. Tr. 445-446. Complainant explained that he had not been involved with the unionization activities but believed he had been fired on account of his disability and for having filed a workers' compensation claim. Tr. 446. Nonetheless, Complainant relayed information to the union representative about his job duties, his injury, his subsequent surgeries, his time out of work under workers' compensation insurance, and what transpired on January 11, 2002, when he attempted to return to work. Tr. 533-534. The union representative prepared an affidavit with this information and Complainant signed it. Ex. C-13. Complainant also told the union representative that the warehouse environment was rife with drugs, alcohol and violence, but the representative declined to include that information and the incident on the loading dock in the affidavit, saying it was hearsay. Tr. 613-614, 709. Thereafter the Teamsters

Local 404 contacted Respondent by letter, stating that it had filed an unfair labor practice charge against Respondent for firing Complainant because of his union activity. Ex. C-9.

34. Kaplan sent Complainant a letter by certified mail dated January 15, 2002. Ex. C-9. In that letter, Kaplan acknowledged receipt of the union's letter and stated that Complainant's employment had not been terminated and that Respondent still considered him to be an employee. Ex. C-9. Respondent went on to state the following: "However, there is no work available for you at this time. Business has been very slow to the point where I have not replaced an employee who recently quit. In addition, those employees actively working have regularly been sent home early because there is not enough work . . . Please check with me weekly to determine when you will be able to be recalled for available work." Ex. C-9. Respondent acknowledged that it sent this letter to clarify that Complainant had been laid off and not fired. Tr. 854.

35. Complainant did not contact Respondent again to follow up on whether there was available work. Tr. 856. Respondent did not contact Complainant when work became available in the warehouse, citing Complainant's responsibility to follow through since Complainant was the one looking for employment. Tr. 856. Kaplan testified that it was possible he hired someone in the weeks or months following Complainant's attempt to return to work. Tr. 240. Respondent's tax records for July 1, 2001, through June 30, 2002, demonstrate a substantial increase in his gross income and a substantial decrease in net loss after September 11, 2001. Ex. C-5, C-6.

36. After January 11, 2002, Complainant sought new employment performing the same or similar duties as those he performed at Respondent. Tr. 447. He filled out applications at CNS Warehouse, Polep, and Springfield Foods, among others. *Id.* He found work at Leonard

and Czar manually unloading trucks in a freezer warehouse. Tr. 449. He worked roughly 60 hours per week at a rate of $10.00 per hour plus overtime. Tr. 449. He was there approximately one month before the cold working conditions became intolerable and he left. Tr. 450. While there, however, he experienced no pain in his finger and was able to perform all his manual lifting duties. Tr. 450.

37. Complainant then worked at Polep's in Chicopee, MA stocking shelves inside the facility, opening boxes, cutting boxes, refilling inventory. T. 451-452. He worked 40 to 45 hours per week earning $8.00 per hour plus overtime. Tr. 452. Complainant left there after a couple/few months because he found the working environment to be too hostile. Tr. 453, 666. He testified that when he was in between jobs, his family helped him financially. Tr. 640, 667.

38. Complainant eventually took advantage of vocational retraining offered by the Industrial Accident Board where he worked with a social worker to find the future career that would best suit him. Tr. 441. He met with a social worker approximately a half dozen times. Tr. 623, 664. They discussed the depression he experienced after being terminated by Respondent, how he felt about his injury and what work he would like to do. Tr. 440, 623. The social worker suggested that driving a truck might be a good job since he wouldn't have much contact with other people. Tr. 623, 663-664. In or around January 2004, Complainant enrolled in United Tractor Trailer Training School in Chicopee, MA. Tr. 458. Complainant completed the 28-day training program and passed his licensing test. Tr. 458, 460.

