GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

COMPLAINANT,
Complainant,

v.

Docket Number 03-554-P (CN)
Dianne S. Harris
Administrative Law Judge

FEDERAL EXPRESS CORPORATION,
Respondent.
_______________________________________/

FINAL DECISION AND ORDER

I. STATEMENT OF THE CASE

This is a Final Decision and Order issued in response to Federal Express Corporation's ("Respondent" or "FedEx") Motion for Summary Judgment. Complainant was employed by FedEx as a Courier/Swing Driver in Washington, D.C. Complainant alleges FedEx discriminated against him due to his disability (back injury) on three counts: 1) by failing to accommodate his request for a permanent light-duty assignment; 2) by failing to hire him for two in-house positions due to his disability; and 3) by terminating him from his employment with the company because of his disability.

FedEx denies all three of Complainant's claims. Respondent contends that although it made reasonable accommodations for Complainant's disability, it was not legally obligated to create a permanent light-duty position. Respondent also refutes the allegation that the company failed to hire Complainant for two in-house positions due to his disability. In the first instance, FedEx noted Complainant did not complete the application process for the position of Service Assurance Agent and thus could not be considered for the job. In the second instance, FedEx

agrees that Complainant was not selected for the position of Dispatcher. However, the company contends that the dispatcher job would have been a promotion for Complainant, and in accordance with FedEx's policies, he was not entitled to receive preference in the hiring process for this position. Lastly, FedEx contends that Complainant was not terminated from their employ due to his disability, but because he failed to secure a job with the company within ninety days.

Procedural History of the Case

Complainant filed a complaint of discrimination on September 17, 2003 with the District of Columbia Office of Human Rights, ("the Office" or "OHR") against FedEx, alleging it had discriminated against him due to his disability. OHR investigated Complainant's complaint of discrimination and on June 28, 2004, the Office issued a Letter of Determination ("LOD") finding probable cause on three counts 1) FedEx failed to accommodate Complainant's request for permanent light-duty work; 2) FedEx failed to hire him for two positions he applied for with the company due to his disability; and 3) FedEx terminated him from FedEx because of his disability.

Attempts to conciliate the case were unsuccessful and on March 22, 2005 the matter was certified to the District of Columbia Commission on Human Rights ("Commission") for adjudication. On March 20, 2008, FedEx filed a Motion for Summary Judgment. A Proposed Decision and Order granting the Motion was issued. No exceptions to the Proposed Decision and Order were filed. A Final Decision and Order was issued on June 15, 2010. Complainant filed a Request for Extension to File a Motion for Reconsideration on July 12, 2010. On July 24, 2011, the Commission denied Complainant's Motion. Complainant filed an appeal with the District of Columbia Court of Appeals *pro se o*n July 24, 2011. On April 2, 2014, the Court

reversed the decision and remanded the case to the Commission with an Order that Complainant be granted an extension to file a Motion for Reconsideration. There was a second attempt to conciliate the case, to no avail.

The case was recertified to the Commission on January 7, 2016. At the request of Complainant, he was provided counsel by OHR. A status conference was held in the case. Discovery was granted to the parties. On September 12, 2016, FedEx filed a Motion for Summary Judgment. Complainant filed an Opposition to the Motion for Summary Judgment and a Cross-Motion for Partial Summary Judgment on October 12, 2016. FedEx filed a Reply and Opposition to the Cross-Motion for Partial Summary Judgment on November 2, 2016. A Proposed Decision and Order was issued on December 31, 2016. On January 14, 2017, an Amended Proposed Decision was issued. On January 18, 2017, Complainant filed Complainant's Exceptions and Corrections to Proposed Decision, which will be addressed following the statement of the Undisputed Material Facts.

II. ISSUES

1) Whether Respondent subjected Complainant to discrimination due to his disability by failing to accommodate his request for a permanent light-duty position.
2) Whether Respondent subjected Complainant to discrimination based on his disability when it failed to hire him for two in-house positions; and
3) Whether Respondent subjected Complainant to discrimination based on his disability when it terminated him.

