STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. David L. Lenotti, Complainant	**:**	**CHRO NO: 0520402**
	:	**FEDERAL NO: 16aa500880**
v.		
City of Stamford, Respondent	**:**	**April 8, 2008**

MEMORANDUM OF DECISION

Preliminary Statement

The public hearing (or hearing) for the above-captioned matter was held September 24-27, 2007, pursuant to the conference summary and order of the undersigned presiding human rights referee issued December 20, 2007. Attorney Michael Columbo appeared on behalf of David L. Lenotti (complainant or Lenotti) who resides at 313 Jefferson Avenue, Mamaroneck, NY 10543. Margaret Nurse-Goodison, Assistant Commission Counsel II, appeared on behalf of the commission on human rights and opportunities (commission) located at 21 Grand St., 4th Floor, Hartford, CT 06106. Attorney Michael Toma appeared on behalf of the City of Stamford (respondent) located at 888 Washington Boulevard, Stamford, CT 06901. The commission filed its briefs with Attorney Colombo's affidavit of attorney's fees and the complainant joined the commission on briefs. The respondent filed its briefs and the record closed on January 14, 2008.

The issues addressed in this decision are: 1) whether the complainant proved by a preponderance of the evidence that the respondent discriminated against him on the basis of his disabilities (learning disability and mental disorder) when it failed to reasonably accommodate him in the administration of a promotional examination (exam) for the position of captain; and 2) if so, whether the complainant is entitled to any damages or other relief.

For the reasons set forth below, it is hereby determined that the commission and the complainant have proven that the respondent discriminated against the complainant in violation of state law. Judgment is entered in favor of the complainant and the commission.

Procedural History

On March 1, 2005, the complainant filed his complaint affidavit (complaint) with the commission alleging that the respondent discriminated against him on February 7, 2005 when it failed to reasonably accommodate his disabilities (mental disorder and learning disability) and when it failed to promote him, paid him a different rate of pay, and denied him a raise because of his disabilities in violation of General Statutes §§ 46a-58 (a), 46a-60 (a) (1), 46a-61, 46a-64; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C 2000e and the Civil Rights Act of 1991; the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. and § 504 of the Rehabilitation Act of 1973, as amended.

The commission investigated the allegations of the complaint, found reasonable cause to believe that discrimination had occurred, and attempted to conciliate the matter. After conciliation failed, the complaint was certified to public hearing on November 20, 2006, in accordance with General Statutes § 46a-84 (a). On November 27, 2006, the Office of Public Hearings issued to all parties of record the original notice of public hearing along with a copy of the complaint. The respondent filed an answer to the complaint on December 13, 2006. The hearing was held on September 24 through 27, 2007. All statutory and procedural prerequisites to the public hearing were satisfied and this complaint is properly before the undersigned Presiding Referee for decision[1].

Findings of Fact

1. The complainant began employment with the respondent as a firefighter in 1990 after passing an exam with a grade of 70. Tr. 18-19.
2. In order to be appointed to lieutenant or captain, an individual must become certified for appointment. Tr. 847-49. This occurs by taking a promotional exam and passing with at least a grade of 70, which would place the candidate on an eligibility list. Tr. 22, 73, 157; R. Ex. 5, pp. 8, 14 and 18; and R. Ex. 35. Also, the candidate must receive a score that is among the three highest scores or the fourth or fifth score within five points of the highest rating on an eligibility list in order to become certified for appointment resulting in receiving an interview with the fire commission. R. Ex. 5, p. 21. Finally, the fire commission interviews the eligible candidates and selects the candidates to be appointed to an open position/s. Tr. 42-50; R. Ex. 5, p. 21.

[1] References made to the transcript pages are designated as "Tr." followed by the accompanying page numbers. References made to the exhibits are designated as either "C. Ex." for the complainant, "R.Ex." for the respondent or "CHRO Ex." for the commission followed by the accompanying exhibit numbers. References made to the findings of fact are designated as "FF" followed by the accompanying numbers and references made to the briefs are designated as "R. Brief" and "R. Reply Brief" for the respondent and "C. Brief" and "C. Reply Brief" for the commission and the complainant followed by the accompanying page numbers.

3. Fire Chief Robert McGrath of respondent's fire department is a non-voting member of the fire commission and he provides the fire commission with information concerning a candidates' performance and character. Tr. 456-57.
4. The eligibility list expires after two years have elapsed and the candidates must take the exam again to become eligible, which is administered approximately every two years. Tr. 178, 481-82, 870, 1069-69. R. Ex. 5, p.19.
5. All exams have 100 multiple-choice questions and are timed exams providing the candidate with three and one half (3 ½) hours to answer questions. Tr. 1035, 699-701; R. Ex. 37 and 38. The Vantage McCann (McCann) company grades the exams, provides the respondent with a report that explains the exam process and provides the candidates' exam scores. C. Ex. 16; Tr. 43.
6. Some candidates complete the exam before the time has expired. Tr. 699, 722, 732, 794-95, 821 and 826.
7. In 1998, the complainant took the exam to be appointed to lieutenant and passed with a score of 70. Tr. 22 and 980; R. Ex. 20.
8. In 2000, the complainant was appointed to lieutenant upon exhaustion of the eligibility list, which means all individuals remaining on the list were appointed. Tr. 25 –30, 989.
9. The fire commission did not conduct a thorough interview when appointing the complainant to lieutenant because it had three open positions and three candidates remaining on the list; thus, all were appointed. Tr. 35, 989. All three candidates met with the fire commission during the same time. Tr. 1168.
10. As a lieutenant, the complainant completed a one hundred forty (140) hour course to become certified as a hazardous material (hazmat) technician. Tr. 375, 525 and 1083.
11. In 2000, the respondent had concerns about the complainant's report writing and referred him to Barbara Boller, a school psychologist for the respondent. Tr. 261; 1011-16.
12. On November 13, 2000, Boller diagnosed the complainant with a language-based learning disability and memorialized her findings in her report/evaluation. Tr. 254-55; C. Ex. 4. Also, she recommended that the

