COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MATTHEW A. HARRISON,	:	
Complainant	:	
	:	
v,	:	**PHRC CASE NO. 201300300**
	:	**EEOC CHARGE NO. 17F201361622**
LAZER SPOT, INC.,	:	
Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant, Matthew A. Harrison, (hereinafter "Harrison") retired from military service on August 31, 2007, after serving more than 20 years. (N.T. 34, 51, 58)
2. After graduating high school in 1984, Harrison joined the U.S. Marine Corps where he served from May 29, 1984 until May 16, 1986 at which time, because of a shoulder injury, Harrison received a medical discharge under honorable conditions. (N.T. 44; J.E. 40)
3. Following service in the Marines, Harrison served with the U.S. Coast Guard from July 20, 1987 until September 2, 1987. (J.E. 40)
4. On March 8, 1989, Harrison began serving full-time in the U.S. Army National Guard. (J.E. 40)
5. In 1989, Harrison was deployed to serve in the 1st Gulf War. (N.T. 45, 89)
6. Harrison's duty stations included Beirut, Lebanon; Somalia; Bosnia; Operation Iraqi Freedom One; and Operation Iraqi Freedom Three. (N.T. 45, 89)
7. Harrison experienced combat in the Gulf War and Operation Iraqi Freedom One and Three where Harrison's mission was to furnish supplies to front line troops by driving an 18 wheel tractor and trailer that hauled supplies to front line troops. (N.T. 46-47)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T.	Notes of Testimony
J.E.	Joint Exhibit
S.F.	Stipulation of Fact

8. Almost daily, while driving supplies, Harrison encountered vehicle borne improvised explosive devices, (VBEIDS), improvised explosive devices (IEDS), suicide bombing vehicles that attempted to ram the vehicle Harrison was driving and being fired upon with rocket propelled grenades. (N.T. 46-47, 49-50)
9. Part of the "rules of engagement" Harrison learned in training included displaying a sign on his vehicle that read in Arabic, "Do Not Approach Vehicle within 20 Meters." (N.T. 48)
10. The vehicles Harrison drove were also equipped with a 50 caliber gun from which a warning shot would be fired when another vehicle began to close in on his vehicle, then a second shot would be fired into the hood of an approaching vehicle that continued to approach, until finally, vehicles that continued to approach would be run over killing the passengers in the approaching vehicle. (N.T. 48)
11. During Harrison's combat experience, he often witnessed death and general destruction. (N.T. 48-49)
12. Upon Harrison's return to the United States in 2007, Harrison's final duty station was Fort Bliss, Texas. (N.T. 56)
13. On one occasion at Fort Bliss, Harrison had a flashback to experiences he encountered in combat. (N.T. 56)
14. Harrison perceived that he smelled burning flesh coming from bushes near where he was walking. (N.T. 57)
15. The person with whom Harrison was walking encouraged Harrison to speak to someone in mental health. (N.T. 57)
16. At that time, Harrison did speak with a Major who informed Harrison that he was experiencing "subliminal nightmares." (N.T. 57)

17. Harrison's reaction was to simply try to just deal with it and he sought no further treatment. (N.T. 58)
18. Once retired from the Army, between October 2007 and May 2008, Harrison worked full-time for approximately 8 months as a corrections officer with the City of York, Pa. Prison. (N.T. 52, 61, 141)
19. Next, Harrison attended Triple A Truck Driving School after which he obtained a Class A Commercial Driver's License (CDL). (N.T. 61, 52, 142)
20. Upon obtaining the Class A CDL license, Harrison began working for McElroy Trucking where he drove a tractor and trailer (two distinct pieces of equipment commonly referred to as an18 wheeler when hooked together) over the road. (N.T. 52, 665)
21. McElroy Trucking's main terminal is located in Hagerstown, Maryland from which Harrison drove to Northern Pennsylvania, to Richmond, Virginia, and into Delaware. (N.T. 145)
22. While working for McElroy Trucking, Harrison occasionally experienced flashbacks associated with combat situations he experienced, however, thinking what was happening to him was under control, Harrison never reported this to McElroy management. (N.T. 53, 146, 180)
23. While working with McElroy Trucking, Harrison was offered a job with KBR Transportation, ("KBR"), a civilian contractor that provided services to the government which included truck driving services. (N.T. 53)
24. In 2009-2010 and again in 2010-2011, Harrison entered into two one year contracts with KBR where, on both occasions, Harrison was assigned to operate 18

wheel rigs from a location in Iraq near where he had served while in the Army. (N.T. 54; J.E. 14, 17)

25. Once again, Harrison was operating in a combat zone where he frequently faced VBEID and enemy fire. (N.T. 55)

26. It was at this point that, while driving an 18 wheeler, Harrison began to experience more flashbacks related to the deadly consequences resulting from rules of engagement in combat situations and symptoms of night sweats, sudden instances of heart racing, nightmares and paranoia. (N.T. 55)

27. Once again, Harrison neither reported the symptoms he was experiencing to KBR nor did he request an accommodation. (N.T. 181)

28. As Harrison was in a combat area, his reaction was to simply just deal with it . (N.T. 181)

29. For Harrison, the experiences with KBR were the tipping point that led Harrison to conclude that he was unable to drive an 18 wheel tractor and trailer rig over the road upon returning from the combat environment. (N.T. 61)

30. Harrison feared that if he did drive a vehicle like the ones he drove in combat, the rules of engagement he was taught might come to mind and he could hurt someone else or himself. (N.T. 61)

31. Harrison realized that if another vehicle got close to his, his heart would race and he would get aggressive. (N.T. 61)

32. At this point, Harrison would wake up sweating, he was having nightmares and he had difficulty sleeping without either white noise or being in an environment where there was no noise. (N.T. 56, 169-170)

33. Approximately two days a week, Harrison was able to sleep only 4 hours a night, while there were other nights when he did not sleep at all. (N.T. 58, 61)

34. After returning from his second year with KBR, and wanting to stay working in the transportation field without driving an 18 wheeler over the road, Harrison found a job for a short period working as a yard jockey with ES-3. (N.T. 62, 64, 169-170)

35. A yard jockey's job involves hooking and unhooking trailers and moving them around an enclosed yard area from what is called a ready line to a loading dock and then back to the ready line. (N.T. 65)

36. To accomplish this, Harrison was assigned to drive an Ottawa which is a tractor that is smaller than the tractors one generally sees pulling trailers on the highway. (N.T. 28, 67)

37. On the highway, the tractors and trailers one sees are commonly referred to as "18 wheelers", the Ottawa tractors when hooked to a trailer have four less wheels. (N.T. 481, 665)

38. In 2011, Harrison lost his job with ES-3. (N.T. 66)

39. After seeing an advertisement on the internet specifically titled as a yard jockey position with the Respondent, Lazer Spot, Inc., (hereinafter "Lazer Spot"), on May 18, 2011, Harrison submitted a job application. (N.T. 67-70, 382; J.E. 58)

40. Lazer Spot is a national corporation, presently operating in 33 states with approximately 2,300 employees. (N.T. 599, 649)

41. Lazer Spot's is organized into regions, one of which is the Carlisle, Pa. region. (N.T. 371)

42. In the Carlisle region, Lazer Spot contracts with approximately 15 to 20 different customers to provide shuttle and spotter services. (N.T. 369, 371, 442, 694)

43. In the Carlisle region, during the relevant time period of this case, Lazer Spot employed approximately 100 to 150 employees. (N.T. 424, 445, 603, 695)
44. In the Carlisle area, Lazer Spot's customers are both manufacturing and warehouse distribution operations that generally have the need to move freight from their facilities by having an empty trailer backed up to and dropped at an open door at a customer's dock area, then, once empty trailers are loaded, having the loaded trailers moved from the dock area to designated trailer parking areas. (N.T. 425-426, 598)
45. Lazer Spot holds itself out as the country's largest premier yard management solutions company as it provides both spotting and shuttle services to it's customer's manufacturing and distribution centers. (N.T. 600)
46. Because of the nature of Lazer Spot's operations, employees are generally called upon to perform either "spotting" or "shuttling" services. (N.T. 371, 375)
47. Basically, the task of "spotting" involves moving a customer's trailers to and from a designated parking area, to and from a customer's docks. (N.T. 38-39. 374, 613)
48. On occasion, a customer would have a surplus of trailers and an off-site location would be rented for use as an excess trailer drop off area. (N.T. 473, 614)
49. Generally, the task of "shuttling" involves driving a customer's trailers over the public roadways from one location to another. (N.T. 210, 371, 375, 613)
50. The main duty of Lazer Spot employees is spotting. (N.T426)
51. 90% of the services provided to Lazer Spot customers are spotting services. (N.T. 420)
52. The job of spotting does not require a commercial driver's license ("CDL). (N.T. 498-499)

53. The principle equipment used by a Lazer Spot employee are yard tractors, also called Ottawa tractors, that are owned by Lazer Spot; larger tractors known as day cabs, either owned or leased by Lazer Spot; and trailers that are mostly owned by Lazer Spot's customers. (N.T. 197, 289, 290, 422, 425, 430, 470, 476, 481, 665)

54. Once a Lazer Spot employee parked a customer's loaded trailer, a driver either employed by the customer or a customer's contract employee would then hook the trailer to a customer tractor and remove the trailer. (N.T. 425-426)

55. Both the larger day cab tractors and the smaller Ottawa tractors are licensed to go on public roads. (N.T. 399, 444, 474)

56. When a day cab tractor is hooked to a trailer the combination becomes what is commonly known as an 18 wheeler (the combined number of wheels on the tractor and the trailer). (N.T. 665)

57. When an Ottawa tractor is hooked to a trailer the combination has a total of only 14 wheels. (N.T. 481)

58. While Lazer Spot's Ottawa tractors can only go about 30 mph and have towing weight limits, they have a shorter wheel base and are more maneuverable and are better to move trailers to and from the dock area of customers. (N.T. 475, 496)

59. Most of Lazer Spot's customers have enclosed areas around their loading docks that are not open to the public. (N.T. 403-404)

60. Only spotting services are provided to approximately ½ of Lazer Spot's Carlisle area customers. (N.T. 442, 504)

61. The size of Lazer Spot's customers in the Carlisle area varies considerably. (N.T. 486-487)

62. The smaller customers tend to require only spotting services. (N.T. 439-440, 486)

63. The large sites often require both spotting and shuttling services. (N.T. 427, 487)

64. Between 30 to 40 Lazer Spot Carlisle area employees performed shuttle work. (N.T. 426)

65. Approximately 8 of the 15 to 20 customer sites required an employee to shuttle equipment on the public roads. (N.T. 399, 415)

66. The tractors that are used for shuttle services are both day cab and Ottawa equipment. (N.T. 651)

67. When hired by Lazer Spot, an employee is placed into a regional pool and assigned a regular schedule and a primary location. (N.T. 160-161, 445)

68. Once assigned to a primary location, to keep employees happy, an employee is not often reassigned. (N.T. 610)

69. When an opening occurred, the Carlisle area manager would try to move an employee to accommodate an employee's expressed desire to work at a certain location. (N.T. 432)

70. Lazer Spot's employee retention was only approximately 22 months. (N.T. 615)

71. Lazer Spot's Carlisle area also employed "floater" employees that learn a lot of the site operations where Lazer Spot's provided services to its customer's. (N.T. 452)