39. In February 2004, Complainant began working for Trans Refrigerator Lines, driving cross-country. Tr. 460. He drove five hours on and five hours off and was paid by the mile. Tr. 460. The job entailed driving from one location to another, backing up to a loading dock, opening the doors and waiting for the onsite workers to unload his truck. Tr. 461. Complainant

worked there approximately six months. Tr. 460. He left because he had no home time. Tr.461. Complainant then worked for Webster Trucking in Hatfield, MA for four or five months. Tr. 461-462. His position was a "less than truckload" driver for eighteen-wheelers, box trucks, and 53-footers. Tr. 462. Complainant next worked for Quaboag Transfer as a flatbed truck driver. Tr. 462-463. He then took a job as a truck driver for Overnight Transportation, which was later acquired by UPS Freight. Tr. 464-465. At the time of the Public Hearing, Complainant works for UPS Freight as a truckload truck driver delivering to Lowe's Home Improvement stores. Tr. 464. The job involves strapping and un-strapping loads on flatbed eighteen-wheelers, then driving to stores where the Lowe's staff unloads the trucks. Tr. 464.

40. In addition to filing a charge of discrimination with the Massachusetts Commission Against Discrimination, Complainant filed a civil complaint against Respondent in the Hampden County Superior Court, alleging, *inter alia*, retaliation for filing a workers' compensation claim in violation of G.L. c. 152, § 75B(2). Tr. 655-656, Ex. C-15. On March 21, 2003, a jury found Respondent guilty of discrimination against Complainant because he received workers' compensation benefits and found that Respondent violated the workers' compensation law by refusing to give Complainant preferential treatment for rehire. Ex. C-15. The jury awarded Complainant $67,500 in lost wages. Ex. C-15, Tr. 656. The court also ordered Complainant reinstated in his position at Respondent. Tr. 657. In or around April of 2003, Complainant returned to work at Respondent and was reinstated to his position of warehouse worker where he performed the same duties as before but without any physical restrictions or pain. Tr. 659, 667-668.

41. Complainant testified that during the five or so months he worked at Respondent following reinstatement, he was harassed, called names, and threatened. Tr. 468. Complainant

stated that Kaplan called him "gimp" and made hand gestures that, as he described them, resembled a hand without an index finger. Tr. 468. According to Complainant, Kaplan also directed his co-workers to shun him, and stated that it was their "game," to try to make him snap so he would quit or be fired. Tr. 467, 670, 678. Complainant testified that the atmosphere at Respondent was even worse when he was reinstated and that there were "some degenerate people" working there who were "out of control." Tr. 681. According to Complainant, there was "rampant drug use, drinking, fights, and assaults." Tr. 682. Complainant testified he was miserable during this time. Tr. 469. Kaplan denied any knowledge of Complainant's offensive treatment, claiming it was "work as usual." Tr. 870-871. I do not credit Kaplan's testimony.

42. In or around September of 2003, Complainant had an altercation with a co-worker, Wayne Milton. Tr. 669. As a result of this serious altercation which involved ethnic slurs hurled by both parties and an alleged assault by Complainant's co-worker, both were terminated.

43. Subsequent to his termination, Complainant filed for and received unemployment insurance benefits, but only after Respondent initially denied him benefits and a hearing was held because Respondent challenged the claim. Tr. 471-472. The parties stipulated that Complainant has no lost wages from March 2004 to the present. Tr. 867.

III. CONCLUSIONS OF LAW

A. Respondent's Motion to Dismiss

At the hearing in this matter, Respondent moved to dismiss Complainant's charges for reasons relating to res judicata. Respondent asserted that Complainant's charge of discrimination is based on the same set of operative facts as his workers' compensation retaliation claim brought in superior court and that this claim should have been raised and

litigated in that proceeding. It asserted that by virtue of his failing to do so he was impermissibly allowed to split his claims. Respondent also argued that Complainant was fully compensated for his losses in that proceeding. The Motion to Dismiss was denied without prejudice and Respondent was advised that it could renew the Motion at the close of the proceedings.