III. MATERIAL UNDISPUTED FACTS

1. On June 12, 1991, Complainant was hired by FedEx to work as a Courier/Swing Driver ("Courier") for their station located at 1501 Eckington Place, N.E., Washington, D.C.

Respondent's Exhibit [hereafter "Resp. Ex."] K and L. A courier's duties entail driving delivery trucks, lifting and carrying packages of varying weights, and delivering packages to recipients. Resp. Ex. A at 29:8-9, 30:18-22 and Resp. Ex. F.

2. On January 15, 2001, while working his shift with FedEx, Complainant slipped down some ice-covered steps and injured his back. Resp. Ex. A at 17:17-22.
3. On July 9, 2001, Complainant reinjured his back at work, exacerbating the injury he incurred on January 15. Resp. Ex. A at 18:9-17. As Complainant bent over to pick up a package, he heard a popping sound and felt a pain that caused him to drop to his knees. *Id.*
4. Following his July 9 injury, Complainant was bedridden and unable to work in any capacity for two months. Resp. Ex. A at 28:6-14,
5. From July 9, 2001 to January 8, 2002, on orders of his treating physician, Complainant did not work due to his injured back. Resp. Ex. A at 27:16-28:10. FedEx's Independent Medical Examiner ("IME") concurred with these findings. Letter of Determination ("LOD") During this time Complainant received Worker's Compensation benefits from FedEx. *Id.*
6. Respondent self-insures its employees for Worker's Compensation benefits; the payments it makes to injured employees are generated directly from the company and not a third-party insurer. Resp. Ex. B.
7. FedEx has a written policy known as Temporary Return to Work ("TRW") that "provides temporary placement for employees who are temporarily unable to perform the range of their regular job duties, but have been released by their doctors to return to work in a limited capacity." Resp. Ex. D.

8. Temporary placements cannot exceed 90 calendar days. Resp. Ex. D. If an employee is eligible for Worker's Compensation at the time of the temporary placement, he is paid his normal rate of pay during the temporary placement. *Id.*
9. In January 2002, Complainant was released by his treating physician to return to work, but he was restricted to light-duty for four hours a day with further restrictions that included no lifting anything over 15 pounds, no bending, and no prolonged sitting. Resp. Ex. A at 29:8-22.
10. FedEx allowed Complainant to do package researching on a temporary basis pursuant to the TRW policy for 90 days. Resp. Ex. A at 29:14-20.
11. After his temporary placement exceeded 90 days in March 2002, Complainant was unable to return to his courier duties due to his injuries. FedEx resumed paying him weekly Worker's Compensation benefits in the amount of $611.00. Resp. Ex. A at 29:21-30:3.
12. Throughout the spring of 2002, Complainant was unable to perform his regular courier duties, but he was able to perform light duty work. Resp. Ex. A at 30:6-22.
13. From April 2002 through September 2002, FedEx continued to pay Complainant $611.00 in Worker's Compensation benefits in weekly installments. Resp. Ex. B.
14. On June 24, 2002, FedEx sent Complainant a letter informing him that, if he was unable to perform the functions of his current position (Courier), he had until September 24, 2002 (90 days) to find another position within the company "for which [he met] the minimum specifications and can perform the essential functions with or without reasonable accommodation." Resp. Ex. E. The letter further advised Complainant that he should apply for vacant positions through the company's internal

application process, and he would “receive placement preference for any lateral or lower-level position for which [he] successfully complete[d] the selection process.” *Id.* Complainant could apply for a position that was considered a promotion, but he would not receive preference. *Id.*