72. When a Lazer Spot employee was out, normally, either the area manager or an employee considered by the area manager to be a good employee or the lead employee of a given site would be chosen to fill in for the absent employee. (N.T. 287, 406, 429, 433, 448, 514)

73. Customer sites have different shifts, (8, 10 and 12 hour shifts). (N.T. 252, 429, 608)

74. Lazer Spot also employs a rapid response team that travels exclusively to fill in when a site is short staffed and to accommodate the start of new openings. (N.T. 610, 650)
75. At times, the needs of a given customer changed depending on various circumstances. (N.T. 401)
76. Lazer Spot's qualifications to be an employee included having 2 years driving experience; holding a Class A CDL; and holding a valid DOT Medical Card. (N.T. 399, 496, 603)
77. Depending on seasonal fluctuations and surges in business, at times, more employees needed to be assigned to a particular location to meet a customer's needs. (N.T. 402, 511, 606-607)
78. At times, Lazer Spot managers even pulled employees from other regional areas to meet customer's needs. (N.T. 445)
79. Lazer Spot recruiters and managers are instructed to inform prospective employees that they might be required to perform any of Lazer Spot services for customers anywhere within a 100 mile radius. (N.T. 403, 614)
80. Lazer Spot jobs are advertised as "yard jockey" openings. (N.T. 209-210, 382, 389, 390, 616-617)
81. Lazer Spot customers refer to Lazer Spot employees as yard jockeys. (N.T. 393)
82. Internal "time off requests" used by employees use the term yard jockey to describe an employee. (J.E. 42, 43)
83. Lazer Spot's handbook describes the job of "driver" as "[t]he main duty of a driver is to drive the Lazer Spot, Inc., equipment and move trailers in interstate commerce… Drivers are hired into a regional employment pool and assigned to a

primary location. As a condition of employment, you are subject to work at other Lazer Spot, Inc. sites within a 100 mile radius of your primary site, and/or any site under the control of your site manager…." (N.T. 160, 456; J.E. 3)

84. Lazer Spot's job description "driver," encompasses both spotting and shuttle duties. (N.T. 400)

85. At the times relevant to this case, Lazer Spot's management hierarchy included: John Moore, Lead Driver at Lazer Spot's customer, Americold, site location (hereinafter "Moore"); Ed Kneper, Carlisle Area Assistant Manager (hereinafter "Knepper"); Richard Klinger, the Carlisle Area Manager (hereinafter "Klinger"); David Mumbauer, North East Regional Manager (hereinafter "Mumbauer"); Jerry Edwards, Vice President of Operations for the North East Region (hereinafter "Edwards"); Mark Clayton, Vice President of Safety (hereinafter "Clayton"); and Rhonda Wilcox-McCurtain, Vice President of Human Resources and General Counsel (hereinafter "Wilcox-McCurtain"). (N.T. 93, 107, 369, 371, 372, 373, 437, 495-496, 596; 633)

86. After making application for a job with Lazer Spot, Harrison was called to come in for an interview with Klinger. (N.T. 70, 156, 382)

87. Harrison testified that he was informed that, like Lazer Spot's advertisement, the job was for a yard jockey. (N.T. 71)

88. Klinger testified that he informed Harrison that the job was for a truck driver. (N.T. 405)

89. When told he needed a Class A CDL and DOT Medical Card, Harrison showed the requisite documentation to Klinger. (N.T. 73, 156)

90. Harrison was hired on June 3, 2011. (J.E. 6)

91. When Harrison completed Lazer Spot's Post-Hire Questionnaire, Harrison indicated that he never had a disability not covered by the questions asked by the Questionnaire form, but did reveal he had experienced a neck injury and surgery in 2005, knee surgery in 1989 and shoulder surgery in 1985. (N.T. 79; J.E. 5)
92. In response to the question that generally asked whether he ever had a mental condition, Harrison responded "no." (J.E. 5)
93. At this point, Harrison had not yet been diagnosed with Post Traumatic Stress Disorder (hereinafter "PTSD"). (N.T. 79, 161)
94. Subsequent to being hired, Klinger tested Harrisons' driving skills while driving a yard jockey tractor (Ottawa) in one of Lazer Spot's customer's lot, Reckett Benckiser. (N.T. 74, 77; J.E. 59)
95. During this driving test, Harrison was not asked to drive out of Reckett Benckiser's lot and even though the test was entirely within the lot area, Klinger checked off a number of items that related to performance competency while driving on a public road even though the items check had not been done. (N.T. 76, 386; J.E. 59)
96. Klinger did perform two separate driving skills tests on another employee, Andrew Lentz, (hereinafter "Lentz") by having Lentz drive one vehicle in a customer's lot area and, approximately a week later, another vehicle over the road. (N.T. 215)
97. When Lentz was hired, he initially worked for 4 or 5 days at Lazer Spot customer, Purina's site where Lentz was asked if he would assist Purina move their operation approximately 12 blocks away. (N.T. 211)
98. Although hired as a yard jockey, Lentz agreed to assist by shuttling from the Purina location as Lentz earned additional money for doing so. (N.T. 212)

99. Until permanently assigned to Lazer Spot's customer, Americold, for his first year of employment, Lentz was moved around to several work sites. (N.T. 207, 215)

100. Harrison's first assignment was to be a yard jockey at Reckett Benckiser where he moved trailers from a ready line to Reckett Benckiser's dock and back. (N.T. 92)

101. The Reckett Benckiser site did require the yard jockeys to drive the Ottawa and trailers a short distance off site to turn around. (N.T. 163, 379, 380, 481)

102. Harrison worked at the Reckett Benckiser site for approximately 4 to 5 months, then, when a vacancy came open, Harrison asked Klinger to transfer him to the customer site Americold. (N.T. 93)

103. The effective date of Harrison's transfer to Americold was February 6, 2012. (N.T. 94)

104. Once again, Harrison did not perform shuttle work while at Americold, he strictly moved trailers with an Ottawa tractor from a ready line to the customer's dock and back, all within Americold's fenced in yard area. (N.TR. 373-374, 385, 389, 413-414)

105. Americold's operation involved managing refrigerated trailers requiring Lazer Spot employees to be familiar with this added duty feature. (N.T. 221-222)

106. While at both Reckett Benckiser and Americold, Harrison was a safe driver, performed well, and in a September 2011 evaluation was noted as very helpful and that he would make a good lead. (N.T. 160-161, 162, 200-201, 506; J.E. 38)

107. Moore described Harrison as dependable and one of the best employees. (N.T. 284)

108. Harrison's September 2011 evaluation also indicated that he had been cross-trained at 3 to 4 sites. (N.T. 160-161: J.E. 38)

109. At that point, Harrison had already cross-trained at Reckett Bencksier, Caterpiller and Americold. (N.T. 108-109, 162, 225, 450)

110. Klinger confirmed that in 2011, the purpose of cross-training was to benefit employees. (N.T. 376)

111. Klinger also confirmed that prior to 2013, cross-training had only occasionally been done in the Carlisle area and that he kept informal records of which employee could be sent to another location when a fill-in employee was needed. (N.T. 376, 415, 429)

112. Moore provided testimony suggesting that for a time, there was no cross-training. (N.T. 295-296)

113. Lentz offered testimony clarifying that for a time, cross-training of those working as spotters was to go to sites and learn the variances of spotting duties at those other sites. (N.T. 218)

114. In the Carlisle area, each customer site is different and depending on the size of a site, there might only be 2 employees per shift. (N.T. 450, 472)

115. Lazer Spot also selected only certain customer sites as cross-training sites. (N.T. 295, 486)

116. Employees were not required to learn the variables of every site. (N.T. 451)

117. The intention of cross-training was to acclimate employees to the differences in environments, rules, and flow of traffic procedures they would encounter at another site if temporarily assigned to fill-in in an employee's absence. (N.T. 504, 701)

118. Wilcox-McCurtain testified that there are 4 reasons for Lazer Spot's cross-training program: (1) under a federal motor carrier exemption Lazer Spot would not have to pay overtime to employees who worked more than 40 hours per week

(driving of an Ottawa did not affect this exemption); (2) Lazer Spot had flexibility with respect to filling in for absent employees; (3) cross-training promoted a team concept versus fragmented job assignments; and (4) cross-training helped keep up a driver's skills. (N.T. 621-623)

119. Wilcox-McCurtain testified that the cross-training program attempted to account for the variables in shifts. (N.T. 692-693)

120. Wilcox-McCurtain also testified that, at least, an employee should cross-train at 2 or 3 other sites. (N.T. 609)

121. Clayton clarified that for safety reasons, it is better to have less cross-training so an employee knows several sites rather than try to know the variable of each and every site. (N.T. 730)

122. Between June 2011 and February 2013, cross-training did not require an employee who was a yard jockey spotter to cross-train to do shuttle work. (N.T. 218, 414)

123. Moore agreed that at first, cross-training of spotters did not involve driving 18 wheelers over the road, but just learning other sites. (N.T. 266)

124. Employees who worked as spotters at some of Lazer Spot's remote isolated sites were not required to cross-train at all. (N.T. 717)

125. In or around the fall of 2012, Lazer Spot's shuttle work increased. (N.T. 429-430)

126. Lazer Spot's largest customer, Unilever, was moving their operation 43 miles away requiring 30 extra drivers and Lazer Spot to rent extra tractors and trailers to facilitate Unilever's move. (N.T. 421, 448, 474)

127. Edwards clarified that this was the only time Lazer Spot needed some of its spotter employees to cross train as potential shuttle drivers. (N.T. 521)

128. Moore, the lead driver who performed mainly spotter services at Americold was used on only 3 occasions to drive a shuttle as part of Unilever's move. (N.T. 259, 268)

129. In the fall of 2012, Harrison was in a meeting attended by Mumbauer, Edwards and Klinger, where one of the topics discussed was cross-training that would include spotters cross-training to shuttle. (N.T. 459, 502, 515-516)

130. This meeting had been called because it became known that many employees were opposed to the new development in the cross-training program. (N.T. 228, 409, 459, 485)

131. Wilcox-McCurtain testified that ½ of the shuttle employees did not want to cross-train as spotters and ½ of the spotter employees did not want to cross-train to shuttle. (N.T. 612)

132. At the fall of 2012 meeting, Lentz spoke up saying that he did not want to operate a day cab doing shuttle work. (N.T. 639)

133. Lentz also expressed concern about the way Lazer Spot wanted to do cross-training. (N.T. 228, 234)

134. Lentz perceived that Lazer Spot wanted to put an employee with no experience managing refrigerated trailers into Americold for training while having him cross-train to do shuttle work. (N.T. 215)

135. Klinger informed Lentz that management wanted to do cross-training the way they wanted to do it. (N.T. 229)

136. Lentz's expressions of concern were deemed insubordination and he was terminated. (N.T. 228, 233, 641)

137. At the fall of 2012 meeting, Harrison revealed that he would not be able to shuttle with an 18 wheeler rig due to difficulties he has with PTSD and that he would not endanger the lives of others or himself because of his PTSD. (N.T. 501, 516)