In its post-hearing brief, Respondent reasserted the Motion to Dismiss on the grounds that the Commission had no jurisdiction to adjudicate Complainant's discrimination charges because they are barred by res judicata. Respondent's position is that claim preclusion bars Complainant's discrimination complaints because "claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents re-litigation of all matters that were or could have been adjudicated in the action." *O'Neill v. City Manager of Cambridge*, 428 Mass. 257, 259, (1998), *quoting Blanchette v. School Comm. of Westwood*, 427 Mass. 176, 179 n. 3 (1998). It asserts that Complainant's failure to remove his c. 151B claim to Superior Court and to amend that complaint to include the 151B claim, has resulted in an impermissible splitting of his claims in two different forums and that the Commission has disregarded "considerations of fairness and the requirements of efficient judicial administration [which] dictate that an opposing party in a particular action as well as [the Commission] is entitled to be free from continuing attempts to re-litigate the same claim." *Wright Mach. Corp. v. Seaman-Andwall Corp.* 364 Mass. 683, 688 (1974).

An important exception to the rule of res judicata, however, applies to situations where a specific statutory scheme by implication, permits a plaintiff to pursue more than one action. An action brought under the workers' compensation statute seeking compensation for lost wages and a return to employment is not based on the same underlying claim as an action for

discrimination, which is for violation of a civil right. The workers' compensation statute, G.L. c. 152, and the Fair Employment Practices statute, G.L. c. 151B, are separate and distinct statutes, which adjudicate very different rights, provide distinct avenues of relief and rely on agency expertise in very different areas of law. The Commission is authorized to issue broad remedies regarding future compliance with the discrimination laws of the Commonwealth, while an action under c. 152 § 75B is intended to remunerate an injured employee for lost wages and return them to work. Moreover, the Commission is authorized to award damages for emotional distress that is proximately caused by the employer's unlawful discrimination, where no such remedy is available under the G.L. c. 152, § 75B. The Commission has consistently held these considerations should result in application of the concepts of res judicata with discretion in actions before the Commission. *Currelley v. F.W. Russell & Sons Disposal, Inc.*, 24 MDLR 388, 391 (2002); *Pardon v. Callahan*, 6 MDLR 1901 (1984); *Brown v. City of Salem*, 6 MDLR 1542 (1984). In light of these considerations, Respondent's Motion to Dismiss for lack of jurisdiction is denied.

B. Disability

Massachusetts General Laws c. 151B, § 4(16) prohibits discrimination in employment on account of disability. The statute's prohibitions include termination of a disabled employee who is capable of performing the essential functions of the job with a reasonable accommodation. To establish a prima facie case of discrimination based on disability, Complainant must first show: (1) he suffers from a handicap; (2) he is a qualified handicapped person; and (3) the he suffered an adverse employment action based on his handicap. *See, e.g., Dartt v. Browning-Ferris Industries, Inc.*, 427 Mass 1, 9 (1998); *LaBonte v. Hutchins & Wheeler*, 424 Mass. 813, 821 (1997). In order to establish discrimination, Complainant need not

prove that Respondent terminated his employment solely on the basis of his disability. *Dartt*, 427 Mass at 8-9. If Complainant is able to establish a prima facie showing of discrimination based on handicap, then the burden shifts to Respondent to show that it terminated his employment for legitimate non-discriminatory. *LaBonte*, 424 Mass. at 821.

First, Complainant must prove he was a handicapped person within the meaning of the statute. G.L. c.151B §1(17). The statute defines a "handicapped person" as one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or (c) is regarded as having such impairment. *See Dahill v. Police Dept't of Boston,* 434 Mass. 233 (2001); *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination,* 441 Mass. 632 (2004). Consistent with the Legislature's directive that the provisions of G.L. c. 151B shall "be construed liberally" to effectuate the remedial purposes of the statute, the Commission has traditionally interpreted the definition of handicap broadly to effect protections for those employees who have suffered impairments that affect their ability to do their jobs but who are still capable of carrying out the essential functions of the job. G.L. c. 151B, § 9. *Dahill, supra.* at 240.

The Commission's interpretation of the handicap provisions of G.L. c. 151B has been consistent with this approach, as have Massachusetts's courts.[7] *See Dahill, supra.* (defining disability more broadly and declining to adopt the holding in *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999), that if impairment is corrected or mitigated by measures such as medication or eye glasses, the employee may not be deemed disabled). The Supreme Judicial Court has emphasized that "[G.L.] c. 151B anticipates that determining whether a person is a 'handicapped person' will be an individualized inquiry…Per se rules are to be avoided." *Ocean*

[7] Moreover the Commission is in the process of amending its guidelines to reflect changes in Federal law.

Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, *supra.* at 637. Whether an impairment substantially limits a major life function turns on factors including the nature and severity of the impairment, the duration of the impairment, and its permanent and long-term impact. *See School Committee of Norton v. Mass. Comm'n Against Discrimination*, 63 Mass. App. Ct. 839, 844 (2005).

Complainant is right-handed and suffered an injury to his right index finger that caused him severe pain that restricted the use of his right hand in his work, impacted his ability to lift heavy objects and impacted other activities including personal care and his recreational hobbies of hunting and finish carpentry. As a result of the severity of the injury, Complainant underwent two surgical procedures and ultimately had his finger amputated in November 2001. Complainant's injury substantially limited his ability to perform the heavy lifting duties of his job and caused limitations in his ability to grasp and hold items and perform other daily life activities relating to personal care and hygiene. Following his third surgery to amputate his right index finger Complainant had to make substantial adjustments in how he performs a number of major life activities. He had to relearn how to perform certain daily activities without his index finger, such as turning a key in a lock, turning a doorknob, and writing. He sometimes forgets that he no longer has an index finger, which causes him to drop things, and he has to adjust his hunting technique when hunting with both a gun or a bow and arrow. I conclude that Complainant is impaired in a number of major life activities and is also deemed disabled by virtue of the operation of G.L. c. 152B, § 75B, and his eligibility to receive workers' compensation benefits.

Next, Complainant must show he is a "qualified handicapped person" within the meaning of G.L. c. 151B, § 1(16). A "qualified handicapped person" under the statute is one

who is capable of performing the essential functions of a particular job, or who would be capable with a reasonable accommodation. A reasonable accommodation is any job modification that makes it possible for a handicapped person to perform the essential functions of his or her position. *See McNamara v. The General Hospital Corporation*, 33 MDLR (2011), citing MCAD Handicap Guidelines, section 11(C); *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 648, n.19 (2004). Employers have a duty to engage in an interactive process when its handicapped employee requests a reasonable accommodation. *McNamara, supra*. at 11, citing MCAD Handicap Guidelines at VII; *Mammone v. President & Fellows of Harvard College*, 446 Mass. 657, 670 n.25 (2006).

At all relevant times, Complainant's job as driver's helper then warehouse worker required that he load and unload supplies from delivery trucks. This loading and unloading required a significant amount of heavy lifting by hand, and was an essential function of the job. However, some lifting duties could also be facilitated by use of a forklift and Complainant was permitted to perform light duty work for a period of time, while the other warehouse employees temporarily picked up the slack. Complainant and Respondent both testified that Complainant was allowed to perform light duty jobs after his initial injury, such as sweeping and cleaning, and was allowed to limit his heavy lifting to that which he could comfortably perform. There was no evidence that this posed any serious disruption in the operation of Respondent's business.

While still recovering from his first surgery, Complainant was allowed to operate a forklift because the regular operator, Jeff Chartier, was unable to work following a car accident. When Chartier returned to work, Complainant resumed some of his prior heavy lifting duties. While Complainant complained of intense pain in his finger, both he and Kaplan agreed that he

adequately performed the essential functions of his job, and Kaplan noted no deterioration in his performance.

Complainant was returned to work after his first two workers' compensation leaves of absence. After Complainant's second surgery, he sought a reasonable accommodation in the form of light duty work or forklift operation. Complainant testified that Kaplan's response to his request was, "there is no light duty in this job." Kaplan described the warehouse worker position as one where there is no light duty available because one of the positions essential functions is a significant amount of lifting. I conclude that there was not a significant amount of permanent light duty available in Complainant's position of warehouse worker. Notwithstanding, Kaplan testified that he advised Complainant to take it easy, do the best he could, and stay on forklift duty. Complainant did spend time operating a forklift, which eventually became too painful to perform even as a reasonable accommodation. Complainant testified to experiencing increasing nerve pain in his finger that shot all the way up his arm. The pain occurred when Complainant touched any object in certain ways. Complainant eventually became unable to operate a forklift due to the increasing nerve pain in his finger. This nerve pain was the result of the second surgery, which was not successful.