15. FedEx posts job vacancies in the company on the Job Change Applicant Tracking System (“JCATS”). Resp. Ex. F. Complainant received notice of the different positions posted through JCATS. Resp. Ex. A at 43:5-21. His manager sent him notice of job vacancies in the company as well. Resp. Ex. A at 43:14-15.
16. Following FedEx’s June 24 letter, Complainant filed applications with FedEx for two job vacancies: one as a Service Assurance Agent and the other as a Dispatcher. Resp. Ex. G and H.
17. Complainant was not selected for the Service Assurance Agent position because he did not complete his application. Resp. Ex. I. Upon receipt of Complainant’s application for the Service Assurance Agent position, FedEx notified him in writing that his application was incomplete and asked him to submit a supplemental application to be considered for the position. Resp. Ex. I and J. Complainant failed to submit a supplemental application as requested, and as a result, he could not be considered for the job. Resp. Ex. I.
18. The Dispatcher position was, by Complainant’s own acknowledgement, a promotion from the Courier position he had held prior to his injury. Resp. Ex. L. Complainant was not selected for the Dispatcher position. Resp. Ex. A at 49:1-13.
19. On September 24, 2002, FedEx sent a letter to Complainant informing him that he Would be terminated on November 20, 2002 because he was unable to return to his

position as a courier per his doctor's orders and he had not secured another position within the company. Resp. Ex. K.

20. Complainant contested his termination in a letter he sent to FedEx dated November 4, 2002, alleging that he never received the June 2002 notice advising him of his proposed termination. Resp. Ex. L.

21. Based on Complainant's appeal of his termination, FedEx extended Complainant's termination date from November 20, 2002 to December 20, 2002 and "encouraged" him to apply for other in-house positions. Resp. Ex. M. When Complainant had not found a job by the extended deadline, he was terminated on December 21, 2012. Complainant's Charge of Discrimination.

IV. COMPLAINANT'S EXCEPTIONS

1. The Commission erred by making a factual finding that Complainant's disability was not the motivating factor for being denied the dispatcher position. Complainant produced substantial evidence for a reasonable juror to find that FedEx discriminated against Complainant based on his disability.
2. The Commission misapplied the Summary Judgment standard by making a factual finding that the Dispatcher Position was a promotion.
3. The Commission misapplied the law by failing to consider reassignment to a vacant position as a reasonable accommodation.
4. The Commission misapplied the law by failing to consider whether Complainant could perform the essential functions of his job with a reasonable accommodation.

Exception 1.

To support his position that there are material facts in dispute in this case, Complainant

contends that the Commission erred by making a factual finding that his disability was not the motivating factor for being denied the Dispatcher position. Complainant also stated in his Exceptions that Human Resources Manager, Human Resources Manager for FedEx was "plotting" to get him fired because he had filed two previous Worker's Compensation claims against FedEx and Human Resources Manager suspected Complainant of not being truthful about his injuries.

Complainant argued that Human Resources Manager told him his job-related injuries were preventable and had requested further investigation into the circumstances that gave rise to his Worker's Compensation claims. Human Resources Manager also suggested conducting surveillance of Complainant to upper management, which was ultimately turned down.

Complainant contends that this evidence is enough for a reasonable juror to find that FedEx discriminated against him based on his disability and that it was the motivating factor for why he was denied the Dispatcher job. *See George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005). The undersigned finds that Complainant's argument is without merit for the following reasons:

First, there was no factual finding in either the Proposed Decision and Order or in the foregoing Final Decision and Order that Complainant's disability was or was not a motivating factor in his denial of the Dispatcher position.

Second, prior to applying for the position of Dispatcher, Complainant was provided a copy of the employer's policies concerning reassignment for disabled workers, which states disabled employees may receive preference for lateral or lower-level positions, but not for jobs that that would constitute a promotion. Complainant

acknowledged he knew the Dispatcher job would be a promotion for him and that he would not be given preference.

Third, Complainant's argument that Human Resources Manager's concern for the veracity of Complainant's job-related injuries constituted evidence of a motive to discriminate against Complainant due his disability is without merit. The fact that Human Resources Manager s had concerns over whether the Complainant was making fraudulent Worker's Compensation claims against the company does not support an inference that FedEx discriminated against him because of his disability or support a finding that he was not selected for the position of Dispatcher due to disability discrimination. Exception 1 is denied.