138. Mumbauer informed Harrison that it would be ok for him to cross-train at Reckett Benckiser given Harrison's request that he not be assigned driving over the road with an 18 wheeler. (N.T. 460)

139. Mumbaure told Harrison that his issue was not a problem and that "we can work with that," and a place for Harrison to do his cross-training would be found. (N.T. 276-277, 462)

140. Mumbauer agreed that it was possible to cross-train Harrison in a way that did not require him to operate a day cab tractor and trailer over the road. (N.T. 466)

141. Subsequently, in February 2013, another meeting was held at which Harrison, Mumbauer, Edwards and Klinger attended. (N.T. 394, 503)

142. The subject of the meeting was again cross-training that would include shuttle driving and that the prior arrangement with Harrison had changed. (N.T. 110, 394)

143. Again, Harrison expressed concern about driving an 18 wheeler over the road and indicated that he would refuse to do so. (N.T. 504, 517)

144. Harrison asked to be permitted to continue to do cross-training that did not involve driving an 18 wheeler over the road. (N.T. 519)

145. Edwards confirmed that he found no reason Harrison could not have continued to work at Americold and that Lazer Spot's need for flexibility could have been achieved by assigning Harrrison to work at sites like Americold. (N.T. 505)

146. Klinger agreed that he too saw no reason others could not have been assigned to do the shuttle work in lieu of Harrison. (N.T. 424)

147. Klinger told Harrison that he would have to drive over the road or be fired. (N.T. 110)

148. Klinger then gave Harrison Wilcox-McCurtain's phone number and told Harrison to call her. (N.T. 111, 467)

149. When Harrison called Wilcox-McCurtain, he told her about the symptoms of his PTSD and why PTSD prevented him from driving an 18 wheeler rig over the road. (N.T. 663)

150. During the conversation, Harrison also relayed that since the fall of 2012, he had been accommodated. (N.T. 112)

151. Wilcox-McCurtain informed Harrison that if he would not perform the job he was assigned, he would be deemed to have resigned. (N.T. 634)

152. Harrison responded by saying that he would not quit, to which Wilcox-McCurtain replied, then it could be called a termination. (N.T. 634, 638)

153. When Harrison informed Wilcox-McCurtain that he would come to work, she replied that he cannot because he does not work there anymore. (N.T. 638)

154. During a conference call, Wilcox-McCurtain, Edwards and Clayton spoke and decided to terminate Harrison. (N.T. 508, 523, 723)

155. During this conference call regarding whether to terminate Harrison, Wilcox-McCurtain expressed a possible safety concern regarding Harrison continuing to work in a yard spotting trailers. (N.T. 519)

156. This concern had been relayed to her from Edwards. (N.T. 507)

157. After Wilcox-McCurtain instructed Klinger to inform Harrison that he was terminated, Klinger called Harrison to tell him of the decision. (N.T. 412)

158. The next scheduled work day, Harrison appeared at the Americold gate and was denied access. (N.T. 638)

159. A termination notice was then sent to Harrison that stated Harrison had resigned. (N.T. 671; J.E. 41)

160. Upon receiving this notice, Harrison called Wilcox-McCurtain insisting that he did not quit and asking to be reinstated. (N.T. 671)

161. Before participating in the decision to terminate Harrison, Clayton never even spoke with Harrison. (N.T. 723)

162. Neither Clayton, Wilcox-McCurtain, Edwards, Mumbauer, nor Klinger attempted to learn anything about the effects of PTSD or to contact either Lazer Spot's or Harrison's doctor. (N.T. 393, 506, 682, 723)

163. The condition of PTSD that Harrison referenced in the fall meetings of 2012 and February 2013, had been diagnosed by Lebanon, Pa. Veterans Affairs Dr. Edward R. Dale after examining Harrison on August 17, 2011. (N.T. 82; J.E. 39, 40)

164. Harrison had made an appointment with the Lebanon VA after several veteran friends of his told him to go to the VA to see if he was eligible for benefits. (N.T. 81-81, 202)

165. Harrison had been awarded the global war on terrorism expeditionary medal which automatically connected a sufficient stressor to a PTSD diagnosis. (N.t. 319-320, 363; J.E. 40)

166. Harrison's condition was deemed serious as he received a score of 50 using a global assessment measurement. (N.t. 391-320)

167. On January 13, 2012, Harrison was awarded a 30% disability benefit due to the diagnosis of PTSD. (N.T. 84, 322; J.E. 40)

168. Harrison was neither referred for treatment by Dr. Dale nor did he receive medications. (N.T. 154-155)

169. In preparation for this Public Hearing, on March 21, 2016, Harrison was evaluated by Forensic Evaluator, Dr. Neil S. Kaye, an expert in the field of PTSD. (N.T. 319, 358)

170. Dr. Kaye testified that Harrison clearly has PTSD related to the experiences he encountered while in combat environments. (N.T. 324)

171. The symptoms of PTSD described by Dr. Kaye include: avoidance; autonomic arousal; reliving of trauma; nightmares; flashbacks; having a startle response; anxiety; and problems with social and occupational functioning. (N.T. 325)

172. Specifically, Harrison was found to have routine sleep disturbance; trouble falling asleep; awakening in the middle of the night; and experiencing nightmares with combat trauma content. (N.T. 353, 354)

173. Dr. Kaye explained that Harrison's symptoms are not generalized but circumscribed to Harrison's association with driving 18 wheeler rigs only. (N.T. 326)

174. Harrison was found to be like so many other veterans with PTSD that do not seek treatment or take medication because Harrison does not like to see himself as either sick or mentally ill. (N.T. 331)

175. Even knowing he has PTSD, Harrison sees himself as a healthy functional adult. (N.T. 332)

176. Dr. Kaye related that Harrison is able to drive vehicles other than 18 wheeler rigs over the roads. (N.T. 356)

177. Dr. Kaye offered that Harrison cannot be put into a "trigger" situation that resembles his combat experiences that are the source of his PTSD. (N.T. 327, 334)

178. Dr. Kaye also confirmed that Harrison is fully capable of performing the job of yard jockey that he had performed for Lazer Spot. (N.T. 328)

179. Dr. Kaye relayed that approximately 20% of veterans returning from combat in the middle east have PTSD. (N.T. 361)

180. Following Harrison's termination from Lazer Spot on February 7, 2013, Harrison attempted to find employment as a yard jockey, a forklift operation, in security and other jobs by searching the internet, magazines, newspapers, listening for openings on the radio and through job fairs. (N.T. 116)

181. At the time of his termination, Harrison's rate of pay with Lazer Spot was $16.00 per hour. (N.T. 642, 733)

182. While employed by Lazer Spot, Harrison had worked 50 hours per week, straight time. (N.T. 648, 733-734)

183. In 2013, Harrison received unemployment compensation benefits in the amount of $12,212.00. (N.T. 116, 117; J.E. 34; S.F. 1)

184. In September 2013, Harrison began working for Dunbar Armor where he drove an armored truck from central Pennsylvania to Philadelphia 2 to 3 times per week. (N.T. 173)

185. Harrison resigned his position with Dunbar Armor in December 2013. (N.T. 173)

186. Harrison's earned $6,028.91 while employed with Dunbar Armor. (S.F.)

187. In 2014, Harrison was hired full-time by Kloeckner Metal as a forklift operatonr retrieving sheets of metal where he earned approximately $18.00 per hour. (N.T. 173)

188. Harrison had difficulty performing the forklift duties with Kloeckner Metal because sheets of metal he would be asked to retrieve were not always where they were

supposed to be causing Harrison to spend more time performing tasks than the employer required. (N.T. 120)

189. Thinking he might be terminated, Harrison resigned. (N.T. 121)

190. Kloeckner Metal informed Harrison that they would have another position for Harrison instead of him resigning, however, Harrison declined the alternate position because the alternate job was not operating a forklift but performing duties that Harrison did not understand or know how to perform. (N.T. 175, 202-203)

191. Harrison earned wages of $2,908.62 while an employee of Kloeckner Metal. (S.F.)

192. In August 2014, Harrison enrolled as a full-time student at York Technical Institute ("YTI") in YTI's electrician program. (N.T. 121, 175)

193. Harrison completed the program and looked for employment as an electrician apprentice. (N.T. 123)

194. Harrison worked a short time with Berks & Beyond and earned $347.75. (S.F.)

195. Next, Harrison worked at Bridgewater Wholesale, Inc. where he earned $1,936.84. (S.F.)

196. On October 5, 2015, Harrison was then hired by PennDOT earning $17.04 per hour, 38 hours per week. (N.T. 35; J.E., 23)

197. Harrison drove a dump truck as a transportation equipment operator until April 29, 2016. (N.T. 36)

198. Harrison's 2015 wages at PennDOT were $5,391.56. (S.F.)

199. Harrison's 2016 wages at PennDOT through April 29, 2016, were $13,395.09. (S.F.)

200. Before going to work with PennDOT, Harrison promised his x-wife that he would take care of their 12 year old daughter for the summer effectively removing himself from searching for a job during the summer of 2016. (N.T. 34-35, 42, 176, 204)

201. In PennDOT's March 31, 2016, supervisor's performance review of Harrison, the supervisor wrote, "I know you don't want full-time but continue to come back and help us each Winter. Thanks for a great Winter." (N.T. 41; J.E. 25)

202. At the time of the Public Hearing, Harrison was seeking full-time employment with PennDOT. (N.T. 40)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.

2. The parties have fully complied with the procedural prerequisites to a Public Hearing in this case.

3. Mathew A. Harrison is an individual within the meaning of the PHRA.

4. Lazer Spot is an employer within the meaning of the PHRA.

5. To establish a *prima facie* case of disability discrimination, Harrison must prove by a preponderance of the evidence that:

   a. He is a disabled person within the meaning of the PHRA;

   b. He is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and

   c. He suffered an adverse employment action as a result of discrimination.

6. Harrisons established a *prima facie* case of disability discrimination.

   a. Harrison established that he has a disability, PTSD.

   b. Harrison established that he was qualified to do the job of yard jockey.

   c. Harrison established that under the circumstances of this case, driving an 18 wheeler over public roads is not an essential function of the job that he was qualified.

   d. Harrison established that in February 2013, he suffered an adverse employment action in the form of Lazer Spot's denial of an accommodation and termination of him.

7. Lazer Spot articulated that Harrrison was denied an accommodation and terminated because Harrison was unable to perform a job function that Lazer Spot argues was an essential function – driving an 18 wheeler over the public roads.

8. Neither participating in cross-training that involved driving an 18 wheeler over the road nor potentially being assigned to drive an 18 wheeler over the public road is an essential function of the job.

9. Harrison has proven by a preponderance of the evidence that Lazer Spot's denial of an accommodation of his PTSD and Lazer Spot's termination of him were because of his disability.

10. Harrison established that, after Harrison requested an accommodation of his PTSD, Lazer Spot failed to engage him in a good faith interactive dialogue.

11. To establish a *prima facie* case of a retaliatory discharge, Harrison must show:

a. That he requested an accommodation for a disability;

b. That Lazer Spot was aware of Harrison's request for an accommodation;

c. That subsequent to requesting an accommodation, Harrison suffered an adverse employment action; and

d. That a causal connection exists between the request for an accommodation and the adverse action.