It is apparent that after his second unsuccessful surgery, there was no reasonable accommodation in the workplace that would have permitted Complainant to perform his essential job functions as a warehouse worker. He then made arrangements to have a surgical procedure to amputate his finger and again left work and received workers' compensation until he recovered from his third surgery. Complainant was out on workers' compensation and received benefits from approximately April 2001 until he attempted to return to work at Respondent on January 11, 2002.

A leave of absence for a period of time can be a reasonable accommodation. MCAD Handicap Guidelines, p. 36 20 MDLR (1998); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA III-23 ("Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disabilities . . . where this will not cause an undue hardship."). While there may be circumstances where an extended leave of absence is an appropriate or reasonable accommodation, including a request for a limited extension, which sets a definite time for the employee's return, each case must be evaluated on the circumstances. *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) (under the circumstances requested two-month extension was reasonable). I conclude that Complainant was a qualified handicapped person because he was granted a variety of accommodations in the workplace from the time of his initial injury and successfully returned to work after his first workers'compensation leave. Moreover, his demonstration that he could perform the job with such accommodations, coupled with the operation of M.G.L., c. 152, sec. 75B(1), also results in the conclusion that Henry meets the second element of the prim facie case.[8]

Therefore, the only remaining issue to determine is whether Complainant's employment was terminated in January of 2002 on account of his disability after his amputation surgery and recuperation period. Complainant's employment with Respondent was effectively terminated on January 11, 2002, the day he was scheduled to return to work following recuperation from the surgical amputation of his finger. Complainant testified he hand-delivered Dr. Leslie's medical

[8] Chapter 152, § 75B(1) provides: "Any 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."

release to Respondent indicating that he could return to work with no restrictions. Kaplan testified to having received the release from Complainant and acknowledged that he was cleared to return to work with out restrictions. Complainant testified that he was no longer impeded by the pain or fused position of his finger and was no longer seeking any reasonable accommodations in the workplace.

In some cases, such as this one, one question will remain: whether Complainant has satisfied an additional element of a prima facie case—whether the position that he held remained open and the employer sought to fill it. *See Dart v. Browning-Ferris Industries, Inc.*, 427 Mass. 1, (1998) (setting out elements of prima facie case based on handicap discrimination). Respondent has claimed that Complainant was not permitted to return because of lack of work and that he was laid off rather than terminated. In a reduction in force situation, the Complainant is not replaced and presumably the employer would not "seek to fill the position, for the very purpose of a workforce reorganization is generally to reduce the number of employee." *Sullivan v. Liberty Mutual Insurance Company*, 444 Mass. 34, 41 (2004); citing *Lewis v. Boston*, 321 F. 3d 207, 214 n. 6 (1st Cir. 2003) (in typical reduction of force case this additional element is "unworkable because the plaintiff's position no longer exists"). Since in this case, there is no evidence that anyone other than Complainant was laid off, it is not the typical reduction-in-force scenario. Notwithstanding, even where there is a lay-off of one, Complainant may satisfy the fourth element of the prima facie case by producing some evidence that his layoff occurred under circumstances that would allow a reasonable inference of unlawful discrimination. *Sullivan, supra.* at 44-45. I conclude that Complainant has met that burden and established a prima facie case.

Once Complainant has established a prima facie case of discrimination based on his disability, the burden shifts to Respondent to provide a legitimate, non-discriminatory reason for refusing to return Complainant to work on January 11, 2002. Kaplan testified that, on the day Complainant returned to work after recovering from his amputation surgery, he informed Complainant that he had a full crew and only enough work for those employees currently working. Complainant does not dispute that he was told there was no work for him, but believed he was being terminated. Kaplan also testified that his business experiences a post-holiday slow down each year between New Years Day and Easter, and that Respondent had sufficient warehouse workers in December during the busy holiday season and therefore had no need for another employee in the warehouse once business slowed. Other than Kaplan's self-serving testimony, there was no evidence at Hearing regarding an economic slowdown or other lay-offs that had occurred during this time (indeed, as noted above, Exhibits C-5 and C-6 indicate an *increase* in revenue for the Respondent). Moreover, Respondent failed to notify Complainant of this alleged downturn or that it would not have work available for him during any of their discussions leading up to January 11, 2002.

