COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT DuBOISE, Complainant	:	
v,	:	PHRC CASE NO. 201402679 EEOC CHARGE NO. 17F201560857
ARROWHEAD LAKE COMMUNITY ASSOCIATION, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. Robert DuBoise, (hereinafter "DuBoise"), a high school graduate, without a college degree, was born on August 21, 1957. (N.T. 19; R.E. 1)
2. While serving in the U.S. military in the mid-70's, DuBoise injured his lower back causing pain, sciatic nerve damage and limited movement of his lower extremities. (N.T. 55, 56, 126)
3. The back injury resulted in 2 spinal fusions and an eventual surgery on DeBoise's left shoulder. (N.T. 58, 102)
4. Since incurring the back injury, DuBoise has consistently been on medications. (N.T. 146)
5. In October 1999, DuBoise was hired by Arrowhead Lake Community Association, (hereinafter "Arrowhead"). (N.T. 126)
6. Arrowhead is a private gated community situated on 3 square miles. (N.T. 45)
7. There are approximately 2,500 homes and 4,000 lots at Arrowhead.. (N.T. 45)
8. Amenities at Arrowhead include: 2 lakes; 4 beaches; 6 swimming pools; and approximately 9 playgrounds. (N.T. 45)

* 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
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

9. Arrowhead also has approximately 49 miles of roadways that are owned by Arrowhead: 12 are paved and 29 are dirt roads. (N.T. 44, 133)
10. Lot owners pay dues to Arrowhead which is run by 9 members of a Board of Directors. (N.T. 44, 134)
11. When DuBoise was hired in 1999, his position was Director of Maintenance over 2 departments; Roadway and Surface Water Drainage Maintenance Department; and Facilities Maintenance Department. (N.T. 128)
12. In 2012, Arrowhead split the duties of the Director of Maintenance between 2 Directors, one of which was assigned to DuBoise – the Roads and Ditches Director. (N.T. 128)
13. As the Roads and Ditches Director, DuBoise's duties included maintenance of the roads and equipment, operating plow trucks, graders and a backhoe, interfacing with vendors, cutting grass, making application for permits, and interacting with homeowners about their complaints and concerns with the roads and ditches. (N.T. 20, 44, 65, 103, 136)
14. The Roads and Ditch Director position was designed to have both physical and non-physical components. (N.T. 20)
15. It was expected that the Roads and Ditch Director's time would be spent doing physical things 70% of the time and non-physical tasks 30% of the time. (N.T. 20)
16. Effectively, DuBoise was a working foreman who worked along with 2 maintenance workers assigned to be on his crew. (N.T. 46)
17. DuBoise's salary for the position of Roads and Ditch Director was between $60,000.00 and $65,000.00 per year. (N.T. 23)

18. After the Maintenance Director job was split, the 2 new Directors had less non-physical tasks to perform. (N.T. 128)

19. In approximately 2002 or 2003, DuBoise made Arrowhead aware of his prior injury and that he is a disabled veteran. (N.T. 58, 126)

20. DuBoise never requested an accommodation with regard to his prior injury. (N.T. 146)

21. When DuBoise's prior injuries flared up, DuBoise would perform the non-physical tasks of his position until he felt better and could do the physical tasks. (N.T. 58)

22. Arrowhead's 2 Directors were under Arrowhead's General Manager, Lonnie Howard, (hereinafter "Howard"). (N.T. 41)

23. Howard answered directly to the President of Arrowhead's Board of Directors. (N.T. 44)

24. On Columbus Day, October 14, 2013, DuBoise and one of his employees were working the holiday. (N.T. 19, 20)

25. At the time, DuBoise was a 13 year employee of Arrowhead. (N.T. 19)

26. DuBoise had driven a loaded dump truck to a dump site that was several miles from the site where he and his employee had been working. (N.T. 22, 130)

27. DuBoise encountered difficulty closing the tailgate and in the process, DuBoise slipped and fell backwards injuring his right shoulder and neck. (N.T. 22)

28. After failing, DuBoise kept working driving the truck back to the job site. (N.T. 130-131)

29. The next day, DuBoise went to work but experienced physical difficulty. (N.T. 132)

30. DuBoise reported the injury to another manager following the workers compensation protocol. (N.T. 132-133)

31. DuBoise had injured Cervical vertebrae 3/4, 5/6, and 6/7 and T 1 and 2 along with his right shoulder. (N.T. 139-140)

32. DuBoise was off work until June 3, 2014. (N.T. 23)

33. While DuBoise was out of work, he received medical attention from his family doctor, Dr. Edward Carey, and a Neurologist. (N.T. 24 and 25)

