

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. & GARY COOPER,  
Complainants

V.

DOCKET NO. 11-BEM-01635

RAYTHEON COMPANY,  
Respondent

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Appearances:

Joseph L. Sulman, Esq. and David I Brody, Esq. for Gary Cooper  
James F. Kavanaugh, Jr., Esq. and Michael J. Rossi, Esq. for Raytheon Company

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 22, 2011, Complainant, Gary J. Cooper, filed a complaint with this Commission charging Respondent, Raytheon Company, with discrimination on the basis of disability for failing to provide a reasonable accommodation for his traumatic brain injury, for not engaging in an interactive process to determine a proper accommodation, for subjecting him to disparate treatment on the basis of his disability and for removing him from his position as a Technical Support Engineer, in violation of M.G.L. c. 151B sec. 4(16).

The investigating commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on May 4-8, 18 & 19, 2015. After careful consideration of the entire record in this matter, and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

## II. FINDINGS OF FACT

1. Respondent Raytheon Company is an industrial corporation with headquarters located in Waltham, Massachusetts. Respondent manufactures weapons and military and commercial electronics and is a major defense contractor.

2. Complainant Gary Cooper resides in New Hampshire. Complainant graduated from Salem High School in 1977 and completed a semester of electrical engineering courses at New Hampshire Technical Institute. He was hired by Respondent in January 1978, spent four months as a cable maker in Respondent's Lowell facility, and then transferred to the position of a test technician, a union position he held for 23 years until 2000. T. 501-503.

3. As a test technician, Complainant worked on a variety of test stations testing missile components. During this time, some test stations became computerized and others remained manual. T. 505-8.

4. Complainant's sister Brenda Godin has worked for Respondent since 1982.<sup>1</sup> Their late father, a 30-year employee of Respondent, was a manager in the test engineering department. T. 114, 694. Their brother, Godin's twin, had also worked in test engineering for Respondent. T. 51-552.

5. In July 2000, Complainant suffered a traumatic brain injury when he fell from a ladder or scaffolding while performing repairs at Godin's house. T. 696; Jt. Ex. 65. He has no memory of the accident. T. 509. After a period of hospitalization, Complainant underwent out-patient treatment including speech therapy. T. 510.

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<sup>1</sup> Godin worked her way up from a union job and acquired undergraduate and graduate degrees with the financial assistance of Respondent. She currently works as a Business Interface Lead. T. 31-32.

6. Complainant took a medical leave of absence from work until January 1, 2001 in order to recover from the injury which left him with significant cognitive deficits. Complainant had to relearn basic activities such as eating, drinking, speaking and retrieving and retaining memory. T. 42-44; Jt. Ex. 114. Complainant was able to regain most of these functions but suffered permanent damage to his long-term and short-term memory and partial hearing loss in one ear. T. 43-45; 518-519; Jt. Exs. 114; 133; 135. Complainant has difficulty concentrating in noisy environments and he becomes anxious in large groups.<sup>2</sup> T. 513-514, 520-21.

7. Complainant relies on certain triggers to jog his memory. At home he puts notes on the counter and on dry erase boards. He has learned to retain information by repetition. T. 515. In order to compensate for his deficits, Complainant created memory aids, such as calendars and notes in his work space. T. 516. At work he carried a clipboard which he referred to when needing to recall information. He also refreshed his memory by re-reading emails. T. 520. Routine is very important to Complainant's ability to function and recall information.

8. When Complainant returned to work in January 2001, following his injury, his physician provided a letter to Raytheon stating that he could work full-time without restriction. Ex. R-3. Upon his return, he was laid off from his testing job, which he had done for 23 years, resulting from a union matter unrelated to his injury. He was given an assembly job, which he considered a "down-grade." He successfully performed that job for 90 days and was then offered the position of Technical Support Engineer I (A01) in Respondent's Test Engineering Department, located in Andover, MA. T. 504; Jt. Ex. 33; Stipulated Facts, at 4. He was assigned to the second shift and his job duties as a technical support engineer included overseeing the

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<sup>2</sup> At the public hearing, Complainant spoke slowly and took time responding to questions, but understood all that was said to him and demonstrated knowledge of his job functions.

testing of components for military grade equipment that Respondent produced and sold to clients, primarily the United States government. T. 699-700

9. There are 437 test stations on Respondent's production floor. Twenty percent of the stations are older and print out copies of pass/fail records. The remaining eighty percent of the stations are newer and gather parametric test data which provides the tester with more detailed information beyond whether the test passed or failed. The data suggests the location of the part that caused the failure. T. 997-9.

10. Complainant's job was to troubleshoot and interpret test results, perform some statistical analysis, identify trends and engage in problem solving. Complainant was also responsible for drafting new test procedures and improving existing test procedures. T. 266. Complainant testified that he performed trouble shooting and understood "first pass yields."<sup>3</sup> T. 535. Complainant knew how to create spreadsheets on Excel but was unable to perform certain functions of Excel, such as creating "Perato" data which is displayed on a graph. T. 405-6.

11. Similar testing was performed on all shifts; however, fewer people worked the second shift and Complainant was usually the only engineer in his unit working his particular station along with the union test technicians who performed the actual tests. T. 436-437. As there was no operations supervisor to oversee the union technicians on the second shift, Complainant had the additional duty of supervising the test technicians. T. 538.

12. The first and second shifts overlapped in time. Complainant began his shift by attending a meeting with engineers on the first shift, who passed on information about the work required to be performed on the second shift. T. 265.

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<sup>3</sup> "First pass yield" refers to the percentage of time a part fails the first time it is tested. It is important to know the first pass yield in order to understand the "root cause" of the failure, which could be a problem with the product, the test design, the test procedure or the assembly. A test engineer can determine the root cause of the failure by using "parametric" data, which instead of showing that the part passed or failed, showed where the part failed and how to analyze the data. T. 1000-1001.

13. On the second shift, Complainant had space to himself, it was quiet and he could work without interruption. T. 546. Complainant created a highly organized workspace that included a large desk calendar, a computerized reminder system, additional workspace lighting and extra office filing systems. T. 576-7. Complainant never requested accommodations from Respondent at the time because he did not need them. T. 702.

14. Complainant generally tested two types of hardware; new production, which referred to parts that had come directly from manufacturing and were being tested for the first time and “field returns,” which were testing components or parts that had already been sent to customers and were returned due to a problem. T. 531. Testing field returns differed from new production hardware in that field returns were expected to fail. In the case of field returns, Complainant would start troubleshooting by checking the status report from the field to understand what he should and should not do to test the part. T. 532-533.

15. In addition to Technical Support Engineers such as Complainant who did not have engineering degrees, Respondent employed Test Engineers with engineering degrees.<sup>4</sup>

16. All Raytheon employees received a yearly performance development summary (“PDS”) wherein their performance was rated by their supervisor with confidential input from co-workers called PENT feedback. The performance categories were “far exceeds expectations,” “exceeds expectations,” “meets expectations,” and “improvement required.”<sup>5</sup> In addition, each employee received a mid-year review. T. 1021.

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<sup>4</sup> All degreed engineer positions at Raytheon are designated E01, E02, et seq. All other Raytheon employees are designated A01, A02, et seq.

<sup>5</sup> The terms “improvement required” and “needs improvement” are used interchangeably.

17. From 2002 to 2003, Complainant was supervised by Jose Loureiro, a “test engineering lead.” At the time Complainant was assigned to the manufacturing department<sup>6</sup> which made computer products or integrated data processors for radars for F-15 and F-18 fighter planes. T. 209-310. He was always assigned to the same test station. T. 332.

18. Soon after Loureiro became Complainant’s supervisor, Complainant told him that he had suffered a traumatic brain injury and sent him a power point presentation that he had created regarding the impact of traumatic brain injury on cognitive functioning. Loureiro testified that he never discussed the matter with anyone else at Respondent and he never observed that Complainant had memory issues or difficulty communicating with others or multi-tasking. T. 294-295, 311. I credit his testimony.

19. Loureiro gave Complainant an overall rating of “Exceeds Expectations” on his PDS for 2002 and 2003. He noted that Complainant’s support of the test station was “exceptional,” that he had good technical skills and knowledge, was organized and detail oriented and was able to develop simple solutions to complex problems. He also rated Complainant as “highly promotable.” Jt. Exs. 13; 14.