Furthermore, the record is inconclusive as to whether Complainant's position remained open and Respondent actively sought to fill it at the time Respondent laid him off. Only after receiving a charge of an unfair labor practice from Complainant's union did Respondent notify Complainant, by letter dated January 15, 2002, that he had not been fired, but laid off instead because of lack of work. In that letter, Respondent advised Complainant to check in weekly as to whether work might be available. Kaplan testified that there may have been work available in the weeks or months following Complainant's lay-off (and that someone else may have been hired), and I conclude that it was Respondents obligation to notify Complainant that work was

available and that he was being re-called. The fact that Respondent made no effort to do so, leads me to draw the inference that Complainant was, in fact, terminated rather than laid-off and that the real reason was his disability. I conclude that Complainant was justified in not contacting Respondent again to inquire about the availability of work because, as he credibly testified, he truly believed he had been terminated.

Respondent's refusal to return Complainant to work subsequent to his second surgery and second workers' compensation leave is highly suspect. Complainant had heard rumors throughout his leaves that Respondent wanted to fire him because he had filed for workers' compensation and Kaplan admitted that he had expressed concerns about his insurance rates rising as a result. These issues are directly related to Complainant's disability. Kaplan admitted initially instructing Complainant to use his employer-provided private health insurance for treatment of his injury and there is evidence he sought to avoid filing a workers' compensation claim on Complainant's behalf. He did not file an Employer's First Report of Injury with the Department of Industrial Accidents until August of 2001, after Complainant was out of work for five consecutive days, months after the original injury. He reasoned that it was too early to know the extent of Complainant's injury, and admitted that filing too many workers' compensation claims would cause Respondent's rates to increase. Complainant was the only person purportedly laid off during that time period. Given this history, it is reasonable to conclude that Complainant's work-related disability and his filing for workers' compensation were significant factors in Kaplan's decision not to allow Complainant to return to work in January of 2002. Complainant has produced sufficient evidence that his lay-off occurred under circumstances that would raise a reasonable inference of discrimination.

Complainant's termination in September of 2003 some five months after he was ordered re-instated to work at Respondent by a court order is not before me and was not addressed in the parties' post-hearing briefs.

C. Retaliation

Massachusetts General Laws c. 151B, § 4(4) prohibits retaliation by any employer against a person because he has opposed practices forbidden under c.151B or has filed a complaint with the MCAD, has assisted in the filing of such a complaint, or has engaged in any other protected activity. The statute makes it unlawful "for any person, [or] employer to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." *See Kelley v. Plymouth County Sheriff's Department,* 22 MDLR 208, 215 (2000) citing *Bain v. City of Springfield*, 424 Mass. 758, 765 (1997).

To prove a claim of retaliation, Complainant must first establish a prima facie case that: (1) he engaged in a protected activity; (2) Respondent knew of the activity; (3) Complainant suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse action. *See MacCormack v. Boston Edison Co*., 423 Mass. 652, 662-6 (1996); *Mole v. University of Massachusetts*, 58 Mass. App. Ct. 29, 41 (2003); *Kelley, supra*.

Protected activity refers to opposing discriminatory practices forbidden under G.L. c. 151B by filing of a formal claim of discrimination, complaining internally about discrimination, or testifying or otherwise assisting in a proceeding under Section 5. *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000) citing *Bain v. City of Springfield*, 424 Mass. 758, 765 (1997). Protected activity also includes various forms of pre-charge and non-charge

conduct such as informal voicing of complaints regarding discrimination or verbally opposing an unlawful employment practice or action under G. L. c. 151B. *Madera v. Naratoone Security Corporation*, 24 MDLR 285, 294 (2002). The key is that the conduct being opposed or complained of must be forbidden by G.L. c. 151B.