34. DuBoise rested, received physical therapy, and took medications. (N.T. 24, 26)

35. DuBoise also underwent diagnostics with MRIs and EMGs. (N.T. 26)

36. While out between October 2013 and June 3, 2014, DuBoise received workers' compensation payments from Arrowhead's insurance carrier. (N.T. 74)

37. After speaking with Dr. Carey, Dr. Carey released DuBoise to return to work and provided DuBoise with a Doctor's note which reads, "this patient may return to work 6/3/14. Off since 10/12/14 (sic) Neck and back pain. (N.T. 26, 50, 52, 140: R.E. 2)

38. DuBoise returned to work on June 3, 2014 anticipating that he would return to the position of Roads and Ditches Director. (N.T. 27, 31)

39. DuBoise spoke to General Manage Howard upon returning to work on June 3, 2014. (N.T. 27, 253)

40. When DuBoise asked to be returned to his Director position, Howard informed DuBoise that his position had been eliminated and that there was only a maintenance worker position available. (N.T. 28; R.E. 1)

41. DuBoise testified that he felt that he would be able to do the Director's job "to a point." (N.T. 33)

42. It was worked out that DuBoise was to return at an hourly rate of pay equal to the salary he made as Roads and Ditches Director. (N.T. 23)

43. DuBoise was shocked and surprised and became so upset that he asked if he could begin the next day. (N.T. 153, 154; R.E. 1)

44. DuBoise did not express concern about any physical limitations at the time as he did not know what tasks Howard would assign him. (N.T. 154)

45. When DuBoise did come to work, he and another maintenance worker DuBoise had previously hired, Scott Hamil, were assigned to install speed bumps. (N.T. 31, 46, 137, 142-143)

46. The installation of speed bumps involves drilling a hole into the road surface with a hammer drill and then driving numerous 1 inch spikes through the speed bump into the roadway using a sledge hammer. (N.T. 31, 32)

47. After returning to work, DuBoise was also assigned other jobs that involved bending and heavy lifting, ie, pulling tires off of trucks, removing generators and using a pick axe. (N.T. 32, 58-59)

48. Installing speed bumps, repairing potholes and maintaining equipment are the types of tasks for which DuBoise was responsible as Director of Roads and Ditches. (N.T. 124)

49. Doing the heavy lifting and bending caused DuBoise's neck and shoulder to spasm. (N.T. 33)

50. On June 12, 2014, DuBoise went to Dr. Carey who provided DuBoise with a note which read, "This patient cannot do heavy physical work."). (N.T. 33, 144; C.E, 1)

51. On June 13, 2014, DuBoise gave Dr. Carey's June 12, 2014 note to Howard. (N.T. 36)

52. DuBoise testified that Howard did not sit with DuBoise to go over what DuBoise could do and the non-physical parts of the Roads and Ditches Director position were not offered to DuBoise. (N.T. 36, 38)

53. Howard simply informed DuBoise that there was no work other than the maintenance person position. (N.T. 48)

54. DuBoise testified that Howard told him, "well, I really didn't think you could do it anyway.". (N.T. 41)

55. Because DuBoise was unable to do the physical work assigned, he left. (N.T. 48)

56. For the first month after leaving, DuBoise did not get medical treatment. (N.T. 49)

57. DuBoise's attorney then suggested that DuBoise see a doctor. (N.T. 49)

58. Subsequently, DuBoise saw Dr. Carey who recommended that DuBoise see a pain management doctor for injections. (N.T 50)

59. DuBoise also received massages, physical therapy and chiropractic treatments 3 times a week for 1 ½ years. (N.T. 51)

60. Eventually, DuBoise had shoulder surgery on his right shoulder in May 2015. (N.T. 53, 102)

61. To this day, DuBoise continues to have daily neck pains and spasms. (N.T 54)

62. DuBoise continues to take the pain medications vicoden and xanax as needed. (N.T. 57)

63. DuBoise testified that he was unable to do the physical demands of the job at Arrowhead. (N.T. 58)

64. DuBoise's efforts to mitigate any damages were minimal as DuBoise made blind applications on Monster.Com for only 2 jobs since leaving Arrowhead. (N.T. 60, 61)