20. In 2003, Complainant was promoted to the position of A02-Technical Support Engineer II, which resulted in an increase in his responsibilities. T. 259-260; 430-431. Jt. Exs. 13, 14. He became responsible for determining the cause of test failures and in some cases developing improvements to the testability of hardware. T. 281. In 2004, Loureiro rated Complainant’s performance as “meets requirements.” Jt. Ex. 16.

21. Loureiro testified that Complainant performed well at all the tasks he was asked to do and was able to understand the cause of test failures, was good at problem solving and

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<sup>6</sup> There was evidence that Respondent periodically reorganized its departments and lines of reporting; however Complainant remained a technical support engineer from 2000-2010.

working with union test technicians. T. 268. Loureiro stated that Complainant was actually performing the work of a union test technician who performed the actual testing and analysis to determine problems with the equipment. T. 215. In this position, Complainant was never required to use computer aided design equipment, investigate design factors or make recommendations to design engineers. T. 216, 321, 334.

22. From 2005 to 2010, Complainant had several direct supervisors; R.H., Michael O'Rourke, Guy Larcom and E. S. From 2005 through 2008, Complainant's supervisors rated him as "meets expectations" and described him as possessing strong technical capabilities. Jt. Exs. 18; 20; 22; 25.

23. Test Engineer Brian Hockney worked in test engineering with Complainant from 2005 to 2011. T. 382-383, 385. Hockney worked the day shift, but on those occasions when he worked late he interacted with Complainant. He got along well with Complainant and considered him a peer. Hockney provided PENT feedback for Complainant's PDSs for several years. Jt. Ex. 32.

24. Hockney testified credibly that Complainant gravitated toward the tasks he could do well and avoided tasks related to test yields and projects designed to improve testing. T. 893-4,897-905. Hockney recognized Complainant's limitations and the type of assistance he could expect from Complainant. T. 905-907.

25. Michael O'Rourke<sup>7</sup> was Complainant's section manager in test engineering from 2006 to 2008. In that position he supervised approximately 16 test engineers and technical support engineers. Complainant did not report directly to O'Rourke as there was a supervisory level between them. O'Rourke understood Hockney to be Complainant's direct supervisor, or "lead." T. 344-345.

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<sup>7</sup> O'Rourke, who is now retired, worked for Respondent for 40 years.

26. O'Rourke testified credibly that he made a distinction between test engineers and technical support engineers, such as Complainant. He stated that test engineers were expected to have more technical knowledge than technical support engineers. T. 348-349.

27. O'Rourke testified credibly that Complainant's duties were to oversee and support the testing of products. He described Complainant as ambitious, attentive to detail and always eager to do a good job. He stated that Complainant was technically proficient, able to problem solve routine issues and provide technical support to the union test operators. T. 347-349.

28. O'Rourke completed Complainant's PDS for 2006 and 2007. He wrote that Complainant had excellent technical skills and knowledge of the test equipment, excellent problem solving skills and good technical writing ability for writing test procedures. T. 360-361. Complainant's in-depth knowledge in testing and his leadership skills facilitated the completion of a program within the time deadline. O'Rourke also noted that Complainant provided test validation, root cause and corrective action as required. T. 349-50; 356-359; 387-406; 419-421. Jt. Exs. 20; 22.

29. O'Rourke testified that Complainant did not perform detailed trouble shooting or possess the technical knowledge expected of test engineers. O'Rourke testified that he evaluated Complainant using a job classification guide for a "technical support engineer" position that was less technically complex than a test engineer and was more akin to the union test technician job. T. 386-7. I credit his testimony, which is consistent with Respondent's classification matrix describing an A02's functions as less complex than an E02's. Jt. Ex. 12.

30. Brenda Godin knew O'Rourke from her many years of employment at Respondent. O'Rourke testified that in 2006 or 2007, Godin came to him and described in detail Complainant's traumatic brain injury and its impact on his ability to perform certain daily tasks.

T. 61-4; 350-351. As a result of the discussion with Godin, O'Rourke consulted a human resources manager about Complainant's condition. O'Rourke testified that the human resources manager looked into the matter and told O'Rourke that Respondent's medical department had "nothing on file" regarding Complainant's disability.<sup>8</sup> T. 353.

31. After meeting with Godin, O'Rourke informed his own supervisor, who was then test engineering department manager, about Complainant's disability. The manager asked O'Rourke if he had provided Complainant with any specific accommodation or special treatment and O'Rourke said that he had not. O'Rourke told the manager that other than "asking a lot of questions," Complainant had "no issues." After meeting with the manager, O'Rourke never spoke to anyone else at Respondent about Complainant's disability. T. 353-355.

32. Barbara Moreau has worked for Respondent since 2000. In January 2008, Moreau became department manager for test engineering. T. 1005. At the time, the test engineering department was divided into six sections and employed approximately 150 test engineers as well as 30 electrical engineers on loan from other departments. T. 990-991.

33. Moreau testified that Respondent's guidelines required a certain distribution of the four performance ratings among employees in each department. The numbers changed yearly and she did not recall what the requirements were in 2009. Regardless of how a supervisor originally ranked each employee, Moreau had to work with the supervisors to re-evaluate and manipulate the ratings to ensure that the employees' performance conformed to the bell curve, i.e., to ensure a certain percentage of employees received ratings in each category. T. 1021.

34. Moreau testified that in her first week as head of test engineering, her manager told her that her predecessor had never rated anyone as "needs improvement," and it was her job to

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<sup>8</sup> Complainant also spoke to the same human resources manager at some point and showed him the PowerPoint presentation. T. 568-9. He did not request any accommodations.

ensure that her section managers provided her with employee ratings based on a curve for the performance year 2007. Moreau began to assemble all of the information from her sections managers but stated the process of making all the files “compliant” with the bell curve did not begin in earnest until October or November 2008. T. 1026-1027.

35. In 2008 a piece of hardware called the sub-interface assembly (“SIA”), which is a component part of a radar system, was damaged during a vibration test that applied excessive vibration. The SIAs were fixed and retested, however there were continued problems with the part. Respondent conducted an investigation into the incident and discovered that the test procedure was vague and should have been corrected. The damage was not obvious at the time of the vibration test, but SIAs were failing at a higher level test in assembly and out in the field. T. 561-3; T. 1014-15. 36. Ultimately, a test engineer or technical support engineer determined how to perform the test correctly and instructed the union workers to perform the test correctly and the problem was corrected. T. 365-8. Moreau testified that the customer was upset about the error which caused the part to fail in the field and the repairs were costly to Respondent. T. 751.

36. The matter was investigated and on July 9, 2008, O’Rourke verbally reprimanded Complainant, who oversaw the SIA testing on second shift, for not immediately stopping the testing process and investigating why it couldn’t be run as written. Complainant received the lowest level of discipline from O’Rourke because it was his first offense. Complainant’s mistake was not due to lack of technical knowledge. Ex. R-8; T. 370. The SIA incident is not reflected in Complainant’s PDS for 2008, where he rated “meets,” except by stating that Complainant “needed to develop the courage to stop a process if there was a potential issue.” Moreover there was evidence that a test technician tried to stop the test and told his union representative but still

it was not stopped suggesting that numerous people were aware of the faulty test and did not immediately stop it. According to Complainant, the faulty test was written by engineers in the environmental test lab, and was rewritten by those engineers, who were responsible for changes in the software profile and procedures. Complainant stated that he was not responsible for re-writing the procedures, but he was unjustly blamed for failing to do so. T. 734-743. There was no evidence as to whether the test writer was disciplined for creating a faulty test, nor is there evidence as to problems with SIAs being tested on first shift, which was also testing SIAs.

37. After learning about the faulty test, Moreau and O'Rourke met with Complainant, who identified additional faulty test procedures that he had not corrected for some time. Complainant followed up and corrected the faulty test procedures. T.1016-1017; Ex. R-7.

38. In November 2008, Guy Larcom replaced O'Rourke as section manager and remained in that position for approximately nine months. T. 432. During this time he supervised 18 employees, including Complainant and two other technical support engineers. T. 434, 439. Larcom did not know that Complainant suffered from a brain injury. T. 460.