complainant seek a medical consultation to discuss "ADHD" (attention deficit hypertension disorder). Tr. 262-63; C. Ex. 4.

13. In 2004, Simon Epstein, M.D., diagnosed the complainant with adult attention deficit disorder (ADD) and prescribed medication for him. Tr. 1037-39, 1042; C. Ex. 5; CHRO Ex. 15.

14. Meryl Aronin, a speech language pathologist, diagnosed the complainant with a language based learning disability on June 21, 2007. Tr. 189; C. Ex. 6.

15. The complainant is disabled with a learning disability, ADD and ADHD[2]. Tr. 1029-30, 1037-39; C. Ex. 4 and 6; CHRO Ex. 15; complaint.

16. The complainant's learning disability is continuously present in his daily life. Tr. 1186-87.

17. Aronin and Boller recommended that the complainant be given additional time when taking standardized exams as an accommodation or that the exam not be timed or be given verbally. C. Ex. 4 and 6; Tr. 200-03, 253, 254 and 258; Stipulation (Stip.), 4. Epstein also recommended that the complainant be given additional time as an accommodation when taking examinations. C. Ex. 5.

18. In January 2001, the complainant provided Felicia Wirzbicki, a human resources generalist of the respondent's human resources department, with the Boller report informing her of his learning disability and he requested an accommodation to take the captain promotional exam. Tr. 633, 641-43, 651 and 653; C. Ex. 4.

19. The respondent's civil service rules provide for the personnel director to determine a reasonable accommodation for a disabled person when competing in a selection process. Tr. 153-54, 651-52; R. Ex. 5.

20. On February 8, 2002, the respondent granted testing accommodations of additional time (one and one half (1 ½) the standard time) to complete the firefighter exam for Scott R. Avalos, John Loglisci, Jr., Matthew Rees and Matthew R. Wolk who all had either a learning or mental disability. Tr. 294-95, 327, 350, 666-67**;** C. Ex. 10; C. Ex. 11, CHRO Ex. 24 and 25. Also, on

[2] The complainant refers to ADD as ADHD and the terms are used interchangeably.

July 11, 2005, the respondent granted a testing accommodation of extra time (1 ½ the usual amount) to complete the firefighter exam for Neil Dennehy who had a learning disability. CHRO Ex. 26.

21. The complainant gave a letter dated October 25, 2002 with the Boller report to Wirzbicki, formally requesting an accommodation for his disability to take the captain exam. Tr. 670, 1019-20; C. Ex. 2 and 4.

22. In a letter dated November 18, 2002, human resources director William Stover denied the complainant's request for an accommodation and his reason for the denial was that the ability to quickly process information is an essential function of the current captain position and the exam tests that ability. Tr. 658-60, 670; C. Ex. 9.

23. On January 28, 2005, again, the complainant requested an accommodation to take the March 2005 captain promotional exam. Tr. 63 and 1043; C. Ex. 3; Stip. 8.

24. The complainant's January 2005 accommodation request was for additional time ("time and one half") to complete the exam or for the exam to be given in audio form. Tr. 64; C. Ex. 3; Stip. 8.

25. The complainant did not provide the respondent with Epstein's recommendation letter and did not inform the respondent of his ADD. Tr. 1043.

26. In 2005, Wirzbicki contacted her current supervisor, Dennis Murphy, director of human resources, who contacted Chief McGrath regarding the complainant's request. Wirzbicki provided Murphy with the complainant's request and the Boller evaluation. Tr. 63-65**,** 676-82; C. Ex. 7.

27. Wirzbicki, with the advice of Murphy, denied the complainant's request for an accommodation on February 7, 2005. Tr. 119-20; C. Ex. 7-9; Stip. 9.

28. No one from the respondent's employ contacted the complainant to discuss his request for an accommodation. Tr**.** 1044-46. Murphy did not consult any professionals except for McGrath regarding this request in relationship to the complainant's disability and his job duties. Tr. 64, 137-40, 170, 261-62, 681-90. Wirzbicki is not an expert in the area of learning disabilities as it relates to

firefighting and neither she nor McGrath consulted any professionals in the area of learning disabilities and the captain's duties in regard to the complainant's request. Tr. 261-62, 507, 684-87.

29. In March 2005, the complainant took the captain promotional exam without an accommodation and passed with a score of 70, which ranked him at fourteen (14) on the eligibility list. There were thirteen (13) candidates who scored higher than the complainant. Tr. 1059-60; R. Ex. 33 and 35.