65. Initially, DuBoise only looked for Maintenance Director positions with private communities similar to Arrowhead. (N.T. 60)

66. DuBoise did not attend job fairs, contact friends and acquaintances, take civil service tests, take retraining or career link programs, attempt to learn a new skill, or try to start his own business. (N.T. 91-92)

67. DuBoise did apply for and receive 26 weeks of unemployment compensation at the rate of $500.00 per week. (N.T. 61-80)

68. In May 2015, DuBoise also applied for social security indicating that he is totally disabled. (N.T. 108-110)

69. After leaving Arrowhead, DuBoise applied to reinstate workers' compensation. (N.T. 70-73; C.E.2)

70. On May 5, 2016, DuBoise settled his workers' compensation claim for $200,000.00. (C.E. 2)

71. DuBoise received $160,000.00 of the settlement and his attorney received $40,000.00. (N.T. 111-112; C.E. 2)

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.

3. Robert DuBoine is an individual within the meaning of the PHRA.

4. Arrowhead Lake Community is an employer within the meaning of the PHRA.

5. To establish a *prima facie* case of disability discrimination, DuBoise 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. The determination of whether an individual with a disability is "qualified" is divided into a two part analysis: whether (1) the individual satisfies the requisite skill, experience, education and other job requirements of the employment position; and (2) with or without reasonable accommodation, the individual can perform the essential functions of the position.

7. Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires.

8. Although it was his burden to do so, DuBoise failed to establish that he is otherwise qualified to perform the essential functions of the job.

9. A job function may be considered essential for reasons including: (1) the reason the position exists is to perform that function; (2) the limited number of employees available to perform the job function; and (3) the amount of time spent on the job performing the function.

10. When a Complainant requests an accommodation both the employer and the employee share the responsibility to engage in an informal interactive process which would help identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.

11. A Complainant that argues that an employer failed to participate in the interactive process must demonstrate the following: (a) The employer knew about the disability; (b) the Complainant requested an accommodation for his disability; (c) the employer did not make a good faith effort to assist the Complainant in seeking an accommodation; and (d) the Complainant could have been reasonably accommodated.

12. Both DuBoise's June 3, 2014 and June 13, 2014 requests to be assigned to perform only the managerial tasks of his prior Director's position were essentially requests that Arrowhead remove an essential function of either the Director's position or the position or maintenance worker to which DuBoise was assigned.

13. An employer is not required to eliminate or reallocate an essential function of a job.

14. Performing physical tasks is an essential function of both the Director position DuBoise previously held and the position to which DuBoise was assigned upon his return to work on June 3, 2014.

15. The requisite interactive process requires a continuing obligation and good faith mutual cooperation.

16. Employers are not required to engage in a futile interactive process.

17. A combination of DuBoise uncompromisingly insisting on the single accommodation of assigning him only managerial non-physical tasks and leaving when Arrowhead would not create a position where DuBoise would only perform non-physical tasks made DuBoise responsible for the breakdown in the interactive process.

18. DuBoise failed to establish that he was constructively terminated.

19. DuBoise failed to sufficiently seek alternative employment after leaving the employ of Arrowhead.

20. Monies paid as settlement of a workers' compensation claim would be offset from any PHRC award. *See McKenna et al v. City of Philadelphia,* 636F. Supp. 2d 446 (E.D. Pa. 2009) *citing Russell v. Bd. of Pub. Ed.,* 2009 W.L. 689058 (W.D. Pa. March 11, 2009); *McLean v. Runyon,* 222 F.3d 1150 (9th Cir. 2000).