39. Larcom testified that on a day-to-day basis, Complainant was responsible for instructing the union test technicians, prioritizing tests to be performed and ensuring the tests were performed correctly. He stated that Complainant was not asked to perform the full scope of duties performed by other engineers, who performed parametric data analysis, statistical process control and participated in design reviews for new products. T. 480-81.

40. In 2009, Larcom was responsible for writing a PDS for 2008 for his subordinates. T. 44. Each employee ranked himself, and Larcom received PENT feedback from each employee's colleagues. Larcom then ranked his employees in each job grade. Since he had been in the

position for such a short time, Larcom relied heavily on the PENT feedback in writing the PDSs for his subordinates. T. 445.

41. In Complainant's PDS for 2008, Larcom wrote that Complainant's key strengths were technical capabilities on many variations of test equipment, good technical writing ability, test procedures and excellent problem solving skills. Jt. Ex. 25; T. 449-450. Larcom noted that Complainant struggled to communicate with others. T. 456-7. Larcom placed Complainant at the lower end of "meets" rating and sent his rankings to Moreau. T. 491. Larcom testified that he did not believe that Complainant's performance merited a "needs improvement" rating, nor did he believe Complainant needed to be placed on a PIP. T. 450.

42. In July 2009, Larcom transferred from the Andover facility to a position in Seattle. T. 476-7.

43. In October or November, 2009, D.S. became Complainant's interim section leader. T. 573. Complainant, who knew D.S. from Respondent's Lowell facility, showed him around the areas he would be overseeing. During their conversation, Complainant told D.S. about his TBI and offered him his PowerPoint presentation. T. 575. D.S. asked Complainant whether his TBI affected his performance and suggested obtaining information from Respondent's medical department.<sup>9</sup> T. 577-579; Jt. Ex. 65.

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<sup>9</sup> Around November 2009, Complainant's office along with others, were temporarily moved from the manufacturing area as result of reconstruction at the Andover facility. Complainant found the move difficult because his possessions had been placed in boxes and were not in order and he did not have the extra lighting he required. T. 592. While Complainant previously had his own cubicle, he now shared a larger cube with one other person. He complained about his situation to Moreau, who stated that he, like everyone else, would have to put up with the temporary move. Moreau consulted an ergonomic expert who determined that Complainant did not need more light. Complainant bought his own lamp to work and was able to procure some furniture. T. 717-719.

44. D.S. told Moreau about Complainant's disability. Moreau and an HR specialist then instructed Complainant to go to Respondent's medical department in order to determine whether he required any accommodations. T. 1041-1043.<sup>10</sup>

45. Complainant tried unsuccessfully to arrange a meeting with a nurse in Respondent's medical unit and D.S. T. 581-582. Jt. Ex. 66. Respondent's medical unit logs for November 3, 2009 indicate that Complainant called with a chief complaint of "workplace accommodations," and noted that he had an appointment with a nurse the following day. Jt. Ex. 66.

46. Complainant testified that he met with a nurse in Respondent's medical department on November 4, 2009 to whom he expressed concern about D.S.'s reason for wanting information about his TBI and the possible effect on his evaluation. The nurse told Complainant that the medical department, a contractor to Raytheon, did not become involved with such matters. The nurse introduced Complainant to Dr. Miller<sup>11</sup> with whom he spoke briefly about his TBI. T. 585-6. Miller had access to all employees' medical data. Ex. C-11

47. On or about November 12, 2009, D.S., who did not testify at the public hearing, went to the medical department to ascertain what, if any, obligation he had to accommodate Complainant's disability. Jt. Ex. 71. The following day an HR specialist emailed D.S. that Complainant and his prior manager had set up special reminder calendars, notes and clocks for Complainant and that Complainant was "medically cleared." He advised D.S. that unless he noticed anything out of the ordinary Complainant "should not be treated differently from any other employee." Jt. Ex. 71; T. 1042-3.

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<sup>10</sup> Global Health Resources is Respondent's medical department

<sup>11</sup> Dr. Miller testified via deposition that he was the site physician at Respondent. He testified that if an employee came to him and reported having a disability, he would evaluate and could examine the employee and would seek permission to speak with the employee's physicians. Miller did not recall meeting with Complainant. Ex. C-11.

48. In March 2010, Kristin Buckley became the HR generalist for the Test Engineering Department. Shortly afterwards, D.S. told Buckley that Complainant had fallen off a roof and had a disability. T. 144; 149-150.

49. Buckley and Moreau testified that the medical office could do nothing for Complainant without a signed release from Complainant. T. 156, 167, 1186. Buckley testified that she asked Complainant on numerous occasions to sign a release to allow the medical office to speak with his personal physician about his disability, but Complainant did not provide such a release. T. 214, 217. Complainant denied that Buckley ever asked him to sign a medical release form.

50. Moreau testified that Complainant was given an A classification and the title of “technical support engineer” and not “test engineer” solely because he did not have an engineering degree. She stated that the “As” and the “Es” in test engineering were performing the same tasks. T. 1003-4.

51. Moreau testified that part of the test engineer job was to use statistics and interpret data in order to make improvements in the testing process, work with fellow engineers in test production and design to develop test stations to reduce costs. She stated that although Complainant acknowledged such tasks as goals in his yearly PDS, he told his managers that those tasks were not part of his job and that he only did the portions of the job with which he felt comfortable, such as supporting union workers who needed help with a test problem or test failure. Moreau stated that Complainant was actually performing some administrative duties of a group lead union position, some duties of an operations lead, as well as some engineering functions such as updating test procedures and floor support. T. 1053.

52. While Moreau may have determined that the test engineers and the technical support engineers should perform the same duties, the practice in the test engineering department differed from her conception of the roles. I find that in practice Complainant had consistently performed fewer, simpler technical duties that he performed well and his supervisors O'Rourke and Loureiro did not consider him a test engineer, did not require him to perform the duties of test engineer and evaluated his performance based on the duties he actually performed.

53. I also find that Moreau's testimony was inconsistent with Respondent's job matrix, which distinguished As from Es in terms of their duties; As' job functions were less complex. The matrix also described each level of A0 as having increasing responsibility, with an A03 having more responsibility than Complainant, who was an A02. Jt. Ex. 62.

#### PDS for 2009

54. Moreau testified that in 2009 employees were ranked on a bell curve that required that a certain percentage of employees' ratings fall in each category. Moreau asked each section manager to make a recommended rating for each employee. The ratings of the employees of each section were then merged and manipulated to comport with the bell curve. T. 1021-1022.

55. D.S. originally gave Complainant a "meets" rating in a preliminary PDS for the 2009 performance year. T. 1046; Jt. Ex. 27. After meeting with the section managers, D.S. and Moreau changed Complainant's rating to "needs improvement" before it was finalized. T. 1047. Complainant reviewed and commented on the final PDS on June 14, 2010. The final PDS was issued on June 16, 2010. Jt. Ex. 28. Complainant was ranked against the two other A02s in test engineering. T. 1024. Complainant received the lowest ranking.

56. In rating Complainant's performance for the 2009 PDS, D.S. relied on information from the PENT Feedback of a co-worker who gave a low numerical rating to Complainant and

wrote that Complainant needed to improve his technical skills and that at times Complainant “appears to lose focus and seems to be concentrating on trivial matters... needs to shorten his conversations... and get to the point quicker...” Jt. Ex. 28.

57. D.S. also used language in the PDS that was similar to the PENT feedback from Brian Hockney. D.S.’s comments purportedly summarized the comments from Hockney and were as follows: “Gary requires more than usual guidance to close the loop on engineering tasks for his current level and struggles with more technical issues.” Jt. Ex. 28. However, in Hockney’s actual PENT feedback, he wrote that Complainant “...requires guidance to close the loop on engineering tasks, which is in line with his current level.” Jt. Ex. 32. Hockney testified that he was unsure what he meant by this language, although at his deposition he stated that “in line with his current level” referred to Complainant’s classification as an A02. T. 933-936. The summary assessments of other co-workers who gave Complainant a higher qualitative rating were largely omitted from his 2009 PDS. Jt. Ex. 32.