30. The complainant studied for four months for the March 2005 captain exam. Tr. 1076.

31. On April 3, 2007, Murphy sent the complainant a letter requesting him to submit information for an accommodation to take the April 28, 2007 captain exam. Tr. 99, 105-06, 1074; C. Ex. 15. This letter was not an invitation for the complainant to take the exam with an accommodation but merely to submit information for consideration for an accommodation. Tr. 117, 1075-77; C. Ex. 15.

32. The complainant did not request an accommodation for the April 28, 2007 exam and did not take that exam. Tr. 1075-77.

33. The complainant has worked two thousand one hundred (2100) hours as an acting captain between January 8, 2004 and September 2007. Tr. 839 –41; CHRO Ex. 19.

34. The complainant's duties as an acting captain and as a lieutenant which involve his abilities as a hazmat technician and a supervisor in dispatch included reading certain materials: pre-fire plans, which describe the layout of the building; computer screens; hazmat guidebook (R. Ex. 36), which is the reference book containing the chemical in question and directing how to mitigate the situation; placards, which identify the hazard; and material safety data sheets (MSDS) (C. Ex. 23), which are the manufacturer's specifications for the chemical. The complainant has never had any performance problems while performing his duties. Tr. 156-57, 559, 567-72, 740-50, 1080 and 1094.

35. The written materials that could be referenced at an emergency scene or incident that a captain may have to read are: placards, MSDS, pre-fire plans, computer screens and the hazmat guidebook. Tr. 166, 406-10, 744-46.

36. There have been no reported public safety problems concerning the complainant's ability to read with respect to his job duties either as a lieutenant or acting captain. Tr. 80-81, 570, 740, 754-55, 1080, 1087-89.

37. The ability to read in a timely manner (speed reading) or to quickly process written information is not a required duty/function of the captain position. Tr. 136, 746-47.

38. The captain promotional exam did not test the skill of reading in a timely manner, at a specific rate of speed or of quickly processing information. The exam tests the knowledge of the job, not the rate of reading. Tr. 70, 161.

39. The exam questions are in a multiple-choice format, not in a form similar to an actual practical circumstance of the captain job. Tr. 700-01, 782.

40. The required knowledge, skills, abilities, minimum training and experience and a special requirement of the captain position are (CHRO Ex. 13):

    a. Thorough knowledge of current principles and practices of firefighting and fire prevention;
    b. Good knowledge of first aid;
    c. Good knowledge of fire department administration;
    d. Good knowledge of supervisory practices;
    e. Ability to communicate effectively orally and in writing;
    f. One year of experience in the rank of fire lieutenant or eight years of experience in the rank of firefighter in the Stamford fire department; and

g. Within one year of appointment, must obtain and maintain State certification as a Fire Safety Inspector.

41. The duties and examples of the work of the captain position are (CHRO Ex. 13.):

    a. Under the general supervision of a deputy fire chief, supervises the activities of personnel in a fire and rescue company in firefighting, rescue

and other daily departmental duties; supervises the maintenance of departmental property and equipment; does related work as directed;

b. Responds to emergency incidents;
c. Directs firefighters in the positioning of vehicles, laying hoses, operation of equipment, performing rescue work and other activities at emergency incidents;
d. Directs the work of firefighters in station duties, including the testing and maintenance of equipment, training and re-training on procedures, equipment, general clean-up of area and general drills;
e. Inspects area served by company to become familiar with the location of fire hydrants, physical layout of buildings, quickest travel route and potential hazards;
f. Performs fire safety inspections under general direction of the fire marshal;
g. Inspects personnel, maintains discipline, transmits daily or special orders to subordinates;
h. Advises and instructs subordinates regarding department rules, regulations and procedures;
i. May be assigned to staff duties such as training or fire prevention; and
j. Meets with public in area served.

42. The practical duties of a captain are (Tr. 403-15, 740):

a. Supervising lieutenants and firefighters under his/her command;
b. Making decisions in and out of the fire station, including analyzing firefighting strategies, deciding whether additional response personnel and apparatus is needed;
d. Performing as incident commander at emergency scenes on a daily basis;
e. Directing the emergency operations consisting of evaluating the situation as to structural fire, vehicle accident, transportation-type accident, rescue, hazardous materials response;
f. Determining whether additional units are required; and
g. Reading written materials at the scene.

43. The complainant satisfactorily performed the duties of captain without an accommodation while serving as an acting captain. Tr. 570, 773-79, 740-56. Also, the complainant was able to perform his role satisfactorily as an acting captain in the dispatch division without an accommodation for approximately two years. Tr. 570, 774-79 and 1101-06.

44. The complainant used ten (10) vacation days to participate in this litigation at the commission's offices. Tr. 1151-52.

I

DISCUSSION

A

Federal Law

The complainant alleged that the respondent violated Title VII, the ADA and Section 504 of the Rehabilitation Act of 1973, as enforced through General Statutes § 46a-58 (a) when it discriminated against him because of his learning disability and mental disorder. However, § 46a-58 (a) does not bar discrimination on the bases of learning and mental disabilities. Section 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability." Therefore, this tribunal does not have jurisdiction to adjudicate the complainant's federal claims. Consequently, the complainant's Title VII, ADA and Rehabilitation Act claims are dismissed. See *Cosme* v*. Sunrise Estates, LLC,* CHRO No. 0510210, June 29, 2007.