12. Making a request for an accommodation of a disability is a protected activity under the PHRA.

13. Harrison has established a prima facie case of retaliation.

14. Lazer Spot established that Harrison was denied an accommodation and terminated not in retaliation but because Lazer Spot acted under the inaccurate

assumption that driving an 18 wheeler over the public roads is an essential function of Harrison's job.

15. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on a complaint filed by Matthew A. Harrison (hereinafter "Harrison") against Lazer Spot, Inc. (hereinafter "Lazer Spot"), on or about July 18, 2013, at PHRC Case Number 201300300. Generally, Harrison's Complaint alleges that Lazer Spot discriminated against him because of a his disability, Post Traumatic Stress Disorder ("PTSD"), when Lazer Spot failed to provide Harrison with a reasonable accommodation and then on February 7, 2013, terminated him from his position as Yard Jockey. Additionally, Harrison claims that when he informed Lazer Spot of his PTSD, Lazer Spot failed to engage Harrison in an interactive process that would have helped make an informed assessment whether an accommodation of Harrison's PTSD could be made. Finally, Harrison claims that Lazer Spot retaliated against him after he requested an accommodation of his PTSD. Harrison's claims of failure to accommodate and termination allege violations of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA"). Harrison's retaliation claim alleges a violation of Section 5(d) of the PHRA.

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Harrison's allegations of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on June 28, 29 and 30, 2016, in York, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The state's interest in Harrison's allegations was presented at the Public Hearing by Morgan Williams, Esquire. Solomon Krevsky, Esquire was Harrison's private attorney. Michael Crocenzi,

Esquire represented Lazer Spot. Post-Hearing briefs were submitted by the parties in September 2016. Subsequently, the parties requested and were granted the opportunity to file reply briefs. Reply briefs were received in November 2016.

Section 5(a) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice…for any employer because of the…non-job-related handicap or disability…of any individual to discharge from employment…such individual…or to otherwise discriminate against such individual …with respect to compensation, hire, tenure, terms, conditions or privileges of employment,…if the individual…is the best able and most competent to perform the services required…(43 P.S. 955(a))

Sections 4(p) and 4(p.1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

> The term "non-job-related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in…

Section 4(p.1) states:

> The term "handicap or disability," with respect to a person, means:
>
> (1) a physical or mental impairment which substantially limits one or more of such persons major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment…
>
> (43 P.S. 954(p) and (p.1))

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC at 16 Pa. Code §44.4 which provide:

> *Handicapped or disabled person* - Includes the following:
>
> (i) A person who has or is one of the following:
>
> (A) A physical or mental impairment, which substantially limits one or more major life activities.

(B) A record of such impairment.

(C) Regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

(A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(C) "has a record of such impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

(16 Pa. Code §44.4)

Non-job-related handicap or disability – The term includes the following:

(i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.

(ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

(iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4)

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. See Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983) and Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 624, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The Complainant's post-hearing brief correctly observes that, absent direct evidence, to establish a *prima facie* case of disability discrimination under the PHRA, using the three-step, burden shifting analysis set forth in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), a Complainant must prove that: (1) he is a disabled person within the meaning of the PHRA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) he has suffered an adverse employment decision as a result of discrimination. Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751, 10 AD Cases 1607 (3rd Cir. 2004); and Taylor v. Phoenixville School District, 184 F.3d 296, 9 AD Cases 1187 (3rd Cir. 1999), citing Gaul v. Lucent Technologies, 134 F.3d 576, 580, 7 AD Cases 1223 (3rd Cir. 1998).

Before analyzing whether Harrison proved a *prima facie* case, we acknowledge Lazer Spot's initial assertion that, if analogous federal law and regulations are used, the PHRC should not use case law or federal regulations that reference federal standards after the passage of the Americans with Disabilities Act Amendments Act. ("ADAAA") Of course, in 2008, the ADAAA was passed making it easier for individuals with disabilities to qualify as being disabled and to obtain protection. *See Canfield v. Movie Tavern, Inc.,* 213 U.S.

Dist. LEXIS 173877 (E.D. Pa., Dec. 12, 2013). The ADAAA became effective January 1, 2009 and the EEOC finalized regulations interpreting the ADAAA on March 24, 2011.

Lazer Spot cites several Eastern District of Pa. cases in support of their argument that the PHRC should not follow the standards and analysis of the ADAAA and EEOC regulations but should follow cases and regulations applicable to the ADA. *Canfield, supra, quoting Szarawara v. County of Montgomery,* No. 12-5714, 2013 WL 3230691,*2(E.D. Pa. June 27, 2013)*;* and *Deserne v. Madlyn and Leonard Abramson Center for Jewish Life,* 2012 U.S. LEXIS 68852 (E.D. Pa., May 17, 2012). In effect, these cases state that, because the PHRA was not amended similar to the ADAAA, there should be a separate analysis of ADAAA and PHRA claims. These cases say that for federal case analogy to apply to the analysis of a PHRC claim, the cases utilized should be pre-ADAAA cases. Indeed, *Szarawara* indicates that ADA and PHRA claims were considered simultaneously "because the acts serve[d] the same goals and [were] interpreted coextensively."

However, other Eastern District cases acknowledge that there are courts that continue to treat ADA and PHRA claims as coextensive. *Wilson v. Iron Tiger Logistics, Inc.,* 62 F. Supp. 3d 412 (E.D. Pa. 2014), referencing, *McFadden v. Biomedical Sys. Corp.,* 2014 U.S. Dist. LEXIS 2363 (E.D. Pa., Jan. 9, 2014). Another court acknowledged that there is a split among courts that have addressed the issue. *See Berkowitz v. Oppenheimer Precision Products, Inc.,* 2014 U.S. Dist. LEXIS 152533 (E.D. Pa., Oct. 28, 2014).

In two more recent Middle District of Pa. cases, the opposite conclusion to Lazer Spot's assertion was declared. In the cases of *Barber v. Subway,* 131 F. Supp. 3d 321 (M.D. Pa. 2015) and *Laborde v. Mount Airy Casino,* 2016 U.S. Dist. LEXIS 150510 (M.D. Pa., Oct. 28, 2016), the courts, in effect declare that the PHRA analysis remains consistent

with that of its federal counterparts and that use of the analogous standards under the ADAAA and EEOC regulations apply. Clearly, the PHRA and the ADAAA share the common purpose of uncovering and ending disability discrimination. Accordingly, the general principle that the PHRA should be interpreted in accordance with the PHRA's federal counter part, *see Kelly v. Drexel University*, 94 F.3d 103 (3rd Cir. 1996), will be extended to interpretation of the PHRA in accord with the ADAAA.

Equally important to the overall questions in this case we find the PHRA guidance found in Section 12(a) of the PHRA. This section declares in part: "The provisions of [the PHRA] shall be construed liberally for the accomplishment of the purposes thereof…" Section 2(b) of the PHRA illuminates the general purpose of the PHRA "…to foster the employment of all individuals in accordance with their fullest capacities regardless of their …disability… and to safeguard their right to … hold employment without…discrimination, to assure equal opportunities to all individuals and to safeguard their rights … regardless of… disability…."

In analyzing the components of this case, principally, Section 12(a)'s liberal mandate will be utilized as the issues arising under the required parts of the *prima facie* showing are evaluated. We begin by observing that Lazer Spot's post-hearing brief acknowledges that EEOC regulations adopted post ADAAA list PTSD as an impairment that virtually always constitutes a disability under the ADAAA because PTSD substantially impairs an individual's brain function. Citing 29 C.F.R. §1630.2(j)(3)(iii). We also observe that Lazer Spot concedes that Harrison's PTSD qualifies as a mental impairment. Because the EEOC regulation declares that "in virtually all cases" PTSD meets the standard for what is a disability, we accept this observation.

However, because Lazer Spot submits that the PHRA should be analyzed apart from reference to the ADAAA, the first question Lazer Spot placed on the table is whether Harrison's is an individual with a disability under the meaning of the PHRA. Harrison's post-hearing brief and reply brief assert that PTSD is a disability. Lazer Spot contends that, under the facts present in this case, it is not. On this point, Lazer Spot submits that Harrison cannot establish the first requisite element of a *prima facie* case.

A combination of §4(p.1)(1) of the PHRA and 16 Pa. Code §44.4(i)(A) define the term "disability," with respect to a person, as:

> 'a physical or mental impairment which substantially limits one or more of such persons major life activities"

On this fundamental point, Lazer Spot points to pre-ADAAA cases like *Toyota Manufacturing v. Williams,* 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.,* 577 U.S. 471 (1999). In the *Toyota* case, the U.S. Supreme Court indicated that the term disability should be "interpreted strictly to create a demanding standard for qualifying as disabled." Further, the court declared that to be "substantially limited" in performing a major life activity, the impairment must prevent an individual from doing activities that are of "central importance" in most people's daily lives. The *Sutton* court severely limited the scope of the ADA by interpreting "disabled" to exclude individuals whose disability could be corrected through the use of mitigating measures. Without question, these decisions defined "disability" restrictively.

When the ADAAA was passed, the definition of a disability did not change. The words used are basically the same under the ADA, the ADAAA and the PHRA. Legislative history of the ADAAA indicates that the ADAAA was enacted to reject the narrow interpretations of disability and to reinstate a broad scope of

protection to be available to affected individuals with impairments. (H.R. Rep No. 110-730, pt. 1 at 2, 2008). It was a change in how to interpret the language not a change in the language.

What many do not know is that after *Sutton*, the PHRC specifically rejected the general principles articulated in *Sutton* and continued to maintain that mitigating measure should not be considered when determining whether an individual is disabled under the PHRA. When the ADAAA was passed to give broad coverage, the PHRC was already liberally interpreting the term "disability." Indeed, the PHRC is not bound by federal precedent if the language of the PHRA compels another result. *Harrisburg School District v. PHRC*, 466 A.2d 760 (Pa. Commw. 1983); and *Anderson v. Upper Bucks County Area Vocational Technical School*, 373 A.2d 126 (Pa. Commw. Ct. 1977). Indeed, in advance of the passage of the ADAAA, the PHRC had already recognized that the interpretation of the term "disability" did compel a more liberal approach to interpreting the term "disability."

Generally, the next thing the ADAAA did was to make it easier for an individual to qualify as disabled because the ADAAA provides a non-exclusive list of what constitutes a major life activity. In broadly defining what qualifies as a major life activity, Congress' intent was to reject the *Toyota* standard which required the impaired activity to be of "central importance" to most people's daily lives. See §2(b)(4) of the ADAAA. Under the ADAAA, an impairment limits a major life activity if it affects "… sleeping….or affects a major bodily functioning such as "… brain… functions." Both of these are implicated by this case and work to resolve that Harrison's PTSD is a "disability."

In the present case, page 13 of Harrison's Reply Brief lists 4 major life activities that, in the alternative to simply applying EEOC regulatory language to find that Harrison has a "disability," are purportedly "substantially limited" by Harrison's PTSD: (1) working; (2) social functioning; (3) nervous system autonomic arousal; and (4) sleeping. Lazer Spot challenges each of these activities suggesting that Harrison's impairment of PTSD did not substantially limit any of them.