21. A Complainant who certifies to the Social Security Administration that they are totally disabled is not precluded from claiming that they are able to perform the essential functions of a job as long as they are given a reasonable accommodation. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361 (11th Cir. 1999) and *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

OPINION

This case arises on a complaint filed by Robert DuBoise (hereinafter "DuBoise") on December 16, 2014, against Arrowhead Lake Community Association (hereinafter "Arrowhead"). DuBoise subsequently filed an Amended Complaint on or about March 26, 2015, at PHRC Case Number 201402679. Generally, DuBoise's Amended Complaint alleges that Arrowhead failed to accommodate DuBoise's alleged disability, herniated discs and injured right shoulder. Additionally, DuBoise's PHRC Amended Complaint alleges that Arrowhead failed to engage DuBoise in an interactive process when DuBoise made a request for a reasonable accommodation. Finally, DuBoise's Amended Complaint alleges that Arrowhead constructively discharged DuBoise by insisting that DuBoise perform physical tasks that he could not perform because he could not endure the pain the work would cause. DuBoise's claims of failure to accommodate and constructive discharge 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").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation of DuBoise's Complaint and found probable cause to credit all of DuBoise'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 a public hearing. The public hearing was held on April 18, 2018, in Stroudsburg, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The state's interest in DuBoise's allegations was protected at the Public Hearing by Stephanie M. Chapman, Esquire. James A. Conaboy, Esquire was DuBoise's private attorney. Philip R. Voluck, Esquire and Katharine W. Fogarty, Esquire represented Arrowhead. Post-Hearing briefs were submitted by the parties on June 15, 2018. The parties requested an opportunity to file reply briefs and the reply briefs were filed on July 23, 2018.

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).

Absent direct evidence, to establish a *prima facie* case of disability discrimination under the PHRA, it is appropriate to use the three-step, burden shifting analysis set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Initially, 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).

We begin by analyzing whether DuBoise established a *prima facie* case of disability discrimination. With regard to the first element of the requisite *prima facie* showing, the parties did not dispute that DuBoise had a disability. It must be noted that, clearly, during the period between October 14, 2013, when DuBoise was injured at work, and June 3, 2014, he was disabled under the meaning of the PHRA. However, when DuBoise returned to work on June 3, 2014, he presented Arrowhead with a doctor's note that released

DuBoise to return to work without restriction. At this point, one could say that Arrowhead was unaware that DuBoise still labored with a medical condition that amounted to a disability. The doctor's note gave Arrowhead every reason to believe that DuBoise had fully recovered from his work-related injuries. It was not until June 13, 2014 when DuBoise presented Arrowhead with a doctor's note that stated, "This patient cannot do heavy physical work" (C.E. 1) that the question of whether DuBoise was disabled arises. On June 13, 2014 DuBoise's again requested to be given his old position back, only this time, his request became a request for an accommodation. Between June 3 and June 13, 2014, for all Arrowhead knew, DuBoise was fully cleared to return to work. The June 13, 2014 date is the time when, very quickly, the idea of being potentially required to accommodate DuBoise came into play.

In DuBoise's post-hearing brief, he seems to suggest that on June 13, 2014, Arrowhead was strictly obligated to accommodate him by assigning him to do only the non-physical component of the position of Roads and Ditches Director. In effect, DuBoise argues that Arrowhead had no choice. Arrowhead did have options.

With respect to Arrowhead's knowledge regarding DuBoise's condition, we combine the information Arrowhead had about DuBoise's condition which caused him to be out of work and on workers' compensation from October 14, 2013 until June 3, 2014, with the information the doctor provided in C.E. 1, and conclude that Arrowhead knew on June 13, 2014 that DuBoise had a disability. Accordingly, DuBoise easily meets the first element of the requisite *prima faice* showing.

It is with the next two required elements of a case of alleged failure to make a reasonable accommodation that DuBoise's evidence falls short. First, we look to the definition of "qualified individual." There are two parts to the question of whether a person is a "qualified individual': (1) the individual satisfies the requisite skill, experience, education and other job-related requirements of the position in question; and (2) whether with or without reasonable accommodation the individual can perform the essential functions of the position. *Castellani v. Bucks County Municipality*, 351 Fe. Appx. 774 (3rd Cir. 2009) *citing Turner v. Hershey Chocolate USA*, 440 F.3d 604 (3rd Cir. 2006). *See* also *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016) and *Valdez v. McGill*, 462 Fed. Appx. 814 (10th Cir. 2012).

Here, without question, DuBoise establishes the first portion of the definition of "qualified individual." DuBoise's difficulty is with his obligation to meet his burden to show the second portion of the definition. *See Johnson v. Cleveland City School District*, 443 Fed. Appx. 974 (6th Cir. 2011). On June 13, 2014, DuBoise's doctor clarified that DuBoise was unable to do heavy physical tasks. Of course, whether the position was the job DuBoise previously held, Director of Roads and Ditches, or the maintenance position to which DuBoise was assigned on June 3, 2014, both positions required physical labor. The Director or Roads and Ditches carried a task designation of 70% physical and 30% non-physical and the maintenance position was obviously 100% physical.