B

State Law

The complainant also alleged that the respondent violated General Statutes §§ 46a-61 and 46a-64 et seq. However, the complainant and the commission neither produced evidence of these claims nor argued the merits of these causes of action in their briefs[3]. Therefore, the complainant's §§ 46a-61 and 64 claims are dismissed. The remaining allegation is the claim for the violation of § 46a-60 (a) (1), which is viable and the focus of this decision.

The respondent has been charged with violating § 46a-60 (a) (1) for failing to accommodate the complainant's learning and mental disabilities, failing to promote him, denying him a raise and paying him a different rate of pay[4]. As set forth in § 46a-60 (a), "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability . . .." "While § 46a-60 (a) does not specifically require an employer to reasonably accommodate an employee's disability, an employer's duty to provide such reasonable

[3] In support of their argument for attorney's fees, the commission and the complainant provided an extremely sparse argument, which contained three conclusory sentences asserting violations of § 46a-64 (a) (1) and (2) in the damages section of their brief; the first time these violations were mentioned. C. Brief, pp. 46-47. Also, there was no mention of their claim for a violation of § 46a-61 in their brief or reply brief.

[4] While the commission and complainant stated all but one (differential rate of pay) of these allegations in their brief, they only provided arguments pertaining to the failure to reasonably accommodate claim. C. Brief.

accommodation is, nevertheless, well established in Connecticut law. See, for example, *Conte v. Board of Education*, judicial district of New Haven at New Haven, Docket No. CV-02-0466475 (2003 WL 21219371, 4) (May 15, 2003); *Trimachi* v*. Connecticut Workers Compensation Committee*, judicial district at New Haven, Docket No. CV-97-0403037s (June 14, 2000) (27 Conn. L. Rptr. 469, 473); *Commission on Human Rights & Opportunities ex rel. Kochey* v. *Eastman Kodak Co*., CHRO Case No. 8310319, 29-30 (April 30, 1996); *LaRoche* v*. United Technologies Corp*., CHRO Case No. FEP-PD-60-1, 10-11 (August 28, 1978)." *Cosme* v*. Sunrise Estates, LLC,* CHRO No. 0510210, n. 4, June 29, 2007.

It is well established that Connecticut's anti-discrimination statutes are coextensive with the federal law on this issue and therefore, this case will be analyzed using both the prevailing Connecticut and federal law. See *Pik-Kwik Stores, Inc.* v*. Commission on Human Rights & Opportunities*, 170 Conn. 327, 331 (1976). The state courts look to federal fair employment case law when interpreting Connecticut's anti-discrimination statutes, but federal law should be used as a guide and not the end all for interpreting state statutes. See *Wroblewski* v*. Lexington Gardens, Inc.*, 188 Conn. 44, 53 (1982); see also *State of Connecticut* v*. Commission on Human Rights & Opportunities*, 211 Conn. 464, 470 (1989).

C

Failure to Reasonably Accommodate

1

Prima Facie Case

The appropriate legal standard[5] is the one articulated in *Ezikovich v. Commission on Human Rights & Opportunities*, 57 Conn. App. 767, 774 (2000). A complainant can prove a prima facie case of failure to reasonably accommodate his disability by showing that (1) his employer is subject to the statute under which the claim is brought, (2) he is an individual with a disability within the meaning of the statute, (3) he could perform the essential functions of the job with or without reasonable accommodation, and (4) his employer had notice of the complainant's disability and failed to provide such accommodation. Id.; see also *Curry v. Allan S. Goodman, Inc*., _ Conn. _, Docket No. SC 18025 (April 15, 2008); *Stone v. Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997); *Borkowski* v. *Valley Central School District,* 63 F.3d 131 (2d Cir. 1995); *Worthington v. City of New Haven,* 1999 WL 958627 (D.Conn.). The complainant bears the burden to show that a reasonable accommodation existed that would have allowed him to perform the essential functions of his job. *Borkowski* v.

[5] The parties applied the standard used in *D'Amico* v. *New York State Board of Law Examiners*, 813 F. Sup. 217 (W.D.N.Y. 1993) to prove a prima facie case and turned to the burden shifting analysis of the disparate treatment standard of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973) to produce a legitimate business reason and to *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-56 (1981) to prove pretext for

Valley Central School District, supra, 63 F.3d 138-39. Once the complainant has satisfied his burden, the respondent has the burden to prove the accommodation would be unreasonable or would cause undue hardship. Id.

a

Disability

First, there is no dispute that the respondent is subject to the Connecticut fair employment laws and, therefore, § 46a-60 (a) (1) is applicable as alleged. Second, under § 46a-51 (19), a person with a learning disability is defined as "an individual who exhibits a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in a diminished ability to listen, speak, read, write, spell or to do mathematical calculations." The respondent argued that the complainant does not meet the statutory definition of being learning disabled because he has not presented evidence showing that he is an individual "who exhibits a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes involved in understanding or in using language." R. Brief, p. 25.