Exception 2.

The second exception states that the Proposed Decision and Order erred by making a a factual finding that the position of Dispatcher was a promotion. The finding was an undisputed material fact agreed to by both Complainant and Respondent. Complainant acknowledged in his testimony during his deposition that the position of Dispatcher would have been a promotion for him, which would make this finding of fact undisputed. Finding of Facts at ¶ [hereinafter cited as "Facts"] 14. Exception 2 is denied.

Exception 3.

Complainant states the Proposed Decision and Order misapplied the law by failing to consider reassignment to a vacant position as a reasonable accommodation. To support this argument, Complainant contends that FedEx should have reassigned him to one of the two positions he applied for pursuant to the ruling in *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998), that "an employee seeking reassignment to a vacant position is

within the definition if, with or without reasonable accommodation, he can perform the essential functions of the employment position to which he seeks reassignment."

The undisputed material facts of this case show that FedEx has a policy where employees who are no longer able to perform their regular work duties are given preference for vacant positions within the company that are either lateral or lower-level positions. These employees must successfully complete the selection process by submitting a job application to be given preference in the selection process. Employees could apply for positions that would constitute a promotion, but they would not be entitled to receive preference. Facts at ¶ 13. The reasonable accommodation that Complainant is referring to in Exception 3 was available to him, but he had to apply for the position. Complainant applied for the Service Assurance Agent position and the Dispatcher job. Complainant failed to complete his application for the Service Assurance Agent job, so his application could not be acted on. As previously discussed, Complainant was not able to receive preference for his application for the Dispatcher position. Exception 3 is denied.

Exception 4.

Complainant alleges the Commission misapplied the law by failing to consider whether Complainant could perform the essential functions of his job with a reasonable accommodation. The job that Complainant had been hired to do (Courier) required him to lift heavy packages, carry and deliver them to recipients. Facts at ¶ 1. Complainant's treating physician restricted him to light-duty work and instructed him not to lift over 15 pounds. Facts at ¶ 13. It is an undisputed material fact that Complainant could no longer perform the essential functions of his job as a Courier with or without reasonable accommodations. Exception 4 is denied.

V. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, and other evidence show that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment by law. *Celotex Corp. v. Catrell*, 477 U.S. 317, 318 (1986); *Bigwood v. U.S. Agency for Intern. Dev.,* 484 F. Supp. 2d 68, 72 (D.D.C. 2007); *Broderick v. Donaldson,* 338 F. Supp. 2d 30, 40 (D.D.C. 2004); *Grant v. May Dep't Stores*, 786 A.2d 580, 583 (D.C. 2001). In deciding summary judgment motions, courts view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 243 (1986). To prevail on a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *See Beard v. Goodyear Tire and Rubber Co.,* 587 A.2d 195, 198 (D.C. 1991).

If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, the burden of production of evidence shifts to the nonmoving party to show that a genuine material issue exists. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). In opposing summary judgment, a party may not rely on vague allegations, but instead must present specific facts showing that there is a genuine issue for trial; furthermore, the record must be viewed in the most favorable light to the nonmoving party. *Graff v. Malawar*, 592 A.2d 1038, 1040 (D.C. 1991). *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 803 (D.C. 2003) citing *Smith v. Union Labor Life Ins. Co.,* 620 A.2d 265, 268 (D.C. 1993) *see also Beard,* 587 A2d. at 198,

VI. DISCUSSION

Complainant alleges that Respondent violated the District of Columbia Human Rights

Act ("DCHRA") when they failed to reasonably accommodate his request for light-duty assignments, failed to hire him for two positions due to his disability, and unlawfully terminated him from his job due to his disability. *See* D.C. CODE § 2-1402.11(a) (1).