Before taking each purported major life activity separately, we observe that Lazer Spot contends that Harrison did not consider that his PTSD was substantially limiting. Lazer Spot lists 5 reasons for its conclusion: (1) Harrison checked no on his post-hire questionnaire with Lazer Spot regarding whether he ever had a mental condition that he thought was permanent; (2) Harrison did not divulge his PTSD symptoms to KBR while working for them; (3) Harrison only went to the VA regarding his symptoms in an effort to get benefits, not treatment; (4) Dr. Kaye indicated that Harrison's symptoms are of limited impairment, narrowly circumscribed; and (5) after Harrison filed his PHRC Complaint, he completed a post-employment information form for his employer Dunbar Armor where Harrison answered "no" when asked if he has a disability.

Addressing Lazer Spot's contention, Dr. Kaye clarified that individuals like Harrison will commonly use avoidance with regard to their PTSD. Like so many returning veterans, when filling out health questionnaires, Harrison did not check that he has a mental condition because he does not like to see himself as mentally ill. Instead, Harrison sees himself as a healthy functional adult. (N.T. 330-332) Dr. Kaye testified that approximately 20% of returning veterans have varying degrees

of PTSD. Further, Dr. Kaye observed that it is not uncommon for a majority of veterans who have PTSD to not seek treatment or take medications for the PTSD symptoms they experience. Dr. Kaye explained that this situation presents a "big problem." (N.T. 358, 361). Just because Harrison may not have considered himself to have been substantially impaired in major life activities does not mean that he was not.

After several military deployments to areas of combat and two civilian tours in war torn Iraq, the Department of Veterans Affairs diagnosed Harrison with PTSD. Harrison offered that he experiences night sweats, flashbacks and sudden increases in his heart rate when operating an 18 wheeler on the public roads. The VA Doctor who saw Harrison assigned Harrison a global assessment functioning score of 50 and awarded Harrison 30% disability benefits. (J.E. 40) The VA records reveal that Harrison had "persistent sleep problems, difficulty concentrating, exaggerated startle responses, and hypervigilance. (J.E. 40) When Dr. Kaye assessed Harrison, Dr. Kaye indicated that it was his determination that Harrison has "serious symptoms" with social and occupational impairment affection. (N.T. 320, 325) In addition to the symptoms listed by the VA, Dr. Kaye added that Harrison had symptoms of autonomic arousal, nightmares, flashbacks, startle response and anxiety.

Harrison's reply brief offers that even if the ADAAA is deemed not to apply, in the alternative, Harrison should still be found to meet the definition of "disability." Harrison's reply brief begins with "working" as the "major life activity" affected by his PTSD. In *Sutton v. United Airlines, Inc*., 527 U.S. 471 (1999), the U.S. Supreme Court suggested that there was a conceptual difficulty in defining "major

life activities" to include work. Despite *Sutton*, most courts now hold that working is a major life activity. For instance, the court in the case of *EEOC v. R.J. Gallagher Co.,* 181 F.3d 645 (5th Cir. 1999) noted that "[f]or many, working is necessary for self-sustenance or to support an entire family. The choice of an occupation often provides the opportunity for self-expression and for contribution to productive society… For those of us who are able to work and choose to work, our jobs are an important element of how we define ourselves and how we are perceived by others. The inability to access the many opportunities afforded by working constitutes exclusion from many of the significant experiences in life. Without doubt, then, working is a major life activity." Other courts have shared in the conclusion that working is, without question, a major life activity. *See Greathouse v. Westfall*, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006); *Peters v. City of Mauston*, 311 F.3d 835 (7th Cir. 2002); *Torres v. Whitehall Laboratories,* 251 F.3d 236 (1st C"ir. 2001); and *Haines v. Bethlehem Lukens Plate Steel*, 2001 U.S. App. LEXIS 24678 (3rd Cir. 2001).

Fundamentally, both parties to this case agree that an individual is not substantially limited in working if there is a restriction from working a particular job. Indeed, courts and the EEOC regulations that address this issue require that the individual must be excluded from a "class of jobs" or a "broad range of jobs." 29 C.F.R. §1630.2(j).

Both Harrison's and Lazer Spot's post-hearing briefs cite the case of *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998), a case that generally involved the question of whether two truck drivers were substantially limited in the major life activity of working. In *Baulos*, one of the truck drivers claimed that his

physical impairment, a urinary tract disorder, made him unable to be part of a sleeper team and that when he requested to be transferred to single driver positions, his request was denied. The other driver claimed that he had a sleep disorder. His request for a transfer was also denied. Indeed, both drivers were eventually terminated and subsequently both found other driving jobs. In part, the *Baulos* court relied on the fact that neither driver had sufficient seniority under a collective bargaining system in ruling that their employer had not discriminated against the two drivers. More important to the question present in this case, the *Baulos* court evaluated whether the impairments of the two drivers disqualified them from a class of jobs or a broad range of jobs in various classes. Lazer Spot argues that *Baulos* is analogous to the present facts. Harrison argues the case of *Best v. Shell Oil Co*., 107 F.3d 544 (7th Cir. 1997) cited in *Baulos* is the case that is a better analogy.

In *Best*, a truck driver's injured knee made it painful for him to drive "many" of his employer's trucks. The seating configuration of many of his employer's trucks resulted in significant pain to the driver while operating a truck that had a clutch. The employer in *Best* did make several accommodations, but ultimately terminated the driver due to medical restrictions. In *Best*, the driver found employment with another trucking company where he did not experience trouble with his knee injury. The precise question posed in *Best* was " whether [the driver's] impaired knee substantially limited the major life activity of working, or if it simply prevented him from performing one narrow job for one employer."

The court in *Best* found that there was evidence presented that raised a fact issue regarding what impact the driver's knee injury had on working and found that

a jury could find that the driver's knee injury substantially limited the ability to work. The court in *Baulos* may not have found that the drivers were substantially impaired in the major life activity of working, however, the *Baulos* court, in effect, did observe that the driver's impairments were not unique like the impairment found by the *Best* court and that the driver's impairments did "not disqualify them from a similar class of truck driving jobs that did not include sleeper duty."

In this case, the symptoms of Harrison's impairment are relatively unique as they relate to leaving him unable to drive an 18 wheeler over the road without attendant potential harm. The fundamental idea that Harrison's PTSD could result in harm to either himself or others on the road clearly disqualifies Harrison from a broad spectrum of trucking industry jobs. Harrison's real work opportunities are substantially limited and his occupational base is largely reduced because of his PTSD symptoms. Accordingly, Harrison is substantially impaired in the major life activity of working.

Next, we turn to the question of whether Harrison's issues with his sleep amount to a substantial impairment of a major life activity under a pre-ADAAA analysis. Once again, Lazer Spot argues that Harrison is not substantially limited in the major life activity of sleeping. Harrison argues that the problems he has sleeping do amount to a substantial limitation on a major life activity.

First, neither Lazer Spot or Harrison argue that sleeping is not a major life activity. Indeed it is. *See MdAlindin v. County of San Diego et al*, 192 F.3d 1226 (9th Cir. 1999) *citing Pack v. Kmart Corp*., 166 F3d 1300 (10th Cir. 1999); *Colwell v. Suffolk County Police Dept*., 158 F.3d 12 (1st Cir. 1997); and Cirado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998). *See also, Greathouse v. Westfall*, 212 Fed. Appx.

379 (6th Cir. 2006); and *Simpson v. The Vanderbilt University*, 359 Fed. Appx. 562 (6th Cir. 2009).

Lazer Spot points to various cases that generally hold that difficulty sleeping is not a common problem and therefore not a limitation on a major life activity. *Ramage v. Rescot Systems Group, Inc*., 834 F. Supp. 2d 309 (E.D. Pa. 2011); *Nuzum v. Ozark Automotive Distributors, Inc*. 432 F.3d 839 (8th Cir. 2005); *Squibb v. Memorial Medical Center*, 497 F.3d 775 (7th Cir. 2007); and *Boerst v. General Mills Operations, Inc*., 25 Fed. Appx. 403 (6th Cir. 2002). These cases and others like them, present instances where courts found that a litigant's general sleep problems do not rise to the level of substantial impairment. In the case of *Simpson v. The Vanderbilt University*, 359 Fed. Appx. 562 (6th Cir. 2009), the court noted that between two to four hours sleep per night, while inconvenient, lacks the kind of severity required to say the problem qualifies as a substantial limitation on a major life activity.

Here, there is evidence that meets the severity threshold. First of all, the testimony reveals that there are nights that Harrison does not sleep at all. Additionally, the evidence reveals that Harrison's sleep is disrupted by nightmares related to his combat experiences and when startled, he often wakes up and grabs his gun then looks for the source of the sound that work him up. Also, and without question reaching the severe level, Harrison testified that at one point, he awoke to find that he was choking his wife. (N.T. 58) Accordingly, in combination with the testimony of general sleep disturbances, these added features make the situation severe enough to qualify as a substantial limitation even under a pre-ADAAA analysis.

Regarding the other 2 activities Harrison submits were substantially impaired: social functioning and nervous system autonomic arousal, there was insufficient evidence presented to conclude that under a pre-ADAAA analysis, either of these two activities were substantially impaired. Indeed, at the Public Hearing, Harrison's focus was on working and sleeping. Social functioning and nervous system autonomic arousal virtually did not become part of the disability argument until Harrison's reply brief.

In summary regarding the first element of the requisite *prima facie* showing, even using a pre-ADAAA analysis, Harrison is able to establish that his PTSD meets the PHRA's definition of "disability."

This brings us to the heart of this case – whether Harrison can, by a preponderance of the evidence, establish the second prong of the requisite *prima facie* case? Under this prong, Harrison must show that he was qualified for the job because he was able to perform the "essential functions" of the position he held, with or without accommodation. This prong of the requisite *prima facie* showing is a two-step inquiry: first whether Harrison satisfies the skill, experience, education and other job-related requirements of the job; second, whether Harrison can perform the essential functions of the job with or without reasonable accommodation.

In this case, there is no question that Harrison was qualified for the positon he held. With no difficulty, Harrison met each of the "qualification standards" established by Lazer Spot and performed his assigned duties more than satisfactorily for over a year. The question presented in this case involves the

more difficult question of whether Harrison could perform certain tasks that Lazer Spot contends are essential functions of the job.

At this juncture, Lazer Spot submits that if the PHRC finds that Harrison has a qualifying disability, then Lazer Spot argues that it was not required to eliminate what it asserts are essential functions of Harrison's job – participating in a cross-training program that involves training to do shuttle work where an employee would drive an 18 wheeler over the public roads and driving an 18 wheeler on the public road if and when assigned.

Initially, Lazer Spot asserts that the evidence present in this case shows that Harrison was capable of driving an 18 wheeler over public roads. Because Harrison was certified to hold a DOT Class A CDL and also held a valid DOT medical card, Lazer Spot argues that Harrison was capable of driving an 18 wheeler over public roads and, therefore, Harrison was not in need of an accommodation. This position is only partially accurate. Indeed, Harrison was actually capable of driving an 18 wheeler over the public roads, however, the symptoms of his PTSD made it not only unwise but outright dangerous to both himself and the public if he were to do so. This is where the request for an accommodation steps in and the question of whether either a requirement to participate in cross-training that involves driving an 18 wheeler over public roads or being subject to temporary assignment to do shuttle work are essential functions.