However, according to Boller's psychological evaluation, the complainant has a language-based learning disability. FF 15. She reported that the complainant's "[b]asic decoding and spelling skills fell in the low average range and represent a clear and significant discrepancy between his high average to superior cognitive ability. This

---

discrimination in order to analyze the complainant's claim of failure to reasonably accommodate. C. Brief, pp. 26-32.

discrepancy and evidence of processing weaknesses would indicate that Mr. Lenotti meets the criteria to be considered learning disabled as outlined in the Individuals with Disabilities Education Act of 1997 (IDEA). His processing weaknesses are language based and have interfered with the acquisition of skills needed for reading, comprehension and writing." C. Ex. 4. While Boller does not use the word "severe" to qualify discrepancy as stated in the Connecticut statute, she does report that the complainant's discrepancy and processing weaknesses meet the criteria for being learning disabled under the federal law, IDEA[6]. Since General Statutes § 46a-51 (19) closely follows the IDEA in defining learning disability, I find that Boller's evaluation of the complainant's disability meets the definition for learning disability under § 46a-60 (a) (1). See *Bartlett* v*. New York State Board of Law Examiners, et al*., 970 F.Sup. 1094, 1115, recon. denied, 2 F.Sup.2d 388 (1997), aff'd in part, vacated in part, 156 F.3d 321 (1998), cert. granted, vacated, 527 U.S. 1031 (1999), on remand, 226 F.3d 69 (2000) (where New York's definition of learning disability tracked the IDEA but quantified "severe" as a discrepancy of 50% or more … and the experts could not agree on a uniform measure of discrepancy). Further support about this discrepancy was provided by Aronin who testified that the complainant has a significant discrepancy "specifically in terms of the reading and the processing of language" involved with his testing ability and intellectual ability. Tr. 246. Additionally, the respondent did not present expert testimony to rebut Boller's findings of the complainant's learning disability or otherwise to define "severe discrepancy" except to argue in its brief an unsupported lay

[6] A learning disabled person is defined as one who "does not achieve commensurate with his or her age and ability level and has a severe discrepancy between achievement and intellectual ability in . . . [among other things] basic reading skill. 34 C.F.R. § 300.543. " (Internal quotation marks omitted.) *Bartlett* v*. New York State Board of Law Examiners, et al*., 970 F.Sup. 1094, 1115 (S.D.N.Y.1997).

interpretation of the term. R. Brief, p. 26. The complainant has proven that he is disabled within the meaning of § 46a-51 (19).

The commission also argued that the complainant had a mental disorder pursuant to § 46a-51 (20). A person with a mental disability is defined as "an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders [DSM].'" § 46a-51 (20). It is undisputed that Epstein diagnosed the complainant with ADD, which is defined in the DSM. FF 13. Also, the complainant testified that he has ADHD, which is also defined by the DSM. Tr. 1037-39. Although there is no corroborating evidence regarding ADHD, the respondent does not dispute this. R. Brief, p.14. Therefore, I find the complainant is disabled pursuant to § 46a-51 (20) for having ADD and/or ADHD. FF 15. The complainant has proven the first element of his prima facie case and, next, I determine whether he can perform the essential functions of the position of captain (the job he desires (see *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc*., 263 F.3d 208, 216-18 (2nd Cir. 2001)) with or without an accommodation.

b

Perform Essential Functions

"[T]he identification of the essential functions of a job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." *Borkowski* v. *Valley Central*, supra, 63 F.3d 140. The complainant, a lieutenant and a certified hazardous material technician, has performed two thousand one hundred hours as an acting captain. FF 8, 10 and 33. The

respondent's classified service rules define "promotion examination" as "[a] test for advancement within the service and limited to permanent [c]ity employees who meet the minimum qualifications specified in the job announcement." R. Ex. 5, p.8. The complainant completed the March 2005 captain promotional exam and, thus, he met the minimum qualifications of the captain position. There was testimony from witnesses McGrath and Fire Captain Daniel Hunsberger as to the fact that the complainant is qualified for the position of captain and can perform the essential duties. Hunsberger testified that the complainant meets the essential functions of being a captain and that he has no doubt that the complainant could function as a captain because "he's done it." Tr. 755, 773. The respondent's witness, Chief Mcgrath testified, that Lenotti, as an acting captain in a leadership role, has fulfilled the captain's duties that include reading in an acting capacity. Tr. 524-25. Assistant Fire Chief Peter Brown also testified that he believed the complainant should be appointed as captain if he passes the test and is appointed. Tr. 400**.** In fact, the respondent stated that whether the complainant can perform the job of captain is not the issue but rather whether the accommodation was reasonable. R. Reply Brief, p.4.

The respondent did not argue that the complainant could not perform the essential functions of captain with or without an accommodation. What the respondent did argue was that the complainant "was not qualified to be appointed" to the position of captain because he did not score in the top three or five scores of the exam[7]. R. Brief,

[7] The respondent provided this argument in its brief in support of its contention that the complainant can not prove a prima facie case of discrimination of failure to promote. R. Brief, pp. 40-41. The respondent did not argue in its briefs whether the complainant could perform the essential functions of the position of captain with or without an accommodation.

[8] The respondent's contention that the captain position required reading in a timely manner more appropriately supports its argument that accommodating the complainant's disability is unreasonable and, thus, this will be analyzed later in this discussion.

pp. 40-41. The respondent further argued that complainant's reading ability does not meet the required reading skill of the position. In support of this, the respondent posited that as an incident commander at a hazardous materials scene (a position held by a captain), "reading must be done under a time constraint to determine how to defuse the emergency" and the complainant provided no evidence that he could perform adequately in this scenario given his slow reading ability." R. Reply Brief, p. 10. It also argued that the complainant did not present evidence that he had ever been an incident commander who read written data at a hazardous materials emergency. R. Reply Brief, p. 10.