Complainant further argues that Respondent has conceded to the first two probable cause findings because they failed to move that each of the three issues be dismissed in their Motion for Summary Judgment. The undersigned finds that FedEx did address each one of these issues in their discussion for why the Motion for Summary Judgment should be granted, for this reason Complainant's Cross Motion for a Partial Summary Judgment is denied.

Respondent has moved for summary judgment on all counts, arguing that there is no dispute of the material facts and it is entitled to judgment as a matter of law. Complainant has filed an Opposition to the Motion for Summary Judgment.

Upon review of the record submitted, and viewing all the evidence in the light most favorable to Complainant, the Commission concludes summary judgment is warranted in favor of the Respondent on all three of Complainant's claims.

1. **Complainant's Claim One**

Respondent discriminated against him due to his disability when it failed to accommodate his request for a permanent light-duty position.

Complainant claims that FedEx violated the DCHRA by failing to reasonably accommodate his request to be placed in a permanent light-duty position. Under the Americans with Disabilities Act (ADA), an employer must make "reasonable accommodations," to the known physical and mental limitations of a qualified individual with a disability. 42 U.S.C. § 121(b) (5)(A). To establish a *prima facie* case of disability

discrimination based on a failure to accommodate a claim, a complainant must prove that: 1) he has a disability under the DCHRA; 2) Respondent was aware of his disability; 3) he requested and was denied a reasonable accommodation; and 4) with reasonable accommodation, he could perform the essential functions of the position. *Scarborouugh v. Natsios,* 190 F. Supp. 2d 5, 19 (D.D.C. 2002); *Barrett,* 979 A.2d at 1250 (D.C. 2009).

The first element has been met. Complainant has established that he has a disability under the definition of the DCHRA due to the injury to his back. The DCHRA defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities of an individual having such an impairment or being regarded or having such an impairment." D.C. CODE § 2-1401.02 (5A). [1]

A physical and mental impairment is substantially limiting when it renders a person unable to perform major life activities that an average person can perform. *See Ivey v. District of Columbia,* 949 A.2d 607, 612-13 (D.C. 2008). The parties do not dispute that Complainant was physically impaired due to a job-related injury that substantially affected his ability to lift items over 15 pounds. Lifting has been recognized as being a major life activity in disability cases. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) and *Nuzum v. Ozark Automotive Distributors, Inc.,* 432 F.3d 839, 844 (8th Cir.) Courts have held that the inability to perform heavy lifting does not mean that a person is substantially limited from the major life activity of lifting. For example, in *Ray v. Glidden Co.,* 85 F.3d 227, 229 (5th Cir. 1996), the Court held that the inability to lift more than forty pounds was not on its face a

[1] The DCHRA definition of disability is similar to the definition of set forth in the ADA, 42 U.S.C. § 12102(2) (2000). The Courts often rely on the ADA and its accompanying case law as persuasive in interpreting sections of the DCHRA. *See Chang v. Inst. for Pub.-Private P'ships, Inc.*, 846 A.2d 318, 324; *Grant v. May Dep't. Stores Co.*, 786 A.2d 580, 583-4 (D.C. 2001).

substantially limiting restriction. *See also Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1241 (10th Cir. 2001); *Williams v. Channel Master Satellite Sys. Inc.* 101 F.3d 346, 349 (4th Cir. 1996) (inability to lift twenty-five pounds was not considered to be a substantially limiting restriction). However, in the *Lowe,* the Tenth Circuit found a person suffering from multiple sclerosis was disabled within the meaning of the ADA where she had a restriction from her doctor not to lift an item weighing more than 15 pounds. *Lowe,* 87 F.3d at 1174. Thus, Complainant has established that he was disabled due to a back injury that prevented him from lifting more than 15 pounds.

The second element of the failure to accommodate *prima facie* case has also been met. Specifically, FedEx was aware of Complainant's injury to his back because he was injured on the job on January 15, 2001 and July 9, 2001. Employer was also in receipt of Complainant's treating physician's medical findings and their own IME's medical evaluation of the Complainant which concurs with the treating physician's findings.