Lazer Spot's post-hearing brief recites a portion of EEOC's regulations with respect to factors that could be used when assessing whether a given job duty is

an essential function or not. In effect, these consistent and predictable analytical factors are:

a. The employer's judgment as to which functions are essential;
b. Written job descriptions;
c. The amount of time spent on the job performing the function in question;
d. The consequences of not requiring an employee to perform the function in question;
e. The terms of a collective bargaining agreement;
f. The work experience of past employees who held the job in question; and
g. The current work experience of employees in similar jobs.

29 C.F.R. §1630.2(n)(3).

In addition to the factors Lazer Spot referenced, the EEOC regulations also list 3 additional objective factors which include:

a. The function may be essential because the reason the position exists is to perform that function;
b. The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
c. The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. 1630.2(n)(2).

In listing both sets of factors to consider, the EEOC was clear that the items listed are not to be viewed as exhaustive. Relevant other factors can also be considered.

Turning to consideration of several of the listed factors, Lazer Spot submits that considerable deference must be given to an employer's judgment regarding what functions are essential. *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113 (2nd Cir. 2004); and *Duello v. Buchanan County Board of Supervisors*, 628 F.3d 968 (8th Cir. 2010). In fact, courts are split on how much deference to give an employer's determination of which functions are essential. Indeed, by giving too much deference to what an employer deems are essential functions would allow employers to create a screening mechanism that circumvent the very purpose of civil rights statutes which is to prohibit employers from requiring disabled employees to perform certain tasks that a full analysis would reveal are nonessential. *See Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014). In other words, we must not blindly accept Lazer Spot's conclusive assertion that driving an 18 wheeler over public roads is an essential function of working for Lazer Spot. Instead, the totality of all relevant factors must be considered on a case-by-case basis.

By way of example, one court found that selectively timed enforcement of a so-called essential function can be evidence that the function was not essential, but rather a pretext for discrimination. *See Scavetta v. King Soopers, Inc.*, 2013 W.L. 316019 (D.Colo. Jan. 28, 2013). Another court gave consideration to evidence that an employee never did a function when considering whether a particular function was essential. *See Molina v. DSI Renal, Inc*. 840 F. Supp. 2d

984 (W.D. Tex. 2012). Assessing whether a function is essential requires a broad, fact-intensive inquiry to make a proper determination of whether a function is essential.

Job descriptions are also not dispositive of what is actually an essential function. *See Rorrer supra*. and *Means v. Jowa Security Services*, 50 FEP Cases 1809 (Mich. Ct. of Appeals 1989) Also, in the case *of Samson v. Fed. Experss Corp*., 746 F.3d 1196 (11th Cir. 2014), the court stated that if a job description were conclusive, an employer could "avoid the clear congressional mandate" to make a reasonable accommodation simply by asserting that a function is essential. Here, the only job description used by Lazer Spot for positions like the position held by Harrison states as follows: " [t]he main duty of a driver is to drive Lazer Spot, Inc. equipment and move trailers in interstate commerce. In order to become a driver, you must have had a CDL for two years, have a clean MVR, be 23 years or older and be able to pass a DOT physical exam. As a CDL driver, it is the employee's responsibility to ensure the equipment is legal and in operating condition prior to and during use. Occasionally a driver will be asked to perform a yard audit. The yard audit is a secondary function of being a driver. Drivers are hired into a regional employment pool and assigned to a primary location. As a condition of employment, you are subject to work at other Lazer Spot, Inc. sites within a 100 mile radius of your primary site, and/or any site under the control of your site manager. If temporarily or permanently assigned to a site other than the employee's primary location, Lazer Spot, Inc. will reimburse the driver for any extra mileage incurred in order to report for work pursuant to applicable IRS regulations…"

While Lazer Spot's general job description speaks about drivers, in reality, there are two main functions performed by Lazer Spot employees: spotting and shuttling. The distinction between these two separate functions permeates the circumstances of whether driving an 18 wheeler over public roads was an essential function.

Factually, we begin by observing that the evidence shows that when Lazer Spot advertised the job for which Harrison applied, Lazer Spot used the term Yard Jockey, in their ad. Indeed, Lazer Spot acknowledges that it typically used the term Yard Jockey in ads for open positions. Additionally, numerous documents used by Lazer Spot do not call employees drivers, but refer to them as Yard Jockeys. Of course, yard jockeys working for Lazer Spot typically are only used to move trailers around the yards of Lazer Spot's customers. Shuttle work is typically done by employees that generally only drive customer trailers over the public roads.

The evidence in this case shows that of the 100 to 150 employees working for Lazer Spot's customers in the Carlisle area, only 30 to 40 performed shuttle work. If there were 100 employees, this leaves 60 to 70 employees available to do the spotting tasks. If there were 150 employees, this leaves 110 to 120 employees available to do the spotting tasks. Indeed, less than ½ of Lazer Spot's clients even need shuttle services. Most client operations require purely spotting services. One easily understands and appreciates an employer's need to assure there is sufficient coverage to meet all of the needs of its customers. One can also appreciate an employer's efforts to design a program that fulfills a promise given to customers to meet all of their needs. However, in this case, the fundamental

source of the answer to the question of whether driving an 18 wheeler was an essential function can be found in reviewing Lazer Spot's cross-training program.

Testimony reveals that, prior to the fall of 2012, the cross-training program in the Carlisle area had been extremely lax. At times, it simply was not even done. The area manager kept no written listing of which employees had been crossed-trained at which site and could be utilized to fill in if an employee at a given site was out for a day or longer. Cross-training was sporadic at best.

When an employee was out, temporary reassignment to varied locations normally would be done either by the area manager himself or assigned by the area manager to a lead employee from the various sites. Of course, it is important that employees become familiar with the nuances of several other sites so, if temporarily reassigned, the temporarily reassigned employee would not step into another site cold but, instead, have an idea of the requirements of a different site other than the one to which the employee was permanently assigned.

A distinction must be made regarding Lazer Spot's needs with respect to assignment of employees. First and foremost, employees are permanently assigned to a given location. Of course, when an employee is out for any reason, Lazer Spot reassigns another employee to fill in during the absence of the employee who is out. This appears to have been the normal cause of reassignment needs. Then there is the more comprehensive type of need when, for example, Lazer Spot obtains a new client or an active client has an unusual increased need. The evidence in this case shows that Lazer Spot has several clients that have seasonal needs where the work load at a given site increases for a period causing the need for additional employees to be assignment to a client

with an increased work load. There was also evidence of an atypical need in the form of a client moving their operations from one location to another. The evidence references this happening two times in the Carlisle Area: the first time was with the client Purina. Approximately 2 years before Harrison's termination, Purina moved its operations12 blocks to another location. The second atypical need occurred sometime in the fall of 2012 through the winter of 2012-2013, when Lazer Spot's client Unilever moved 43 miles to another location. Unilever was Lazer Spot's largest client.

Of course, to facilitate a client's move to another location, Lazer Spot had the need to utilize more shuttle services. Employee Lentz testified that when he first began working for Lazer Spot, he was hired as a yard jockey and assigned to the Purina location. Lentz indicated that he was asked if he was interested in doing shuttle work and he agreed because he would make more money. Initially, for 4 to 5 days, although hired as a yard jockey, Lentz assisted in the Purina move by performing shuttle work. Lentz further testified that for about a year, he was moved around to several different client sites. Then, after approximately a year with Lazer Spot, Lentz was permanently assigned to work for Lazer Spot client Americold where he became Harrison's co-worker and where neither of them performed shuttle work.

Before addressing the actions taken by Lazer Spot that surrounded Unilever's extensive move it must be noted that Lazer Spot not only had "floaters" subject to fill in for absent employees, Lazer Spot also had a crew that it could fly into a region to be used to meet unusual client needs. In instances where there

were major changes, Lazer Spot was prepared to meet evolving challenges regarding meeting its client's needs.

This brings us to the fall of 2012 when Lazer Spot's cross-training program took a dramatic turn. Indeed, it was at this time when employees who were working as spotters were informed that they would have to cross-train to do shuttle work and employees who performed shuttle work were told they would have to cross-train to do spotting work. The evidence shows that approximately ½ of Lazer Spot's work force, both spotters and shuttle operators, became upset at this change. Neither wanted to cross-train to learn and do the other type of work. (N.T. 612)

In this regard, one particular employee, Lentz, observed and then expressed his deep concern to Lazer Spot management that Lazer Spot's new cross-training program would have the negative effect of reassigning employees who had no experience working with Americold's refrigerated trailer operations into those operations while, conversely, requiring him do something he did not want to do – operate an 18 wheeler over the road. In response, the Carlisle area manager simply informed Lentz that Lazer Spot would be doing the cross-training the way they wanted to. Then when Lentz continued to express opposition, he was terminated for insubordination.

It is apparent that the rationale for adopting the new approach to cross-training that began to be implemented in the fall of 2012 was the result of the massive Unilever move. However, once the Unilever move was accomplished, reassignment of employees would likely return to reassignment to fill in for absent employees. Certainly, Lazer Spot had an increased need for shuttle services

during the Unilever move, however, the question remains, did this increased temporary need turn driving an 18 wheeler over public roads into an essential function? Also, clearly, there was not a limited number of employees that could have performed the fill in reassignments necessary to fulfill providing service to Lazer Spot's customers. Lazer Spot easily could have employees other than Harrison reassigned shuttle tasks and this would have had a negligible effect on Lazer Spot's business.

Next, we observe that in the fall of 2012, when Harrison, because of his PTSD symptoms, asked to be permitted to cross-train in a way that did not include driving an 18 wheeler over public roads, he was told it would be okay for him to cross-train at client Reckett Benckiser where shuttle services were not provided. (N.T. 128) Indeed, Mumbaure told Harrison that his issue was not a problem and that "we can work with that," and another place would be found for Harrison to cross-train. (N.T. 276-277, 462).

Lazer Spot's post-hearing brief acknowledges that in the fall of 2012, managers temporarily allowed Harrison to cross-train at locations that do not have shuttle work, however, Lazer Spot argues that driving an 18 wheeler over the public roads was still an essential function. Lazer Spot cites the cases of *Winfrey v. City of Chicago,* 259 F.3d 610 (7th Cir. 2001) and *Fey v. State of Washington,* 174 Wash. App. 435 (2013) as support of the argument that temporarily waiving performance of an essential function does not transform the function into something less than essential. This argument is similar to Lazer Spot's argument that just because Harrison never had to drive an 18 wheeler over the public roads, does not mean that the function is not essential.

On this point, Lazer Spot cites the cases of *Dropinski v. Douglas County, Nebraska,* 298 F.3d 704 (8th Cir. 2002); *Knutson v. Schwan's Home Service, Inc.*, 711 F.3d 911 (8th Cir. 2013); and *Fey v. State of Washington, supra*. In each of these cases, individuals either never performed a particular function or seldom performed a listed function. In the particular circumstances of each instance, the functions not performed were found to be essential. Jobs must be viewed not in isolation but in context of actual work environments. In the EEOC's listing of factors, the amount of time spent performing the function is a consideration. Here, the evidence shows that, until the dramatic change in the cross-training program expectations, Harrison had not ever been required to driver an 18 wheeler over the public roads.