In its letter to the complainant denying the accommodation, the respondent stated that "[i]t is an essential function of the position of Fire Captain to quickly process written information in order to plan an effective fire attack." C. Ex. 9. However, prior to sending the denial letter, there is no evidence in the job description or the practical duties that supports the need to "quickly process written information" as an essential function of the job. FF 41-42. In fact, McGrath testified that the duty was simply "to read written material at the emergency scene." Tr. 405-06.

In support of the respondent's reason for denying the complainant's request, Brown testified that reading in a "timely manner" is an essential function of the job. Tr. 395-96. Murphy testified that McGrath "indicated that the role of Captain at an emergency scene, a fire scene, etc., that the speed with which one needs to read and comprehend is critical to effectively dealing with the emergency situation." Tr. 66, 69, 157. Murphy testified that a captain has to read fast. Tr. 177. He also testified in response to the question whether there is a difference in the speed of reading for a

lieutenant versus a captain, that he thinks the "focused function of this immediacy on the fire scene for quick comprehension, and quick reading; that is the difference here." Tr. 177-78. It was clear that Murphy was not certain of this issue. Murphy testified that he did not know the amount of time needed to read a computer screen at a fire scene (referenced as "fire screens") because "no timeframe was given, other than the quicker the better." Tr. 166, 171-72. Murphy testified that the ability to read in a "timely manner" is an ability that is necessarily implied by the job description for Fire Captain and that McGrath told him that reading speed and comprehension are important. Tr. 155-57. However, McGrath testified that "reading correctly or reading" is an essential function and he made no mention of the rate of reading. Tr. 446-47. Indeed, McGrath stated that an acting captain has to read materials at the scene of a fire. Tr. 524. Murphy stated that "obviously Mr. Lenotti was promoted to Lieutenant, so obviously implicit in the system he can read fast enough to be a Lieutenant." Tr. 177. In addition, Hunsberger testified that there is no difference in the speed of reading for a lieutenant and that for a captain. Tr. 746-47, 780. There is no dispute that the complainant has performed his duties as a lieutenant, and since he has performed satisfactorily as a lieutenant, one can infer his reading skills are sufficient for that of a captain absent any evidence to the contrary.

The job requirements of the captain position make no mention of the necessity to read in a timely manner or to quickly process written information. FF 40. When it received the complainant's request, the respondent assumed because the complainant needed extra time to take the exam that he could not quickly process written information. The complainant testified that he is very familiar with drafting and reading

pre-fire plans and has not had any problems reading those items. Tr. 1088-90. He also testified that he rarely has had to consult the Hazmat book and has only consulted it once in seventeen (17) years as a firefighter, his testimony was not rebutted. Tr. 1081-82, 1094-97. In 1994, he stated that he referenced MSDS once while working with McGrath. Tr. 1094-95. Also, he testified that he has never had problems reading placards. Tr. 1100. The standard operating guidelines state that the procedure followed at a hazmat incident scene is to "[d]etermine the presence of hazardous materials. Many times this is accomplished prior to arrival through the dispatcher." R. Ex. 4, SOG # 111.01. This is evidence that reading seldom occurs at a hazmat scene because the reading necessary to determine hazmat materials is done by the dispatcher. In fact, the complainant has read computer screens as a dispatch supervisor for approximately two years with no problems. FF 34 and 43.

There is no evidence to corroborate the respondent's contention that reading in a timely manner is an essential function of the captain position. In fact, there was much uncertainty as to this criterion. Is the essential function "reading fast," "quickly processing written information," "reading in a timely manner," "reading in general" or "reading correctly?" The testimony was quite inconsistent. It appears that the complainant's ability to quickly process written information was never an issue and did not become an issue until he requested an accommodation to take the captain promotional exam. It is clear that the complainant must read materials as an acting captain, as a lieutenant, as a hazmat technician and while working as a supervisor in dispatch, and he has never had any performance problems while doing his duties under emergency situations. FF 34.

I do not find that reading in a timely manner or quickly processing written information is an essential function of the captain position[8]. No precise definition has been provided for these terms. I do find that reading during emergency situations is a duty of the captain position. FF 35. However, even if I did find reading in a timely manner or quickly processing written information to be an essential function of the captain position, the complainant as an acting captain has performed the essential functions of the captain job to the satisfaction of the respondent, which is sufficient to meet this element of his prima facie case. See *Cole* v*. Millard Fillmore Hospital,* 116 F. 3d 465 (2d Cir. 1997) (satisfactory performance is performing the job at a level which meets legitimate expectations of the employer). Given the testimony that the complainant is qualified for the captain position, it is not necessary to analyze each job requirement, duty, and the practical skills of the captain position to the qualifications of the complainant. I find that he is able to perform the essential functions of the captain position with or without a reasonable accommodation. FF 43.

c

Employer's Knowledge of Disability

Next I must determine whether the respondent had knowledge of the complainant's disability. First, the respondent was fully aware of the complainant's learning disability. Initially, in January 2001, the complainant provided the Boller psychological evaluation to Wirzbicki, which informed her of his language-based learning disability and recommended "untimed and/or oral tests when the required reading is complex" (his need for an accommodation). FF 17. The respondent has had

knowledge of the complainant's learning disability since January 2001 or alternatively, at least since October 25, 2002 when the complainant formally submitted his initial request. FF 18 and 21.