58. Moreau wrote in Complainant’s 2009 PDS that Complainant did not meet the core competencies of his level. T. 1050. In comparing him to the two other A02s, Moreau wrote, “He could not compete with his peer group.” T. 1051. Moreau wrote that Complainant did not have a bachelor’s degree and did not have the relevant experience to make sound judgment decisions or good decisions on the production floor regarding test failures, and did not have the skills to troubleshoot basic problems. T. 1051-1052. Jt. Ex. 28.

59. On June 14, 2010, D.S. informed Moreau that Complainant raised the issue of his disability with Respondent’s Ethics office.<sup>12</sup> T. 160-161. Moreau emailed her bosses Paul Ferraro and Michael Houston and HR Specialist Kristin Buckley and advised them that, “Medical had provided an email stating that Complainant’s disability does not give him any

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<sup>12</sup> A department within Respondent’s office of general counsel where employees could report ethics concerns.

special consideration or impact his ability to do his job. Gary is stating that the Ethics office told him that we should be taking his disability into consideration.” Moreau testified that she did not ask Complainant about his visit to Ethics because such visits and employee reports were considered confidential and the identity of employees who complained would remain anonymous. Jt. Ex. 75; T. 1196-1199.

60. Moreau testified that she never asked Complainant directly about his disability because D.S. and Godin told her he did not want to discuss it with her. T. 1209-1212.

61. As a result of Complainant’s “needs improvement” rating for 2009, Moreau placed Complainant on a Performance Improvement Plan (PIP) to commence on or about June 25, 2010. The PIP is a written document that identifies key actions the employee needs to take to improve his performance. Jt. Ex. 49.

62. For the duration of a PIP, the employee and his supervisor meet weekly to review the steps being taken, the expectations, and the final results. T. 599-600, 1054. Jt. Ex. 49; T. 1055. Moreau acknowledged that a “needs improvement” rating did not require Respondent to place an employee on a PIP; however, she felt it would not be fair to Complainant not to provide him with the structure and assistance offered by the PIP. D.S. and Kristen Buckley informed Complainant that he was going to be placed on a PIP. T. 602.

63. In approximately June 2010, E.S. took over from D.S. as Complainant’s direct supervisor. Jt. Ex. 68; T.164-165. Moreau testified that while an employee’s direct supervisor typically oversees a PIP, Ms. Moreau oversaw Complainant’s PIP because E.S. had a family medical issue that kept him away from the office. T. 1058. I do not credit Moreau’s testimony in this regard. It was inconsistent with the testimony of Buckley, who stated that Moreau wanted to oversee Complainant’s PIP because she knew it was going to be difficult. This testimony is

also inconsistent with Moreau's own statement that she would supervise Complainant's PIP because E.S. was new to the test engineering department. Jt. Ex. 50; Jt. Ex. 77.

64. Moreau testified that the purpose of Complainant's PIP was to insure that he could perform the duties and responsibilities of the Test Engineering Department. Jt. Ex. 49. The PIP stated that the "fundamental issue" was that Complainant did not agree with the job description and roles and responsibilities for a test engineer. Id. He was expected to meet or exceed the test engineering specific goals for his salary grade, which were defined in the Introduction Evaluation of the PIP. Id. 74. The goals of Complainant's PIP were for Complainant to meet or exceed the test engineering specific goals; for example, for productivity, the requirements were: "first pass yield resolution, utilization of [various Respondent programs], reviewing the test procedure for his test station." T. 1059-1060.

65. Complainant was transferred to the first shift for the duration of his PIP because, according to Moreau, many of the engineers and "subject matter experts" who would offer assistance to Complainant during the PIP worked during the first shift. Jt. Ex. 49; T.1064.

66. Complainant was required to move from the THAAD program, where he had been working, to the Patriot program. THAAD was an AC/DC program and Patriot was powered primarily by DC, was primarily "radio frequency" based, and dealt with insertion loss<sup>13</sup> and return loss.<sup>14</sup> Complainant had not worked with insertion loss and return loss since the 1990s. In addition, Complainant was assigned to a new test station. T. 618.

67. Moreau testified that the tasks that Complainant was expected to perform during the PIP were core test engineering functions. T. 1059, 1063. However, the PIP required

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<sup>13</sup>The loss of signal power resulting from the insertion of a device in a transmission line or optical fiber.

<sup>14</sup>The loss of power in the signal returned/reflected by a discontinuity in a transmission line or optical fiber.

Complainant to perform tasks that he had never done before: He was required to attend regular meetings with other engineers that he had never previously attended. Jt. Ex. 49. He was required to develop four-panel charts to display trends in test results. Jt. Ex. 49. He was required to deal with non-conforming items on the “red rack.”<sup>15</sup> T. 614-6. He was expected to utilize histograms and Pareto charts which were functions of Excel that he had not utilized before. T. 896- 897.

68. During the first week of his PIP, Complainant was required to show proficiency on using VBS charts for first pass yields. After Complainant expressed concern to E.S. that he could not meet the first week’s requirements, E.S. learned that some of Complainant’s peers also struggled with the VBS tool and as a result, E.S. held a VBS training for his entire group. T. 1252: Jt. Exs.77; 78.

69. Complainant testified that at a meeting, E.S. stated that test engineers were now going to be expected to track first pass yields and provide a four panel chart if the yields were below 75%, a task that was new to “just about everyone.” T. 613. Complainant testified that he had never seen a four panel chart and there was some evidence that they were not regularly used.<sup>16</sup> Complainant testified that another of his PIP assignments was to do a test improvement process (“TPM”) project, which he stated, “no one had ever heard of.” T. 616-7.

70. During the PIP, Moreau and others held weekly status meetings with Complainant wherein they discussed the goals for the prior week and the action plan for the upcoming week. T. 1063. Several of Respondent’s employees who were “experts” in different areas met with Complainant one-on-one to train him in areas such as TPM and developing Excel templates.

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<sup>15</sup> If a component failed a test on second shift, Complainant or the technicians would tag it and place it on a “red rack” for the first shift test engineers to go to the test station and analyze the parametric data.

<sup>16</sup> Hockney said he did not use four panel charts much until he became a lead in 2014.

T.1067, 1068. Moreau and E.S. also spent time responding to his questions. T. 1082; Jt. Ex. 78-82; Exs. R-4-6.

71. According to Moreau, Complainant successfully completed most tasks assigned early on in the PIP process, but began to struggle as the tasks grew more technically complex. Complainant got 100% on a statistics course and successfully trained on use of items on the “red rack.” T. 1114; 1119.

72. An engineer who had assisted Complainant with aspects of his PIP emailed Moreau on July 22, 2010 that Complainant did not know how to use Excel and would need several months to become proficient at it. T. 1086. That engineer noted in the same email that Respondent employed test engineers who do not understand basic programs such as Excel which should be mastered within the first year on the job. Jt. Ex. 83.

73. In the 5th PIP Evaluation, dated August 2, 2010, Moreau wrote that Complainant was learning the administrative tasks, “but needs to demonstrate that he can solve engineering problems.” Jt. Ex. 54.

74. By the 6th PIP Evaluation, Complainant was able to complete only five of the 11 tasks assigned to him, despite a lengthy discussion the week prior of what was expected. Moreau wrote that Complainant had not demonstrated the capacity to make technical decisions and sound judgments on his own, and failed to demonstrate adequate follow-through on engineering tasks assigned to him. Jt. Ex. 56.

75. Complainant became very anxious during the PIP and took a medical leave of absence from August 20 to September 20 because of stress. The PIP was suspended at that time. Complainant applied for short-term disability for his one-month leave. On August 27, 2010, Complainant provided a medical release to MetLife, the short-term disability provider, stating

that his medical information may be disclosed to, among others, Respondent's medical unit. Ex. C-11. Complainant returned to work part-time on September 20, 2010 and returned to full-time on November 1, 2010, when the PIP resumed. Stipulated Facts, at 11; T.176; 1121-1122.