The evidence in this case is devoid of information regarding how to classify the nature of the tasks preformed in the physical components of the positions. However, it is clear that upon returning and being assigned tasks as a maintenance employee, DuBoise found that he was unable to perform the tasks. During the hearing, no attempt was made to break the precise tasks of the positions into those that are essential functions and those that were marginal functions.

Here, we observe that DuBoise himself repeatedly indicated that on June 13, 2014, he was, and continues to be, unable to perform any of the physical functions of the positions, essential or marginal. Clearly, DuBoise was unable to assist in the installation of speed bumps, use a pick axe, pull tires and remove generators. All of these tasks were listed as tasks performed by those who held the position of maintenance worker. As such, we find that such tasks were essential functions of the positions and that DuBoise was unable to show that he could do them with or without accommodation. To be a qualified individual, one must establish that an effective accommodation is available that would have enabled him to do the job. *See Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999); and *Tubbs v. Formica Corp.*, 107 F. App'x 485 (6th Cir. 2004).

When considering different accommodations, several aspects are applicable to the circumstances present here. First, when DuBoise returned to work on June 3, 2014, only he and another maintenance worker were the individuals to whom such work would be assigned. On the question of job restructuring as a possible accommodation, we note that employers are not required to reallocate essential job functions. *See Turner v. City of Paris*, 2012 U.S. Dist. LEXIS 181694 (E.D. Ky. Dec. 26, 2012) which generally held that an employer did not fail to accommodate an employee when the employer did not make a single employee do all the lifting associated with the position. Doing so would be to shift essential functions of the job from one employee to another. Employers are not required to do this. *Buskirk v. Apollo Metals*, 307 F.3d 160 (3rd Cir. 2002) *See also, Bryant v. Caritas Norwood Hospital,* 345 F. Supp. 2d 155 (D. Mass 2004); *Bratten v. SSI Services, Inc.* 185 F.3d 625 (6th Cir. 1999); *Hosking v. Oakland county Sheriff's Department*, 227 F.3d 719 (6th Cir. 2000); and *Peters v. City of Mauston*, 311 F.3d 835 (7th Cir. 2002). It is also well settled that employers are not required to accommodate an employee by removing an essential function of the position. *See Barnard v. Lackawanna County*, 217 U.S. LEXIS

156387 (Sept. 25, 2017 M.D. Pa.) *citing Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3rd Cir. 2001).

Interestingly, in the present case, the evidence establishes that the only accommodation DuBoise would have accepted is to be assigned to the 30% non-physical component of his past position of Roads and Ditches Director. In effect, the accommodation DuBoise requested was that Arrowhead create an entirely new position. The PHRA does not require an employer to create a new position to accommodate an employee with a disability. *See ie Buskirk v. Apollo Metals*, 307 F.3d 160 (3rd Cir. 2002), *citing Shiring v. Runyon*, 90 F.3d 827 (3rd Cir. 1996).

When DuBoise returned on June 3, 2014, he was shocked and surprised to learn that his prior position had been eliminated. On this point, DuBoise speculates that the reason his prior position had been eliminated was that this was part of a discriminatory scheme to ensure that DuBoise would not be able to work at Arrowhead. What DuBoise does not account for is that when first hired, DuBoise held the position of Director of both the Roadway & Surface Water Drainage Maintenance Department and the Facilities Maintenance Department. He held this joint directorship from October 1999 until some point in 2012.

It is logical that when DuBoise went out on workers' compensation in October 2013, that Arrowhead had to adjust who would be responsible to direct the work of the maintenance crew that DuBoise had directed. One can easily imagine that consolidation of the directorships would be an easy fix for Arrowhead. More importantly, at no time was an attempt made to call as witnesses those who were in any way involved in the decision to eliminate DuBoise's directorship. Further, little effort was made to explore the reasons why, upon DuBoise's return, there was only one maintenance worker when under

DuBoise's directorship before October 2013, there had been two. Additionally, after DuBoise left on June 13, 2014, no effort was expended to call witnesses to explore whether the directorship and maintenance worker assignments changed in any way. On this point, we recognize a principle referenced in Arrowhead's post-hearing brief: the principle of drawing a negative inference when evidence expected to be used is not offered. *See Kovach v. Solomon*, 732 A.2d 1, (Pa. Super. Ct. 1999). Here, an inference can be drawn that had DuBoise called such witnesses, they would not have been supportive of his claims.