Complainant fails to establish the third element. While Complainant alleges that FedEx discriminated against him because of his disability when it denied his request to be placed in a light-duty position as an accommodation, this allegation does not accurately state the law in this matter. The obligation of the employer is to provide a "reasonable accommodation." *Faison v. Vance Cooks,* 896 F. Supp. 2d 37, 42 (D.D.C. 2012). The undisputed material facts in this case clearly demonstrate that FedEx did not discriminate against him. On the contrary it went beyond what is legally required to accommodate him. After Complainant injured his back a second time on July 9, 2001, FedEx paid him Workers' Compensation benefits from July 10, 2001 until January 2002. FedEx also assigned Complainant to light duty work for 90 days doing package

researching through its TRW Policy. Pursuant to that policy, Complainant's placement in this light-duty position was only temporary and could not exceed 90 days.

An employer does not have to create a permanent light-duty position for an injured worker. *Strass v. Kaiser Found. Health Plan of Mid-Atl.,* 744 A.2d 1000, 1006 (D.C. 2000). Furthermore, even if an employer has a light duty policy, the employee is not entitled to a permanent placement on light-duty simply because of the disability. *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987). What the employer cannot do in operating its light duty policy is treat an employee less favorably because he is disabled than other employees who qualify for placement under the light-duty policy. *Dorchy v. Wash. Metro. Area Transit Auth.*, 45 F. Supp. 5, 16 (D.D.C.1999). To the degree Complainant is alleging that he was discriminated against because he was not placed on permanent light-duty, he has presented no legal authority to support such a proposition and the case law noted above contradicts such a proposition, Therefore, FedEx is found to have provided Complainant with light-duty to the extent set forth in its TRW policy and as required by law.

The fourth element, whether Complainant could perform the essential functions of the position cannot be met either. The duties of a Courier required him to lift packages from his delivery truck and transport them to the addresses of recipients. His treating physician had ordered him not to lift anything over 15 pounds or do any squatting, bending, or crawling. The IME also recommended Complainant not continue carrying out his duties as a Courier due to his injured back.

Accordingly, the Commission grants summary judgment in favor of FedEx on Complainant's first claim, that FedEx denied him a reasonable accommodation for his disability by not placing him in a permanent light-duty position.

2. Complainant's Claim Two

Respondent did not discriminate against Complainant based on his disability when it failed to hire him for the positions of Service Assurance Agent or Dispatcher.

Complainant's second claim is that FedEx violated the DCHRA by failing to hire him for two in-house positions due to of his disability. The Supreme Court set forth in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802 (1973), the elements of a *prima facie* case for discriminatory failure to hire are: (1) Complainant belongs to a protected class; `(2) he applied for a job for which he was qualified; (3) he was denied the job; and (4) his membership to the protected class was a motivating factor in Respondent's denial of the job. Complainant applied for two positions with FedEx, Service Assurance Agent and Dispatcher.

Regarding his application for the job of Service Assurance Agent, Complainant has met the first element that he belongs to a protected class. He has established that he is disabled with a back injury.

Complainant is not able meet the second element of the *prima facie* case. FedEx notified Complainant that the application he submitted for this position was not complete and that he would need to submit a supplemental application for the employer to consider him for the job. Complainant failed to submit the supplemental application as FedEx requested. For this reason, he could not be considered for the job.[2]

The third element is met, because Fed Ex did not select Complainant for the position.

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[2] In his complaint, Complainant alleges that Respondent failed to hire him for numerous positions for which he applied *See* Complaint. However, Complainant has not presented any evidence to show that he applied for any positions other than the Service Assurance Agent and Dispatcher positions. *Futrell*, 816 A.2d at 803 (nonmoving party cannot rely on the bare allegations of its pleadings). In fact, Complainant effectively admitted that he only applied to two vacant positions. *See* Resp. Ex. L at 2. As such, our analysis is limited to these two positions.