76. On August 27, 2010, E.S. completed a form required for Complainant's application for short-term disability. On the form he listed Complainant's title as "Technical Support 2(A02)" and wrote that his "Essential Job Functions" were "Provide technical support to test technicians on the floor concerning product, test equipment and software. Analyze all test data Support development and maintenance of test procedure, software and hardware." Under the category "Mental Demands" E.S. wrote that Complainant's: "Duties are somewhat varied in nature, requiring independent judgment involving commonly encountered problems. Unusual cases or questionable matters deferred to supervisor." Jt. Ex. 118.

77. Information provided to MetLife, and available to Respondent's medical unit, in support of his leave included a letter from Complainant's psychologist, Pamela G. Devaney, Psy.D., dated September 20, 2010:

A requirement of his PIP was that Gary change from second to first shift schedule, after twenty years, for the duration of the program. The disruption this schedule change caused to his sleep pattern has further reduced his capacity to manage the stress of his work situation. It is my professional opinion that, due to Gary's cognitive rigidity, allowing him time out of work to make up his sleep deficit, reorganize his schedule and replenish his inner resources will improve his daily functioning to its premorbid levels.

Jt. Ex. 126.

78. Also in the record as provided by Respondent are two nearly identical letters from Complainant's primary care physician, Dr. Rork, one written on July 9, 2010 and another written on August 3, 2010 with a handwritten notation "medical file:"

To Whom it May Concern: Gary is a 50-year old gentleman with a history of traumatic brain injury in July of 2000. The result of his injury Gary has permanent disabilities including cognitive dysfunction, difficulty with memory issues, and emotional instability at times. His disabilities affect his mental processing, as well as his ability to concentrate. This no doubt will

affect his performance at work, as well as his everyday living. In addition, he experienced emotional changes including some anxiety and depression. He has received, and continues to receive treatment/counseling by his psychologist, as well as receiving treatment by his psychiatrist and myself for his traumatic brain injury.

If there are any further questions regarding his present condition, please do not hesitate to contact me, of course with Gary's permission only.

Jt. Ex. 116.

79. On October 1, 2010, Godin initiated a meeting with Moreau concerning Complainant. T. 1123-1124. Godin told Moreau that she felt responsible for Complainant because his injury occurred at her house. She told Moreau that Moreau made Complainant nervous and that he was too proud to tell her that he had a disability. Godin asked Moreau to speak slowly to Complainant and allow Complainant to take notes and to better document their discussions so that Complainant could refer back to written instructions. Godin asked if Moreau would consider cancelling the PIP and Moreau told her she could not discuss it with her unless Complainant was present. Godin also asked that Complainant be returned to second shift so that he would work in a quiet environment where he could perform better. Moreau explained that Complainant had been moved to first shift so that employees could assist him various areas of the PIP and could not be moved to second shift. T. 1123-1125.

80. Shortly after the meeting Godin emailed Moreau thanking her for taking the time to talk. T. 1126. Godin wrote, in part that Complainant should learn one new task at a time and then move on to a new challenge. She wrote that a reasonable accommodation would be to convert the process into quarterly goals and explained that Complainant learned better by hands-on experience rather than having things explained to him. She urged Moreau to talk to Complainant about ways to assist him. Jt. Ex. 92.

81. On October 25, 2010, Buckley and Moreau met with Dr. Miller, a nurse and a psychologist in Respondent's medical unit regarding Complainant. Moreau testified that she told

Miller that Complainant's family "is telling us he needs additional things and we're not sure we're doing the right thing. Is there anything additional?" T. 1180. The medical office was aware of Complainant's disability and according to Buckley they said they could not take any action unless Complainant had signed a consent form. T. 182-3.

82. In 2010, Respondent had no written policy regarding reasonable accommodations to employees with disabilities. On September 30, 2013, Respondent instituted a written policy entitled "Requests for Reasonable Accommodations under the A.D.A." Jt. Ex. 10.

83. Moreau asked a senior engineer in the test development group to work with Complainant with a VBS project using TPM. T. 1088-1089. Complainant was to solve the discrepancy between two test stations that were running the same tests and software but were not producing the same test data analysis, a problem the senior engineer had worked on for quite a while. He believed the discrepancy was caused by a problem with adaptors. T. 672; 677-79. The senior engineer told E.S. that Complainant did not appear to understand basic concepts required to assess the unit under test. T. 1089-1090; Ex. 82.

84. Complainant testified that the senior engineer did not provide him with much assistance, and on one occasion, refused to answer his questions because E.S. had told him not to do so. T. 670. Complainant testified that he re-ran the test using the adaptors and concluded that it was something in the software that was causing the data problems. He brought the data he collected to Moreau at the next performance review. T. 683. She never looked at the data because at that meeting she told him he had failed the PIP. T. 685-686.

85. On October 25, 2010, Complainant was notified that at his next PIP meeting on November 11, 2010, he was expected to have completed the task that was assigned to him on August 16, 2010. Jt. Ex. 59; T. 1137. He was asked to plot the data and develop a histogram, a

graphing tool similar to a bar graph, analyze the data and provide a recommended solution. Complainant was unable to successfully complete the task. T. 1060-1061.

86. At his PIP evaluation meeting on November 18, 2010, Complainant was again unsuccessful in completing the actions for the week and was still unable to understand the histogram, despite assistance from Moreau and E.S. Jt. Ex. 61; Jt. Ex. 93-99; T. 1157.

87. At the final PIP meeting, on December 2, 2010, Complainant was unsuccessful in completing the tasks assigned to him for the previous four weeks. Jt. Ex. 62. Complainant was unable to show that he could review, trend and analyze data to resolve a typical task that would be assigned to someone at his level. *Id.* According to Moreau, Complainant's inability to complete these tasks showed that he did not have the skills to perform these core job functions. Jt. Ex. 62; T. 1157-1158. On December 2, 2010, Complainant was informed by Moreau that he had failed his PIP. Jt. Ex. 62, 63; T. 1136; 1144-1145; 1160.

88. Complainant testified that he knew he was going to fail the PIP because of the large number of tasks Moreau had assigned him and the amount of time he had to complete the tasks. In addition, Moreau informed him at from the beginning of the PIP that if he failed he could be terminated, or could apply for security guard, union Test B position, or a small number of other jobs within Respondent, which indicated to him that she was preparing to terminate him from his job. T. 609-610. He found it demeaning and demoralizing that Moreau was telling him he might become a security guard. T. 609-610. I credit his testimony.

89. Complainant testified credibly that he continued to work hard on the tasks on his PIP and believed that, given enough time, he could have successfully completed all of the tasks. T. 672-3. Complainant asked Moreau to extend his PIP on several occasions but she refused to do so. T. 834-837.

90. Complainant testified credibly that the environment on first shift was noisy and chaotic and exacerbated his deficits from his TBI such as his short-term memory and difficulty concentrating. T. 635-6

91. At the time Complainant failed the PIP, there were other test engineers working on the second shift. T. 692-93.

92. Respondent paid Complainant for a period of 30 days after failing his PIP, in order to allow him to find another job at Raytheon. He applied for and was hired for a Test B union job. However, because he had left the union years earlier to take a non-union position, he was considered a "new hire" according to the collective bargaining agreement and he took a considerable cut in salary and seniority. T. 688-690. In October 2014, there were layoffs in the Test B jobs and because of Complainant's lack of seniority, he was bumped into an Assembly C job which is the lowest classification at Raytheon. T. 690-691.

93. Complainant testified that subsequent to his starting the Test B job he observed a series of layoffs of test engineers that continued to the point where the program he had worked for no longer had engineering support. T. 692-4.

94. Moreau testified that she did not consider returning Complainant to the second shift to perform only the work that he previously performed or to be assigned only administrative tasks, because he had repeatedly made errors that were costly to the business, suggesting it was too risky to the business to return him to his previous role. She stated that when she switched Complainant to the day shift at the beginning of his PIP, she called the operations lead and offered to put someone else on the second shift to perform the scope of duties Complainant had been performing, but it was no longer going to be covered by a test engineer. She stated that she got no response. T. 1162; 1220-1222.