On this point, another court declared that the most important indication of what constitutes essential functions of a job is what duties are actually performed. *See Gillen v. Fallon Ambulance Service, Inc*., 283 F.3d 11 (1st Cir. 2002). The term "essential" refers to fundamental not marginal tasks that are only tangentially related to day-to-day tasks. The question to ask is what is the purpose of the job? Also, what is the core function necessary to achieve the desired results? Looking to what a positon actually requires better illuminates whether a function is essential or not. *See Pandazides v. Virginia Board of Education*, 946 F.2d 345 (4th Cir. 1991). Further, the task of driving 18 wheelers over public roads is certainly not highly specialized requiring Harrison's expertise. Lazer Spot had shuttle employees who already had the expertise necessary to perform this function.

Another EEOC factor suggests that consideration be given to what are the consequences of not requiring Harrison to either drive an 18 wheeler in a cross-

training scenario or over the public roads. The answer to this question is simple. There would have been no adverse consequences to have removed this requirement from Harrison's duties. Numerous individuals that offered testimony were asked this question and no one could offer any example of an adverse consequence of exempting Harrison from driving 18 wheelers over public roads. Clearly, Lazer Spot was able to easily meet the desired result of providing quality service to all of its customers by assigning shuttle services to the multitude of other employees and exempting Harrison. The Carlisle area manager clearly had the concern that it is better to keep his employees happy. Instead, literally ½ of the employees became unhappy when the new standards were announced.

Also, essential functions closely relate to an employee's on-the-job performance. Here, Harrison was more than adequately performing yard jockey duties for Lazer Spot. Evidence showed that other Lazer Spot employees only stayed employees of Lazer Spot a relatively short time. Lazer Spot had, what many would consider, a serious employee turnover rate. On the other hand, Harrison was recognized to be a long term valuable employee whose evaluation touted him as potentially an employee to be promoted to a lead position.

In this case, a final factor closes the door on Lazer Spot's assertion that driving 18 wheelers over the road was an essential function. Here, the simple fact is that Lazer Spot had employees who were exempt from the more rigorous cross-training program. Lazer Spot had several customer sites that were generally described as "remote isolated" sites. Employees at those sites would never be required to drive 18 wheelers over the road. Generally, to be an essential function, a duty must be required of all employees. *Simon v. St. Louis County, Mo*, 656 F.2d

316 (8th Cir. 1981). Here, Lazer Spot cannot say that driving an 18 wheeler over public roads is mandatory for one employee and not others.

Considering the totality of the circumstances regarding spotting and shuttle duties actually performed by Lazer Spot employees, neither the requirement of cross-training that would include driving an 18 wheeler over public roads nor being potentially assigned duties of driving an 18 wheeler over public roads are deemed essential functions of the job Harrison held. Those functions are not fundamental but deemed marginal.

In summary, Harrison has successfully established the second element of the requisite *prima facie* showing. Accordingly, we move to the third element of the requisite *prima facie* showing.

Without opposition, the facts present in this case clearly reveal that Harrison's request for an accommodation was denied and that he was terminated after Lazer Spot concluded that, if asked, he would refuse to drive an 18 wheeler over the public roads. Thus, the denial of an accommodation and his termination are adverse employment actions suffered by Harrison sufficient to establish the requisite third *prima facie* element.

At this point, Lazer Spot's articulated reason for denying Harrison an accommodation and terminating him merge with the question of whether Lazer Spot failed to engage Harrison in an interactive process. Harrison argues that, once Harrison revealed that he needed an accommodation, Lazer Spot utterly failed to engage in an interactive dialogue. Conversely, Lazer Spot rested its argument on the idea that if a function is essential and an employee is unable to perform the function, no interactive process is necessary.

On this point, we have now concluded that Lazer Spot was not correct in relying on the fundamental premise that driving an 18 wheeler over the public roads was an essential function. Accordingly, Lazer Spot should have engaged Harrison in an interactive dialogue. Indeed, Lazer Spot was "required" to take the initiative to engage Harrison in dialogue designed to learn more about the impact of his PTSD and whether Harrison could have been reasonable accommodated. *See Canteen Corporation, Divison of Compass Group v. PHRC*, 814 A.2d 805 (Cmwlth Ct. 2003), see also *Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999). Of course, Lazer Spot failed in its obligation.

Here, for example, had there been the required dialogue, Lazer Spot would have learned that Harrison could have partially done shuttle work by driving the Ottawa instead of a day cab. It was only the configuration of truck and trailer that results in an 18 wheeler that would have been the "trigger" for Harrison's PTSD.

Here, Lazer Spot is found liable for three things: failure to accommodate Harrison; terminating Harrison because of his PTSD; and failure to engage Harrison in the required interactive process.

We now turn to Harrison's final claim – he was terminated in retaliation for requesting an accommodation. To establish a *prima facie* case of a retaliatory discharge, Harrison must prove by a preponderance of evidence that: (1) he requested an accommodation for his disability, PTSD; (2) Lazer Spot was aware that Harrison had requested an accommodation; (3) Harrison suffered an adverse employment action; and (4) a causal connection exists between the request for an accommodation and the adverse action. *Uber v. Slippery Rock University*, 887

A.2d 362 (Pa. Commonwealth Ct. 2005), *See also, Marra v. Phila. Housing Authority,* 497 F.3d 286 (3rd Cir. 2007).

First, in prior cases, the PHRC has relied on the sound rational found in the cases of *Shellenberger v. Summit Bancorp.*, 318 F.3d 183 (3rd Cir. 2003) *and Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3rd Cir. 2010), to support the finding that requesting an accommodation of a disability is protected and can form the basis of protected activity to support a retaliation claim under the PHRA. The reasoning of these cases is considered sound and will once again be adopted here. Additionally, Lazer Spot acknowledges this principle and cites additional support found in *Williams v. Philadelphia Housing Authority Police Dept.*, 380 F.3d 751, 759 n.2 (3rd Cir. 2004).

Here, Harrison has no difficulty establishing each element of the requisite *prima facie* case. He requested an accommodation of which Lazer Spot was aware, and he was terminated very soon after making the request for an accommodation. However, the evidence in this case is clear. Harrison's employment was not terminated because he requested an accommodation. His employment was terminated because Lazer Spot believed that Harrison would refuse to perform a function that Lazer Spot incorrectly deemed to be an essential function. Fundamentally, the record is clear, this is the reason Harrison was terminated. Accordingly, Harrison's retaliation claim should be dismissed.

Because we find Lazer Spot liable for failing to reasonably accommodate Harrison's PTSD and terminating Harrison because of his disability and for failing to engage Harrison in the required interactive process, we move to consideration of an appropriate remedy.

The PHRC has broad equitable power to fashion relief. Section 9(f) of the PHRA provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement…with or without back pay…and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice…as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

In *Murphy v. Cmwlth. Pa. Human Relations Commission*, 506 Pa./ 549, 486 A. 2d 388 (1985), the Pennsylvania Supreme Court commented on the extent of the Commission's power by stating; "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." The expertise of the Commission in fashioning a remedy is not to be lightly regarded. The only limitation upon the Commission's authority is that its award may not seek to achieve ends other than the stated purposes of the Act. *Consolidated Rail Corp. v. PHRC*, 136 Pa. Commonwealth Ct. 147, 152 A.2d 702, 708 (1990).

The function of the remedy in employment discrimination is twofold. First, the remedy must insure that the Commonwealth's interest in eradicating unlawful discrimination is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which required the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. It's purpose is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *PHRC v. Alto-Reste Park Cemetery Association*., 306 A.2d 881 (Pa. S. Ct. 1973). The remedy should also discourage future discrimination. *Williamsburg Community School District v. PHRC*, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

With respect to entitlement to individual relief, several matters must be addressed. The first aspect we must consider regarding making Harrison whole is the issue of the extent of financial losses suffered. When Complainants prove an economic loss, back pay should be awarded absent special circumstances. See *Walker v. Ford Motor Company, Inc*., 684 F2d 1355, 29 FEP Cases 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the Complainant] would probably have earned…" *PHRC v. Transit Casualty Insurance Co*., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff'd. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Pettway v. American Cast Iron Pipe Co. 494 F.2d 211 (5th Cir. 1974), and *Green v. USX Corp*., 46 FEP Cases 720 (3rd Cir. 1988).

Initially, we turn to wages lost as a result of Harrison's termination. On the question of lost earnings, at the time of Harrison's termination on February 7, 2013, he was working 50 non-overtime hours per week, earning $16.00 per hour. Accordingly, Harrison was earning $800.00 per week.

This weekly figure can be used to calculate the amount of earnings lost from the date of Harrison's termination until June 29, 2016, the date of the Public Hearing of this matter. The calculations of Harrison's lost earnings from February 7, 2013 until June 29, 2016 are as follows:

2013 - $800.00 per week x 46.5 weeks =	$37,200.00
2014 - $800.00 per week x 52 weeks =	$41,600.00
2015 - $800.00 per week x 52 weeks =	$41,600.00
2016 - $800.00 per week x 25.5 weeks =	$20,400.00
Total lost earnings Feb 7, 2013 – June 29, 2016 =	$140,800.00

Initially, Lazer Spot observes that following his termination, Harrison received unemployment compensation benefits in the amount of $12,212.00. Lazer Spot submits that the PHRC has discretion with regard to whether to deduct such benefits and suggests that, under the circumstances of this case, it is appropriate to deduct this amount from any award. Here in the Third Circuit, courts have carved out what has come to be known as the "collateral source rule." Under the collateral source rule, payments under Social Security, unemployment compensation and similar programs are normally treated as collateral benefits which would not ordinarily be set off against damage awards. *See Craig v. Y&Y Snacks, Inc*. 721 F.2d 77 (3rd Cir. 1983); and *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 38 FEP Cases 442 (3rd Cir. 1985). Applying the collateral source rule to this case, unemployment compensation amounts Harrison received will not be deducted.

Harrison's lost wages must now be adjusted by subtracting his interim wages. During the public hearing, Harrison offered testimony that he attempted in a reasonable

and diligent manner to mitigate his damages. Additionally, the burden to establish a failure to mitigate rests with a Respondent. *Booker v. Taylor Milk Co., Inc.,* 64 F.3d 860 (3rd Cir. 1995); *Wheeler v. Snyder Buick, Inc*. 794 F.2d 1228 (7th Cir. 1986); and *Williamson v. Watco Cos*., 110 FEP Cases (W.E. La. 2010).. To establish a failure to mitigate, an employer has the burden to present evidence that (1) substantially equivalent work was available in the relevant geographical area, and (2) that the Complainant did not exercise reasonable diligence to obtain the employment. Here, Lazer Spot attempts to show that Harrison failed to mitigate his damages in several respects.

First, Lazer Spot observes that the second job Harrison found after he was terminated was with Kloeckner Metals. In 2014, Harrison was hired full-time by Kloeckner as a forklift operator where he earned approximately $18.00 per hour. Lazer Spot's post-hearing brief calculated that Harrison, working a 40 hour week with Kloeckner, would have earned $720.00 per week, however, the evidence shows that Harrison, if fear of being terminated, voluntarily resigned from his position with Kloeckner in February 2014. Further, at the time of his resignation, Kloeckner wanted to offer Harrison another position with Kloeckner but Harrison declined the offer. Lazer Spot argues that this circumstances amounts to a failure to mitigate his damages.