Filing for workers' compensation benefits is not, per se, a protected activity within the meaning of G.L. c. 151B, § 4(4). Chapter 152, § 75B protects employees from retaliation for having filed a claim worker's compensation, and not for having opposed practices forbidden by Chapter 151B. The act that is protected is filing a claim for benefits rather than opposing discrimination. As stated above, Chapter 152, section 75B(2) of the workers' compensation law was intended by the legislature as a separate statutory scheme enacted to protect the rights of workers who have filed claims for benefits, and who have required time off from work for related injury, and to ensure their return to work when they are able with compensation for any lost wages resulting from the retaliation. The legislature intended that this statute provide a remedy for employees retaliated against for exercising their rights under the workers' compensation law. Complainant testified that he heard numerous rumors from co-workers that Respondent intended to fire him because he filed for workers' compensation benefits. The fact the he filed a claim in Superior Court pursuant to G.L. c. 152, § 75B, simultaneous with his filing a discrimination complaint at the Commission, demonstrates that he understood that the two statutes governed different rights and remedies. Because Complainant did not engage in protected activity as contemplated by G.L. c. 151B by filing a workers' compensation claim, I find that his claim for retaliation must be dismissed.

IV. REMEDY

Lost Wages

Complainant is entitled to be compensated for any lost wages he incurred from the date of his discriminatory termination. In March of 2003, Complainant was awarded $67, 500 by a jury verdict as compensation for lost wages. In April of 2003, Complainant was re-instated to his position at Respondent. He was terminated from Respondent in September of 2003, arguably for legitimate reasons unrelated to his disability. I conclude that he was fully compensated for lost wages by the award in his Superior Court case.

Emotional Distress

Complainant seeks damages for emotional distress for his unlawful termination from Respondent in 2002. The Commission is authorized to award damages for emotional distress. G.L. c. 151B, § 5. Such awards must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character, and severity of the harm; the duration of the suffering; and any steps taken to mitigate the harm. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). Complainant testified that he felt "angry," "ambushed," and "humiliated" by Respondent when he sought to return to work on January 11, 2002, and was told there was no work for him. He said he was so angry and upset that he had to resist the urge to physically assault Kaplan and had to leave immediately in order to control his emotions. He clearly was reacting to the cruel and humiliating manner in which Respondent set him up, leading him to believe all along that he would be welcomed back to work. He was very upset that Kaplan had been lying to him the whole time he was recuperating from his surgery. Complainant was further humiliated by his co-worker's disgusting and demeaning antics later that morning, mocking him for being fired, while Kaplan stood by laughing. Complainant testified that prior to January of 2002, he always

worked in people-oriented jobs in daily contact with others, but since then he has been consistently unable to work with other people at his side and prefers to work alone and has found some "peace" driving a truck. He sought the assistance of vocational retraining and a social worker after the events of January 2002 to assist him with coping with his depression and other emotions resulting from the discrimination and to help him be able to return to work. He stated at the hearing that six years later he is still angry and has not gotten over the manner in which he was treated. I conclude that Complainant was embarrassed and humiliated by Respondent's discriminatory acts and that he suffered significant emotional distress as a direct result of the unlawful acts. He is entitled to damages for emotional distress in the amount of $50,000.

V. ORDER

Pursuant to above Findings of Fact and Conclusions of law, Respondent is hereby ordered to:

(1) Cease and desist from any future discrimination against its employees based on disability;

(2) Pay to the Complainant the sum of $50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Conduct a training session regarding handicap discrimination, harassment related to disability, and the provision of reasonable accommodation, within 120 days, for all of its managers, supervisors, and employees at its warehouse operation. Respondent shall utilize a trainer approved by the Commission or a graduate of the Commission's "Train

the Trainer" course. Respondent shall submit a draft training agenda to the Commission at least one month prior to the training date and note the location of the training. The Commission retains the right for a designated representative to attend and observe the training session. The Respondent shall notify the Commission of the names and job-titles of those who attend any training session. The training shall be repeated at least one time within one year of the first session for any and all employees who did not attend the initial training or who were hired thereafter. Respondent shall conduct this training annually for the next five years.

This decision represents the final Order of the Hearing Officer. Any party aggrieved by this decision may file an appeal to the Full Commission by filing a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this decision and a Petition for Review within thirty (30) days of receipt of this decision.

So Ordered this 19th day of April, 2012.

Martin S. Ebel
Hearing Officer