95. E.S. placed a Senior Test Engineer (E03) on a PIP from August 30, 2010 to October 5, 2010, around the same time as Complainant. That employee, like Complainant, did not agree with the roles and responsibilities of a test engineer. That employee had been placed on a PIP for the same issue twice previously and failed the PIP. T. 1262-3; Ex. C-6; Jt. Ex. 149 Moreau testified that this employee was not similarly situated to Complainant because he had behavior issues that were not best addressed through a PIP, and could do the job, but did not want to. She added he had sound decision-making skills, never put a product at risk, and passed the PIP on this third time. T. 1265-1266.

96. Several other employees in the test engineering department received improvement required ratings for multiple years through 2010 and were not fired or forced to find new positions. Jt. Ex. 149; T. 1256-59. One example given was of an E03 who “needs to develop his core engineering skills. He does not have a strong understanding of FPYs and has never provided any information related to root cause or corrective action.” Jt. Ex. 149. An E05 who received three improvement required ratings in a row was designated as having “a very difficult time with multi-tasking. If he has more than one task to execute he becomes very inefficient, mistake prone, and confused... He reacts without thinking about what consequences his actions may have on a large scale.” Jt. Ex. 149. Another E03 who received improvement required ratings in a row was described as a “consistent low performer... HR strategy is that if there are any more issues with him we will move right to termination.” Jt. Ex. 149

97. Complainant testified that Moreau’s treatment of him was demeaning and he became “severely emotionally compromised.” T. 855, 653. Complainant testified credibly that the PIP caused an increase in the anxiety and depression he had dealt with in the past. T. 869.

He testified that he had taken the anti-depressant Wellbutrin off and on for years, but during the PIP he was placed on the anti-anxiety medications Xanax and Lamotrigine for the first time. Jt. Ex.141; T. 849.

98. Complainant stated that in August 2010 he became fearful of Moreau. T. 653. Complainant testified credibly that he spent each entire weekend before his Monday PIP meetings worrying about the meetings and was “emotionally unstable” “nervous” and “had the shakes.” T. 653. On August 18, 2010, he emailed Godin: “I can’t do this anymore. [Moreau] is purposefully making this extremely difficult for me. I am being set up to fail. I want my life back and my job too. Why is she doing this to me??? I am going to have a nervous breakdown. Please call.” Ex. C-3. The following day, Complainant took a leave of absence. Jt. Ex. 57.

99. In August 2010, Complainant visited a psychiatrist who diagnosed him with major depression that was severe with biological symptoms. Jt. Ex. 123. He began seeing his psychotherapist Devaney weekly. Her notes show that Complainant was “having trouble fulfilling requirements at work & feeling overwhelmed.” Jt. Ex. 126. On July 16, 2010, less than one month into Complainant’s PIP, she wrote that work stress has had a serious negative effect on him. On August 5, 2010, she noted that Complainant was feeling overwhelmed by a new work requirement. On October 15, 2010, as Complainant’s PIP was about to resume, she noted that Complainant was struggling with balancing work tasks with self-care. He had passive suicidal ideation and felt fearful, angry and helpless about his job stress. On December 3, 2010 as his PIP was ending, Complainant feared he would be overcome with hopelessness, helplessness and suicidal impulse upon the receiving the results of his PIP. On December 7, Complainant told Devaney that he expected to be terminated from his job and expressed suicidal ideation but had no plan or intent. Jt. Ex. 126.

100. On December 18, 2010, after Complainant failed his PIP, his mood worsened and he acknowledged having a suicide plan. Id. Godin recalled Complainant saying he was going to drive into a tree at high speed and discussed hurting himself with woodworking tools. T. 108-109.

101. In 2009, when Complainant worked the second shift as an A02, he earned \$79,689.61 in gross wages. In 2010, when he worked first shift and took a leave of absence, Complainant earned \$70,785.75. I find that if Complainant had not been moved from second to first shift and had not been placed on a PIP he would have earned \$82,080.30 (assuming a 3% raise) in 2010. Thus his lost wages that year total \$11,294.55 (\$82,080.30-70,785.75)

102. Upon returning to a union job, Complainant earned \$41,746.61 in 2011. I find that had Complainant worked the second shift as an A02 in 2011, he would have earned \$84,542.71 (assuming a 3% raise) Thus his lost wages that year total \$42,796.10 (\$84,542.71-41,746.61). Complainant earned \$42,361.03 in 2012. Had he continued to work as an A02 on the second shift, he would have earned \$87,078.99 (assuming a 3% raise). Thus his lost wages that year total \$37,334.15 (\$87,078.99-42,361.03) Jt. Exs. 143,144, 145-147.<sup>17</sup>

103. Complainant's lost wages from 2010 through 2012 equal \$91,424.80.  
(\$11,294.55+\$42,796.10+\$37,334.15)

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation.

Complainant alleges that Respondent failed to accommodate his disability, failed to engage in an

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<sup>17</sup> Complainant received an average 3% raise every year he was a technical support engineer.

interactive dialogue to determine appropriate reasonable accommodations, subjected him to disparate treatment based on his disability and unlawfully terminating him and causing him to seek a demotion because of his disability, Traumatic Brain Injury (“TBI”).

#### Disparate Treatment

Complainant may establish a prima facie claim of handicap discrimination by showing that he (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by his employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998). I conclude that Complainant has established a prima facie case of disparate treatment based on his disability

Complainant has established that he is a handicapped person within the meaning of the statute because he suffers from traumatic brain injury and its permanent manifestations. He has short-term memory problems, suffers from anxiety and depression and requires routines, memory aids and minimal distractions to function with his cognitive deficits.

In order to establish that he is a qualified handicapped person, Complainant must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. Complainant has established that he was successfully performing the position of technical support engineer from 2000 to 2009, with positive reviews and with no accommodations other than memory aids. Beginning in 2009, Complainant was subjected to a series of adverse actions when his rating was downgraded from “meets” to “needs improvement,” based on Respondent’s articulated policy of rating all employees based on a bell

curve and the directive to place certain employees in the “needs improvement” category. Complainant fell victim to this artificial construct, and he was placed on a PIP which he failed, chiefly because of the large amount of new tasks he was given and an altered environment he was placed in. As a result, he was terminated from his position of technical support engineer, given thirty days to find another job within Respondent and then transferred to the union position of test technician. These adverse actions occurred after Barbara Moreau became manager and learned of Complainant’s traumatic brain injury. Complainant was also treated differently in terms of his PIP. There was evidence that Complainant’s supervisor placed a similarly situated employee, who had no known disability, on a PIP at around the same time as Complainant. This employee had been placed on a PIP for the same issue twice previously and failed the PIP. Like Complainant, he did not agree with the roles and responsibilities of a test engineer. This evidence establishes that test engineers were permitted to receive improvement required ratings repeatedly without facing termination or demotion. It also establishes that several test engineers with engineering degrees had deficiencies in supposed core test engineering areas such as first pass yields, root cause and corrective action but did not face termination or demotion. Thus I conclude that Complainant has established a prima facie case of disparate treatment discrimination on the basis of disability.

Once Complainant had established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its decision. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000) Respondent’s legitimate, non-discriminatory reasons for its actions were that in 2009, it faced a demand for higher productivity and efficiency due to changes in the global economy and could

no longer afford a test engineer such as Complainant who was not performing the full functions of the job.

Respondent asserts that 2009, Complainant was expected to begin performing some core test engineering functions that he had not been asked to perform in the past which became essential functions of Complainant's job. Respondent argues that it was justified in adding these core functions to Complainant's job and that its actions were compliant with the ADA, "which does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it." EEOC Technical Assistance Manual at II-18 (1992)

At the same time, the manager of the test engineering department was instructed to ensure that a certain percentage of employees within each job category in the units she supervised receive a rating of "improvement required." As Complainant was the lowest ranked A02 in test engineering, he received the rating of "improvement required" on his PDS for 2009, despite his direct supervisor's initial rating of "meets." As a result of this rating structure, in 2010 he was placed on a PIP which Respondent asserted was designed to test Complainant's ability to perform the essential functions of the job of test engineer. Complainant failed the PIP and was terminated from his position and allowed to seek out other employment with Respondent; he then transferred to a much lower paying test technician position.