The fourth element is not met. Complainant is unable to show that the motivating factor for why he was not hired for the position of Service Assurance Agent was his disability. Complainant was not hired for this job because he did not properly complete the job application and failed to comply with FedEx's request that he submit supplemental information to be considered for the position.

Complainant submitted a second application of employment with FedEx for a Dispatcher position. Complainant is able to establish element one of a *prima facie* case, that he had a disability (an injured back). He meets the second element because he applied for the position of dispatcher. There is no evidence that he was or was not qualified for the job and he is given the benefit of the doubt that he was qualified. The third element of the *prima facie* case is also met in that Complainant was not selected for the dispatcher position. Complainant has failed to establish the fourth element that his disability was the motivating factor in his being denied the position. Complainant was advised by FedEx that he would be given preference in applying for lateral or lower positions within the company. FedEx also informed Complainant that he would not be given preference for positions he applied for that would be a promotion. The Dispatcher position was considered to be a promotion. Accordingly the Commission finds that the summary judgment is warranted in favor of Respondent on Complainant's failure to hire claim.

3. Complainant's Claim Three

The Respondent did not discriminate against Complainant based on his disability when they terminated him from their employ.

Respondent moves for summary judgment on Complainant's claim that Respondent violated the DCHRA by terminating his employment based on his disability. The DCHRA

makes it an "unlawful discriminatory practice" for an employer to discharge an employee "wholly or partially for a discriminatory reason based upon a disability." D.C. CODE § 2-1402.11(a) (1). In considering claims of discrimination under the DCHRA and in the absence of direct evidence, we employ the familiar burdens shifting framework established by the U.S. Supreme Court in *McDonnell Douglas, Inc. v. Green,* 411 U.S. 792 (1973). To establish a *prima facie* case of unlawful termination under the DCHRA, the Complainant must demonstrate (1) he had a disability; (2) he was discharged; (3) he was qualified for the position with or without accommodation; and (4) the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Once the Complainant has met the initial burden of proof in establishing a *prima facie* case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's dismissal. *Cf McDonnell Douglas*, 411 U.S. at 803.

Once the employer has articulated a legitimate, nondiscriminatory reason for the dismissal, the burden shifts back to the Complainant to establish that the employer's stated reason is pretext and the real reason for the discharge was discriminatory. *See McDonnell Douglas,* 411 U.S. at 804; *Chang,* A.2d at 846, 324; *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994)

Complainant has established element one. He had a disability (injured back). He also has established element two, that he was discharged from his job with FedEx. Complainant is unable to meet the third element that he was qualified for the position with or without accommodation. By the medical reports of his treating doctor and the IME, Complainant was physically restricted from lifting anything heavier than 15 pounds, bending, squatting and crawling. The duties of Courier required lifting packages of varying weights, bending,

and squatting. Complainant also is unable to establish element four, that his discharge occurred under circumstances that raise an inference of unlawful discrimination. FedEx's termination letter to Complainant dated September 24, 2002 states he is being let go due to his inability to return to his assigned job of Courier. There is no evidence that FedEx was using Complainant's disability in a discriminatory manner in their decision to discharge him. Accordingly, the undersigned finds a summary judgment is warranted in favor of Respondent on Complainant's claim it terminated him for his disability.

VI. CONCLUSIONS OF LAW

1. Summary Judgment is warranted in favor of Respondent on Complainant's claim that it failed to provide him with a reasonable accommodation of his disability by placing him in a permanent light-duty position.
2. Summary Judgment is warranted in favor of Respondent on Complainant's claim that it had discriminated against him based on his disability when it failed to hire him for two in-house positions with the company.
3. Summary Judgment is warranted in favor of Respondent on Complainant's claim it had discriminated against him based on his disability when it terminated him.

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/s/ Commissioner Earl D. Fowlkes, Jr.

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/s/ Commissioner Ellie Collinson

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/s/ Commissioner Anika Simpson

This date 21st of June, 2019 it is so ORDERED.