In response, Harrison observes that the job at Kloeckner was not substantially equivalent employment to the job he held with Lazer Spot. In fact, the Kloeckner job was very different. The evidence in this case shows that Harrison diligently looked for alternate employment but could not find a job compatible with what he had done for Lazer Spot. Harrison cites the case of *Tomasso v. Boeing Co*., 2007 U.S. Dist. LEXIS 62492 (E.D. Pa.) in which the court noted that "generally, a plaintiff may satisfy the

reasonable diligence requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing and available to accept employment. *See also Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). Here, the evidence shows that Harrison submitted numerous resumes and applications with computer search engines. He reviewed newspapers and local periodicals for job opportunities. He ultimately first became employed after continually searching following his termination in September 2013 and up to the point Harrison returned to the school environment, he was consistently attached to the job market.

As for Harrison's voluntary resignation from Kloeckner, the evidence reveals that Harrison was having difficulties with assignments he was asked to do. As Harrison indicates, no evidence was produced by Lazer Spot to establish that the job with Kloeckner was suitable or comparable to his job at Lazer Spot or that Harrison did not have good cause to resign and not take another positon offered. Lazer Spot has not proven that the evidence regarding Harrison's difficulty working for Kloeckner and not accepting alternate employment with Kloeckner rises to the level of having failed to mitigate. Accordingly, it cannot be said that Harrison's experience with Kloeckner shows a failure to mitigate.

Lazer Spot then argues that from August 5, 2014 to May 34, 2015, Harrison chose to attend York Technical Institute to learn basic electrician skills. Lazer Spot cites the case of *Keller v. Connaught, In*c. No.96-177, 1977 WL 56925 at *4 (E.D. Pa., February 10, 1997), and argues that during this period of schooling, no back-pay should be allowed due to lack of mitigation and the fact that the schooling was not designed to lead to employment in a comparable field.

The case cited by Lazer Spot is an unreported case and therefore lacks precedential value. Despite this weak argument, the *Keller* case is distinguishable in several fundamental ways. First, in *Keller*, the Complainant failed to exhaust all comparable job options before enrolling in school. On this point, once again, Lazer Spot has the burden to show that Harrison did not exhaust the search for comparable jobs. The evidence on this point comes from Harrison who indicated that he continually sought employment after his termination. All Lazer Spot offered is that Harrison attended school. This fails to meet Lazer Spot's burden to establish by a preponderance of the evidence that there were available comparable jobs and that Harrison failed to use reasonable diligence to secure a job. *See Orr v. Mukasey*, 631 F. Supp 2d (D.P.R. 2009). Next, the Complainant in *Keller* embarked on an extensive multi-year educational program that would lead to law school. Here, in comparison, Harrison attended a relatively short trade school. Next, the opportunities available to Harrison were significantly reduced given his PTSD. He would have been unable to drive any 18 wheelers over public roads. Given this limitation, it was not unreasonable for Harrison to consider a career change. Added to this is the simple fact that Harrison's education would have been paid for by the VA. Not having to pay to attend a trade school is a significant motivator. For these reasons, Harrison should not be found to have failed to mitigate by attending school.

Next, Lazer Spot points to Harrison's seasonal position with PennDOT that began on October 5, 2015 and paid $17.04 per hour for 38 hours per week. Lazer Spot points to a comment in Harrison's supervisor's performance review of Harrison where the supervisor stated "I know you don't want full-time but continue to come back and

help us each Winter. Thanks for a great Winter." Lazer Spot suggests that once again, Harrison failed to mitigate his damages by not pursuing full-time employment.

Finally, Lazer Spot argues that Harrison, in effect, removed himself from searching for work for the Summer of 2016. Harrison revealed that he neither looked for or wanted to work the Summer of 2016 because Harrison had promised his ex-wife that he would take care of their 12 year old daughter for the Summer.

Of the areas argued by Lazer Spot as failures to mitigate, only Harrison's removal from searching for a job during the Summer of 2016 will be viewed as an instance of failure to mitigate. Accordingly, no back pay award is appropriate for the period April 29, 2016 through September 2016. This amounts to $6,400.00 which is an amount to be deducted from Harrison's back pay calculations.

Amounts earned by Harrison during the period February 7, 2013 until June 29, 2016 are calculated as follows:

Employment with Dunbar Armor	- 2013	=	$6,028.91
Employment with Kloeckner	- 2014	=	$2,908.62
Employment with Berks & Beyond and Bridgewater Wholesale, Inc.		=	$2,311.59
Employment with PennDOT	- 2015	=	$5,391.56
Employment with PennDOT	- 2016	=	$13, 395.09
Total mitigation earnings		=	$30,035.77

Given these calculations, Harrison total lost earnings are calculates as follows:

Lost wages following termination	= $140,800.00
Minus earnings in mitigation	= $30,035.77
lost earnings	= $110,764.23

Minus an amount equal to the period Harrison		
effectively removed himself from the job market	=	$6,400.00
Total Lost Earnings		$104,364.23

In addition to lost wages, Harrison testified that he incurred medical expert fee expenses in the amount of $10,750.00. Additionally, Harrison incurred expenses serving subpoenas on witnesses in the amount of $130.00. Accordingly, Harrison should also be awarded $10,880.00 as expenses incurred in pursuit of this claim.

Harrison presented no evidence that when terminated he lost benefits. Harrison did not elect to receive health or dental benefits and there was no evidence of a retirement plan that was affected by his termination. Accordingly, no award with respect to benefits is appropriate.

Additionally, the PHRC is authorized to award interest on the back pay award at the rate of six percent per annum. *Goetz v. Norristown Area School Dist.,* 328 A.2d 579 (Pa. Cmwlth. Ct. 1975).

The remaining issue in this case regarding fully rectifying the harm caused by Harrison's termination is to order reinstatement into a substantially equivalent position similar to the positon Harrison held before his termination. Further, it is appropriate to order front pay until such time as an unconditional offer of reinstatement is made. *See Pollard v. E.I. du Pont de Nemours & Co*., 532 U.S. 843 (2001).

Here, for multiple reasons, Lazer Spot may be unable to reinstate Harrison into a substantially equivalent position as yard jockey at the Americold customer site. In such event, Lazer Spot should be required to pay Harrison the difference between what he would have earned with Lazer Spot and his gross earnings from jobs he works in furtherance of his obligation to mitigate his damages. In the event Harrison is offered

unconditional reinstatement and rejects such an offer, at that time, all front pay obligations should cease.

Deeming front pay an appropriate award, Harrison should be paid the difference between what he has earned since September 2016 until the present and what he will earn in the future. September is the month selected because, as previously indicated, Harrison removed himself from the job market for the summer of 2016. If Harrison is not offered reinstatement, the front pay award should continue for a period of 2 years from the date of this order. *See ie EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 913 (S.D.N.Y. 1976), *aff'd,* 559 F.2d 1203, *cert dinied,* 434 U.S. 920 (1977) and; *Daniels v. Essex Group, Inc.*, 740 F.Supp. 482 (N.D. Ind. 1990). This is consistent with the Lazer Spot employee general retention figure of 22 months.

Initially, within 30 days of the date of this Order, Harrison should be required to report to Lazer Spot the amount of his gross earnings from September 2016 and the date of this Order. Then, within 30 days of Lazer Spot's receipt of Harrison's initial report, Lazer Spot should be required to pay Harrison the amount Harrison would have received if he would have been working for Lazer Spot, less the amount of gross earning Harrison received in the relevant time period.

Subsequently, beginning six months after this Order, and then on a semi-annual basis for a 2 year period, Harrison should be required to report to Lazer Spot the amount of his gross earnings for the previous six month period. Then within 30 days of Lazer Spot's receipt of such semi-annual report, Lazer Spot should be ordered to pay Harrison the amount of gross earnings he would have received as a Lazer Spot employee minus the amount of gross earnings he actually made during the relevant six month period.

At all times, Harrison should be required to continue to make good faith efforts to secure comparable employment in mitigation of his damages.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MATTHEW A. HARRISON,	:	
Complainant	:	
	:	
v,	:	**PHRC CASE NO. 201300300**
	:	**EEOC CHARGE NO. 17F201361622**
LAZER SPOT, INC.,	:	
Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Harrison has proven he was discriminatorily denied an accommodation of his disability, PTSD, and terminated because of his disability in violation of Section 5(a) of the PHRA. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, the Permanent Hearing Examiner further recommends issuance of the attached Final Order

PENNSYLVANIA HUMAN RELATIONS COMMISSION

_____
Date

By:_____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MATTHEW A. HARRISON,	:	
Complainant	:	
	:	
v,	:	**PHRC CASE NO. 201300300**
	:	**EEOC CHARGE NO. 17F201361622**
LAZER SPOT, INC.,	:	
Respondent	:	

FINAL ORDER

AND NOW, this _____ day of _____, 2017 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby.

ORDERS

1. That Lazer Spot Inc. shall cease and desist from denying reasonable accommodations to employees with disabilities.
2. That Lazer Spot Inc. shall cease and desist from terminating employees because of their disabilities.

3. That Lazer Spot Inc. shall pay Harrison the lump sum of $104,364.23 which amount represents lost earnings between February 7, 2013 and June 29, 2016.
4. That Lazer Spot Inc. shall pay additional interest of 6% per annum on the award in paragraph 3 above, calculated from February 7, 2013, until payment is made.
5. That Lazer Spot Inc. shall reimburse Harrison $10,880.00, which amount represents expenses incurred by Harrison to pursue his PHRC Complaint.
6. That Lazer Spot shall offer to reinstate Harrison into a yard jockey position.
7. Within 30 days of the date of this Order, Harrison shall report to Lazer Spot the amount of his gross earnings from September 2016, until the date of this Order. Upon Lazer Spot's receipt of this report, within 30 days, if Harrison's earnings were less that the earnings he would have made as a Lazer Spot employee, Lazer Spot shall pay Harrison an amount equal to the difference between his gross earnings during this period and what he would have earned as a Lazer Spot employee.
8. Unless and until Lazer Spot reinstates Harrison, beginning six months after the date of this Order, and for a period of two years, Harrison shall file semi-annual reports to Lazer Spot which indicate the gross amount of earnings Harrison had during the previous six month period. Upon receipt of these reports, and if the amount earned by Harrison was less than her would have earned as a Lazer Spot employee, Lazer Spot shall pay to Harrison the amount of the gross earnings he would have earned with Lazer Spot minus Harrison's gross earnings during the relevant six month period.

9. If Lazer Spot offers Harrison reinstatement and Harrison refuses such an offer, at that time, all front pay obligations shall cease.

10. If Lazer Spot fails to reinstate Harrison during the two year period after the date of this Order, Harrison shall continue to make diligent efforts to find comparable work.

11. That, within thirty days of the effective date of this Order, That Lazer Spot Inc. shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Morgan Williams, Esquire, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 301 5th Avenue, Suite 390, Piatt Place, Pittsburgh, PA 15222.

PENNSYLVANIA HUMAN RELATIONS COMMISION

By: _____
M. Joel Bolstein, Esquire
Interim Chairperson

Attest:

_____
Dr. Raquel O. Yiengst
Vice Chairperson