Respondent asserts that despite having received a "meets" rating on his earlier evaluations, Complainant was having performance problems, as evidenced by his failure to update a test procedure resulting in damage to a radar component for which he received a verbal warning in 2008. Respondent asserts that this demonstrated Complainant's lack of ability to recognize and promptly correct a problem that jeopardized Respondent's relations with its

customers and was costly to Respondent. I conclude that Respondent has articulated legitimate, non-discriminatory reasons for its actions against Complainant.

If Respondent meets this burden, Complainant must prove by a preponderance of the evidence that these reasons are a pretext and that Respondents "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493,501 (2001); See, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, supra. at 501. Complainant retains the ultimate burden of proving that Respondents' adverse action was the result of discriminatory animus. Id.; Abramian, 432 Mass at 117.

For the following reasons, the evidence has persuaded me that Respondent subjected Complainant to disparate treatment on the basis of his disability, a traumatic brain injury. In the first instance, I note that for a period of eight years, Complainant, a non-degreed, designated "A" employee, was not expected to perform the same duties as designated "E" degreed engineers. Complainant was not a test engineer; his job description was different from that of a test engineer and most of his prior supervisors, over a period of eight to nine years, did not consider him a test engineer, nor did they require him to perform all the functions of a test engineer.

Complainant's supervisors assessed his performance based on the limited set of tasks he was required to perform as a technical support engineer and not on the full scope of duties of a test engineer. Moreover, Respondent evaluated Complainant's performance in relation to other A02s, and not test engineers, based on an artificial construct to justify placing him in the needs improvement category and on the PIP, further undermining Respondent's position that Complainant's position was the same as a Test Engineer. I find that it was well known to

Complainant's managers and supervisors that he suffered from a traumatic brain injury, and when it came time to downgrade certain employees to comply with the bell curve requirement, he was an easy target, because of his cognitive impairments. This is supported by evidence that his 2009 rating was in some respects disingenuous, as his supervisor altered the actual language used by his peers who were supportive of his performance.

There is also scant evidence that Complainant's performance problems were disproportionate to others, who were not disabled. Rather the evidence demonstrated that others with performance issues were not treated so harshly. The evidence established that test engineers with no known disabilities were permitted to receive "improvement required" ratings repeatedly without facing termination or demotion and also established that several engineers with technical degrees demonstrated deficiencies in supposed core test engineering areas such as first pass yields, root cause and corrective action but did not face termination or demotion. In addition there was evidence that a lack of knowledge of "core tasks of test engineering" was not unique to Complainant. E.S. observed that engineers other than Complainant were also struggling with the process of VBS that was a subject of Complainant's PIP. An engineer who assisted Complainant with his PIP found it noteworthy that other test engineers at Respondent did not understand basic programs such as Excel, and that this problem was not unique to Complainant.

Contrary to Respondent's assertions, I conclude that adding functions to Complainant's job and then placing him on a PIP was not done for the purpose of assisting Complainant to succeed at his job. I did not credit the testimony of Moreau that she placed Complainant on a PIP in order to assist him to succeed in his position. The evidence suggests that just the opposite was true and that real intent of the PIP was to force Complainant from his position.

This conclusion is supported by evidence that prior to the start of Complainant's PIP, Respondent had already begun discussing with recruiters the availability of alternative positions for Complainant. In addition, the PIP required Complainant to learn, under time pressure, tasks that he had never before performed, in a different program at a different test site, on the busy day shift, all of which were detrimental to Complainant's ability to learn and retain information, and done with the knowledge that Complainant's TBI required him to learn tasks in more linear fashion, with repetition and hands on experience in an environment that was quiet and not distracting. Finally, Complainant sought, through his sister and on his own, to extend or discontinue the PIP in favor of a quarterly goals plan which Respondent refused to consider. I conclude that the use of the PIP in this instance was intended to ensure Complainant's failure and to document his failure.

I reject Respondent's argument that the EEOC guidelines would permit an employer under these circumstances to alter and enlarge a disabled employee's job duties in order to include tasks he had never before performed, without consideration of a reasonable accommodation. Respondent's assertion does not comport with this Commission's interpretation of disability law. In Doble v. Engineered Materials Solutions, 35 MDLR 36 (2013) the Full Commission rejected an employer's argument that a Complainant was not a "qualified" person with a disability because he could not perform the new job to which he was assigned. The Commission held that Complainant's qualifications should be analyzed in terms of his prior, eliminated job, *otherwise an employee's rights under M.G.L. c. 151B, § 4(16), could be extinguished merely by reassigning a disabled employee to a job that he cannot do and then claiming accommodation is not feasible.* (Emphasis added) Doble, supra.

Moreover, Respondent's reasons for treating Complainant differently in terms of his PIP were not credible. Respondent's attempt to distinguish Complainant's situation from that of another engineer who was placed on at least three PIPs because he was able to perform the job, but had "behavioral issues" that were "not best addressed through a PIP" is not a persuasive distinction and raises questions as to how the Respondent utilized PIPs.

I conclude that Respondent's use of the PIP in this instance was as a justification for removing Complainant from his position by providing him with goals that were unattainable within the given time period and circumstances, and the result of unlawful animus on the basis of Complainant's disability. Denesha v. Farmers Insurance Exchange, 161 F.3d 491(8th Cir1998) (age discrimination found when employee placed on formal discipline and employer created unattainable goals in comparison to co-workers.) Willnerd v. First Nat. Nebraska, Inc. (8th Cir. 2009) 558 F.3d 770, 779 (court reversed summary judgment for the employer, concluding that evidence of the employer's imposing an unattainable goal raised a triable issue of fact)

With respect to the SIA vibe issue for which Complainant received a verbal warning, the lowest level of discipline, for failing to stop a faulty test, I conclude that this issue was not the real reason he was placed on a PIP. This incident occurred in 2008, two years prior to his being placed on a PIP, and is reflected only indirectly in Complainant's 2008 PDS, for which he received a rating of "meets," with the comment that Complainant, "needed to develop the courage to stop a process if there was a potential issue." Moreover there was evidence that a test technician tried to stop the test and despite telling his union representative, the test was not stopped, which suggests that numerous people were aware of a problem, yet failed to stop the faulty test. There was no evidence as to whether the test writer was disciplined for creating a faulty test.

Given all of the above, I conclude that Respondent's reasons were a pretext for disparate treatment that was based on Complainant's disability.

Failure to Provide Reasonable Accommodation

Even if placing Complainant on a PIP could be deemed to be a legitimate, non-discriminatory action by Respondent, there is a serious question about whether Respondent had an obligation to offer Complainant a reasonable accommodation that would have allowed him to successfully perform all aspects of the job of technical support engineer, after he was placed on the PIP, transferred to a new location and a new shift and assigned a variety of new and different tasks, many of which he had never before performed.

As stated above, in order to establish that he is a qualified handicapped person, Complainant must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. The evidence, including Respondent's performance evaluations demonstrate that Complainant was performing the essential functions of his job without any formal accommodation up until that time, by using his own memory aids and other tools he had established to compensate for his cognitive deficiencies and receiving good ratings for many years after suffering a TBI. He was not deemed unable to perform the essential functions of his job until Respondent decided to fully implement the bell curve ratings which worked to his disadvantage as discussed above. As noted above, I conclude that Complainant's 2009 rating was disingenuous and based on an alteration of his actual ratings by his peers.

If a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and

the qualified individual with a disability." Figueroa v. Springfield Transit Management, 23 MDLR 17 (2001). The employee's initial request for an accommodation triggers the employer's obligation to participate in this interactive process to determine if an accommodation is feasible. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; EEOC Notice Number 915.002, 10/27/02.

I conclude that Respondent was on notice of Complainant's disability and had been for many years. After Complainant was placed on a PIP in 2010 he notified Respondent, as did his sister, that he needed more formal accommodations to be able to perform the new and varied tasks he was given and to work on the first shift which was much more chaotic and distracting for him.

Once Complainant requested an accommodation, it was incumbent on Respondent to engage in an interactive process with Complainant to determine if the accommodations he sought or any others were feasible.

I conclude that, at the very latest, when Complainant's sister requested that Moreau suspend Complainant's PIP, urging her to discuss accommodations with him, and to return him to the second shift, where he could work without distractions, this triggered Respondent's obligation to engage Complainant in the interactive process, to determine whether there was any

accommodation feasible that would allow him to perform the additional tasks Respondent identified as essential. Complainant also requested an extension of his PIP, asserting that given more time, he could learn by repetition and practice the new tasks required of him.