Second, the respondent argued that it was not aware of the complainant's ADD/ADHD. R. Brief, p. 25. The commission argued that the respondent "was well aware of [Boller's] recommendation that the [c]omplainant seek a medical consultation about ADHD." C. Reply Brief, p. 3. The complainant did not consult Epstein until 2004 regarding ADD and Epstein diagnosed the complainant with ADD. FF 13; CHRO Ex. 15 and 16. However, the complainant did not provide the respondent with Epstein's letter or inform the respondent of his ADD. FF 25. While the Boller evaluation recommended "a medical consultation to discuss ADHD," Boller did not diagnose the complainant at the time with ADHD. FF 12. I find that the respondent had no knowledge of the complainant's ADD/ADHD. However, the complainant has proven that the respondent had knowledge of his language based learning disability and next must show that he requested a reasonable accommodation, which accommodation the respondent denied.

d

Request and Denial of Accommodation

On January 28, 2005, the complainant requested that the respondent administer the captain promotional exam in an audio format or provide him with extra time to take the exam as a reasonable accommodation for his disability. FF 23 and 24. The respondent granted other requests from firefighters with learning disabilities for the same accommodation, extra time to take an exam (see C. Ex. 10 –11; CHRO Ex. 24-25), and the Boller report recommended "untimed tests" for the complainant. FF 17 and

20. "The ADA defines 'reasonable accommodation' as . . . appropriate adjustment or modifications of examinations . . . and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111 (9)." *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). The complainant requested an accommodation that he believed was reasonable.

On February 7, 2005, the respondent denied the complainant's request for an accommodation to take the March 2005 captain promotional exam. FF 27. In its denial letter, the respondent explained that it had reviewed the complainant's request with the entire record of his first request in October 2002, which also had been denied. FF 27; C. Ex. 2. The respondent stated that "there [was] no reason to alter the decision that was reached on this matter in the past." C. Ex. 8; Stip. 9. In the previous denial letter of November 18, 2002, the respondent referenced the complainant's October 25, 2002 request for an accommodation, denied the accommodation and provided a reason for the denial. FF 22; C. Ex. 2. The complainant has proven a prima facie case by satisfying this last element in that he requested a reasonable accommodation and the respondent denied his request.

2

Interactive Dialogue

"Once a disabled individual has suggested to his employer a reasonable accommodation, federal law requires, and we agree, that the employer and the employee engage in an informal, interactive process with the qualified individual with a disability in need of the accommodation . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those

limitations. 29 C.R.R. § 1630.2 (o) (3). In this effort, the employee must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion." (Internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc*., _ Conn. _, Docket No. SC 18025 (April 15, 2008). See also *Beck* v. *University of Wisconsin Board of Regents*, supra, 75 F.3d 1135 ("[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability"). Here, the complainant provided Wirzbicki with a request for an accommodation in January 2005. FF 23. Wirzbicki provided Murphy with the Boller evaluation and the complainant's letter requesting an accommodation. FF 26. Murphy made the decision to deny the request. FF 27. He did not consult with Lenotti or any medical professionals regarding Lenotti's request. FF 28. He testified that he relied on McGrath's judgment that the complainant cannot respond to emergency incidents because lack of skill and comprehension or speed and comprehension. Tr. 132. However, Chief McGrath testified that he was not aware that the request was for Lenotti. Tr. 530-31. McGrath testified that he did not make the decision to deny the accommodation and, in fact, he does not believe anyone with a reading disability should be provided extra time to take an exam. Tr. 530-35. Murphy did not consult anyone else other than McGrath to discuss Lenotti's request and McGrath did not consult any experts on reading regarding Lenotti. FF 28. In addition, neither Wirzbicki nor the human resources department consulted any experts on reading or learning disabilities as it pertained to Lenotti, and Wirzbicki did not consult McGrath. FF 28.

There is much evidence in the record that the respondent made no effort to contact the complainant to engage in a meaningful discussion to determine his precise limitations from his learning disability and discuss potential reasonable accommodations that could overcome those limitations. By its lack of any communication with the complainant and with any medical professionals, the respondent did not make a good faith effort to determine an appropriate accommodation if any. The respondent could be found liable for failure to accommodate merely based on its failure to initiate an interactive process with the complainant; *Beck* v*. University of Wisconsin Board of Regents*, supra, 75 F.3d 1137; however, the respondent argued that it was not reasonable to accommodate the complainant.

3

Respondent's Defenses of Unreasonable Accommodation

Once the complainant proves a prima facie case, the respondent has the burden to show that it denied the accommodation because it was unreasonable or would cause undue hardship. See *Borkowski* v*. Valley Central School District,* supra, 63 F.3d 131. Section 46a-60 (a) (1) allows for an exception to discrimination if the employer has a bona fide occupational qualification/need (BFOQ). The respondent's position is that it did not provide an accommodation because "reading speed" is an essential function of the job, which constituted a business justification for denying the request for a testing accommodation. Reply Brief, p. 6. It argued that it was unreasonable to allow the complainant to use additional time to take the exam because reading in a timely manner is a business necessity of the captain position; and that providing additional time would

be unreasonable due to public safety concerns on the job. R. Brief, pp. 21-23 and 28-30. This is a two-part argument for showing the accommodation was not reasonable.