This same principal can be applied to the purported comment the General Manager is said to have made to DuBoise when DuBoise gave him the Doctor's note saying DuBoise could not do heavy physical work. Purportedly, the General Manager said "well, I really didn't think you could do it anyway." Of course, without the testimony of the General Manager, there is no context for the purported comment. Fundamentally, the comment can be taken as a negative statement or as an expression of support for a co-worker. Without the General Manger's testimony, there is no way to assess the meaning of the comment.

In summary, for the reasons stated, we find that DuBoise was not able to establish that on June 13, 2014, he was a qualified individual. DuBoise did not show a reasonable accommodation would have allowed him to perform the physical duties of his position. Accordingly, DuBoise has not established a requisite element of the required *prima facie* showing.

With respect to the third element of the requisite *prima facie* showing, DuBoise had to establish that he suffered an adverse employment action. One might say that upon his return, DuBoise had been demoted, however, the only change was that DuBoise would no longer be paid a salary but now his pay was on a hourly basis. On this point, there was no dispute that arrangements had been made to ensure that DuBoise would receive the same pay as he had as a director. As an aside, would an employer intent on setting up a scenario to get rid of an employee go to the trouble of ensuring that upon the return of the employee they would be paid the same. One ponders how the other maintenance employee would feel if they learned how much DuBosie, the then co-maintenance worker, was earning as compared to their hourly rate of pay

Assuming arguendo, that DuBoise was able to establish a *prima facie* case, DuBoise's evidenceary problems continue. Fundamentally, employers are not obligated to participate in the interactive process unless a Complainant can show that they are otherwise qualified to perform the essential functions of a job. *See Gaul v. Lucent Techs, Inc.* 134 F3d 576 (3rd Cir. 1998); *and Shapiro v. Township of Lakewood*, 292 F.3d 356 (3rd Cir. 2002). Further, along with several other factors, a Complainant seeking to establish a failure to engage in the interactive process must demonstrate "the employee could have been reasonably accommodated but for the employer's lack of good faith." *See Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999).

Under the circumstances present here, when DuBoise presented the doctor's note to Arrowhead on June 13, 2014 and left shortly thereafter, he really did not give Arrowhead sufficient time to even consider another possible accommodation other than the accommodation DuBoise insisted be given to him. The record reveals that DuBoise would accept nothing less than being assigned the non-physical components of the Roads and Ditches Director's position. Such a position is fundamentally unreasonable, *See Whelan v. Teledyne Metalworking Prods.*, 226 Fed. Appx. 141 (3rd Cir. 2007), and because DuBoise simply left, the total breakdown of the interactive process can be found to be attributable to

DuBoise's actions. The evidence presented in this case reveals that DuBoise cannot establish that Arrowhead failed to engage him in the interactive process.

DuBoise's remaining allegation that he was constructively terminated is dismissed because the evidence presented in this case reveals that DuBoise simply left because he knew he would not be able to perform the physical functions of the job.

In summary, DuBoise is unable to establish a *prima face* case of denial of an accommodation for a disability and cannot prove that Arrowhead failed to engage him in the interactive process. For these fundamental reasons, DuBoise's Complaint should be dismissed.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT DuBOISE, **Complainant**	:	
	:	
v,	:	**PHRC CASE NO. 201402679**
	:	**EEOC CHARGE NO. 17F201560857**
	:	
ARROWHEAD LAKE COMMUNITY ASSOCIATION,	:	
Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that DuBoise has failed to prove he was discriminatorily denied an accommodation, in violation of Section 5(a) of the PHRA, that Arrowhead failed to engage DuBoise in an interactive process and that DuBoise was constructively terminated. 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

December 4, 2018
Date

By: ______________________
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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	:	
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	:	
ARROWHEAD LAKE COMMUNITY ASSOCIATION, **Respondent**	:	

FINAL ORDER

AND NOW, this 18th day of December, 2018 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 the Complaint in this case be, and the same hereby are dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISION

By: ______________________
M. Joel Bolstein, Esquire
Chairperson

Attest:

____
Dr. Raquel O. Yiengst
Vice Chairperson