Respondent did not consider the impact of Complainant's disability on his ability to perform the purported essential functions of the position; nor did it explore the possibility of a reasonable accommodation. Figueroa, supra at 21.

Respondent argues that it was relieved of the obligation to discuss reasonable accommodation because of Complainant's failure to communicate directly with his manager or to provide a medical release form to Respondent's medical unit. Respondent asserts that Complainant's lack of communication prevented the company from engaging in an interactive dialogue with Complainant regarding a reasonable accommodation to his disability. An employer cannot refuse to engage in the interactive process due to bureaucratic formalism. Anderson v. United Parcel Service, 32 MDLR 45 (2010); Duso v. Roadway Express, 32 MDLR 131(2010). I am not persuaded by Respondent's arguments that Complainant was derelict in his communications or failed to engage in his part of the interactive process. As stated earlier, Respondent was fully aware of Complainant's disability and the impact on his cognitive functioning. He had provided various supervisors with a power point presentation about his injury and its effects. Respondent was on notice that he suffered cognitive deficiencies and needed to learn in a new way from the time he returned to work after his injury. There was at the very least constructive notice of Complainant's need for accommodation. It is apparent that his supervisors and co-workers were aware of his use of notes and memory aides and that he learned by repeating tasks. This knowledge, coupled with the alleged dissatisfaction with Complainant's

performance obligated Respondent to start discussion of accommodation long before institution of the PIP. However, even if reasonable persons could disagree about when Respondent was on notice that Complainant needed an accommodation, I find that Complainant explicitly asked for an accommodation when he sought to return to the second shift and when he asked for an extension or suspension his PIP and that these requests triggered Respondent's obligation to engage in the interactive process. Instead, as was clear even prior to institution of the PIP, Respondent's managers seemed to have determined that the memory aids Complainant utilized and the medical clearance from Complainant's physician absolved it of any obligations to engage in the interactive process or provide any accommodation to Complainant. I find that Respondent made no sincere effort to engage in any interactive process with Complainant to determine whether the accommodations he sought, including more time, or other accommodations, might be feasible and allow him to perform the additional functions Respondent required of him in the new environment. The failure of an employer to participate in the interactive process to identify reasonable accommodations or failure to offer a reasonable accommodation once one has been identified is a violation of G.L. c. 151B. Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination, 441 Mass. 632, 644 (2004).

Information available from Respondent's medical unit placed it on constructive notice that a PIP was not a substitute for a reasonable accommodation. Moreover, Respondent's medical unit received documentation from Complainant's medical providers demonstrating that the PIP and the change in his shift were seriously detrimental to Complainant's mental health and that he needed a medical leave of absence as a result.

If an accommodation has been requested, the employer has the burden of showing that any requested accommodation is unreasonable and would create an undue hardship on its

operations. Figueroa, at 20-21. Respondent did not produce evidence that the requested accommodation of suspending or extending Complainant's PIP would create an undue hardship on its business or operations.

Respondent argued that Complainant's requests for suspension or extension of his PIP or his reassignment to the second shift were not reasonable because Respondent no longer had a need on the second shift for a test engineer who did not perform the full functions of the job. Respondent also asserted that returning Complainant to his prior role on the second shift would have required them to create a position that did not exist and for which there was no business need at the time. Respondent argues the reason Complainant was assigned to the first shift was to give him access to colleagues who could mentor him, oversee his work, offer training, and answer questions; a level of assistance and mentoring that was not available on the second shift.

Respondent also argues that suspension of the PIP was not a reasonable request because the purpose of the PIP is to improve an employee's performance. It asserts that suspending the PIP would not have improved Complainant's technical abilities, judgment or skill set and would not have enabled him to perform the essential functions of his job. Respondent's argument fails to consider that the purpose of an interactive dialogue is to focus on and determine the likely outcomes of an accommodation. Respondent speculated that any extension or modification of the PIP would have been fruitless. However, there was no exploration or discussion with Complainant, his medical providers or Respondent's medical unit about what modifications could be made and what the likely outcome would be. While "there is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business," an employer

cannot refuse to engage in the interactive process based on its own belief that an accommodation is futile. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). An employer's mere contention that it could not reasonably accommodate an employee is insufficient as it is mere speculation. Id. [citations omitted]

Given Complainant's past performance and Respondent's own assessment of his skills and abilities when given sufficient time to learn and process information, the evidence supports a conclusion that an extension or cancellation of the PIP in favor of a different course of action, for example quarterly goals as suggested by Godin, would likely have been an effective reasonable accommodation. This would have required consideration of the cognitive limitations associated with Complainant's disability, including impairment of his memory and required repetition of duties in order to learn. More importantly, there was no evidence that an extension of the PIP would have created an undue hardship on Respondent's business or finances. I conclude that the decision to demote Complainant rather than explore reasonable accommodations to his disability was a violation of G.L. c. 151B. See Doble, supra. Based on all of the above, I conclude that Respondent is liable for discrimination in violation of M.G. L. c. 151B sec. 4(16) for its disparate treatment of Complainant based on his disability and its failure to engage in an interactive process to explore the feasibility of reasonable accommodation that might have allowed Complainant to continue in his job as a technical support engineer.

#### IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and

emotional distress suffered as a direct and probable consequence of Respondent's unlawful actions. Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

#### A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College supra at, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on the credible testimony of Complainant I am persuaded that he suffered emotional distress as a result of Respondents' unlawful actions. Complainant is a hard-working, dedicated, long-time employee of Respondent. He began working for Respondent one year after completing high school and has spent his entire working life there. Complainant took great pride in his work and loved working for Respondent. He was able to succeed at his job despite his traumatic brain injury for many years as manifested by his performance ratings. It is apparent that work for him was more than just a job and that his sense of identity and self-worth were

closely tied to his work. Being placed on the PIP exacerbated his existing depression and anxiety and caused him distress so significant that he contemplated suicide. I find that being terminated and then forced to seek and accept a lower paying lower status position caused him great embarrassment and humiliation as he was required to work with employees whom he had previously supervised. Complainant visited his therapist and his primary care physician to help him cope with his distress and his anti-depressant medication was increased. He confided to his sister that he was so distraught by his situation in the workplace that he felt like killing himself. There was evidence that Complainant had suffered from on-going depression, anxiety and occasional suicidal thoughts resulting from his traumatic brain injury in 2000 and that this pre-existing condition likely contributed to his distress. Notwithstanding, it is clear that Complainant suffered significant emotional distress as a direct result of the discriminatory treatment by Respondent of being placed on a PIP, terminated and forced to seek and accept a lower paying position and that these actions greatly exacerbated his depression and anxiety. This was confirmed by his health providers. I find that Complainant is entitled to an award of damages for emotional distress resulting from Respondent's unlawful conduct in the amount of \$100,000.

#### B. Lost Wages

Complainant seeks back pay from the time of his PIP until the public hearing and front pay to the age of 65, when he planned to retire from Respondent. I decline to award Complainant front pay up to the age of 65 as this is highly speculative. I am unable to speculate as to how circumstances might have differed had Complainant's disability been accommodated. Moreover, given the evidence that test engineers were being laid off during this time, it is entirely uncertain how long a period of time Complainant would have continued working in a technical support engineering position. In view of these speculative circumstances, I conclude

that it is fair and reasonable to award his lost wages from the date he was placed on the PIP until January 2013, a period of two and one half years. Lost wages for that period of time total \$91,424.80. (See Findings of Fact #1116-114)

## V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discrimination on the basis of disability.

2. Respondent pay to Complainant the sum of \$100,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3. Respondent pay to Complainant the sum of \$91,424.80 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. To conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources managers located in its Massachusetts facilities. Such training shall focus on discrimination based on disability, the interactive process and negotiation

of reasonable accommodations for disabled employees. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. Following the training session, Respondent shall send to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any of the above described employees who fail to attend the original training and for new personnel hired or promoted after the date of the initial training session.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 26<sup>th</sup> day of February, 2016

  
JUDITH E. KAPLAN,  
Hearing Officer