a

Job Relatedness

First, the respondent argued that the requested accommodation "would have eliminated from the exam process the need to read under a predetermined time constraint. Reading under this time constraint is necessary to test the ability to read in a timely manner, which is an essential function of the job of Fire Captain." R. Brief, p. 15, R. Reply Brief, p. 9. In its November 18, 2002 denial letter, the respondent stated that "[i]t is an essential function of the position of Fire Captain to quickly process written information in order to plan an effective fire attack. . . . the examination must be administered in written form and within the predetermined time limit, in order to test, among other things, a candidate's ability to quickly process written information." FF 22. "Nothing in [Title VII of the Civil Rights Act] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Griggs* v*. Duke Power Co.,* 401 U.S. 424, 436

(1971). The respondent's argument bears on whether the exam was job-related and consistent with business necessity. R. Brief p. 21**.**

The question is whether the captain promotional examination is "a test intended to measure the applicants' ability to read [quickly/timely] or ability to perform under specific time constraints and, necessarily, whether those abilities are 'essential functions' of being a [captain]." *Bartlett* v*. New York Law Examiners,* supra, 970 F. Sup. 1130. As determined above, reading in a timely manner or quickly processing written information was not an essential function of the captain position. However, even if this function was an essential function of the captain position, the evidence showed that the exam did not test for that skill but measured the knowledge of the job. FF 38.

There was no evidence that the captain exam was intended to test the speed of reading. When asked whether it was discussed to give the complainant a different type of exam than the standardized one everyone else takes, Murphy responded, "we didn't want to test for reading and comprehension but reading and comprehension was an essential functioning of the Captain on a fire scene." Tr. 69. He further testified that the exam does not test for comprehension but tests your knowledge of fire fighting. Tr. 70. He also testified that "[t]here are tests designed for -- to scale one's reading and comprehension abilities. This test is not designed for that, however implicit in being successful in this test one needs to read and comprehend words." Tr. 69-70.

In direct contradiction to the respondent's argument that the exam is necessary to test the ability to perform or read under time constraints, the respondent has provided extra time on exams as an accommodation to firefighters with learning disabilities. FF 20. The respondent's reason for this was that the captain's duties and the entry-level

firefighters' duties are very different at emergency scenes. R. Reply Brief, p. 4. It argued that reading is critical for a captain, who supervises and directs the rank and file, but entry-level firefighters are not incident commanders and therefore they do not read at emergencies, but take direction from supervisors. R. Reply Brief, p. 5. Contrary to this, there is evidence in the record that firefighters also may have to read materials at an emergency scene. Firefighters Avalos, Wolk, Loglisci and Rees, who all had some type of a learning disability, were all provided extra time as an accommodation to take the exam. FF 20. Avalos testified that a firefighter also reads materials; however, it is rare. Tr. 306-08. McGrath corroborated this testimony when he testified that when Lenotti worked as a firefighter he might have been given materials to read at the scene of a fire. Tr. 556. McGrath further testified, "a lot of that responsibility of reading some of these manuals, reading pre-fire plans, could be delegated to a firefighter in the Deputy Chief's aide classification so to speak, which is not a classified job by the way. It usually goes to seniority." Tr. 556-57. Ironically, the respondent allows for a firefighter to receive an accommodation for a learning disability, even though a firefighter with a learning disability may on rare occasions have to read at the scene of an emergency.

The captain exam is three and one half hours in length. FF 5. Taking a timed exam does not necessarily determine that the test takers can read quickly unless that aspect is being examined. It may show that anyone who took the test and passed with a high score can read and knew the material, but not necessarily that they can read quickly because there is no statistical evidence regarding the rate of speed for average, slow or fast readers related to this particular exam. In fact, the McCann report states,

"[t]he time limit is designed so that all candidates will have sufficient time to answer all questions on the examination without being rushed." FF 5; C. Ex. 16, p. 2. The McCann report is in complete opposition to respondent's argument that the present case is similar to *DiPompo* v*. West Point Military Academy*, 770 F. Sup. 887, 889-90 (S.D.N.Y. 1991) where the court held a firefighter must read at emergency scenes and operate "under time pressure" in hazmat situations. The respondent argued, "[i]t is this time pressure that the *DiPompo* court referred to that was the basis for the respondent's denial of the testing accommodation[ ] in [the present] case. Granting the requested accommodations would have eliminated the 'time pressure' aspect of the written examination to the extent that the examination no longer would be testing an applicant's ability to read in a predetermined time frame." R. Brief, p. 21. However, in *DiPompo* v*. West Point Military Academy*, supra, 770 F. Sup. 888-91, the plaintiff asked to eliminate much of the reading necessary to perform the job and the court held it was not reasonable because it would materially change the job and unacceptably compromise public safety. Here, the complainant is not asking to change the job and there is no indication that the exam measures the skill of working under time pressures.

Also, there was no evidence that the questions on the test are in the same form as would appear for a captain on the job at an emergency scene to test for the rate of reading. See *Crane* v*. Dole, et al.*, 617 F. Sup. 156, 160 (D.D.C. 1985) (court held the test was not job-related and was "in a form completely unlike the circumstances under which the job would actually be performed"). The exam questions are in a multiple-choice format, not in a form similar to an actual practical circumstance of the captain job. FF 39. If reading quickly or in a timely manner was truly a required qualification of

the position of captain then one would think that the respondent would provide an exam specifically for testing the skill of the speed at which one reads. If the rate for reading was truly a required qualification for the captain position, the criterion, e.g., “must read 100 words per minute” should be stated in respondent’s records or documents for the position, which according to the evidence, it was not.

There was no evidence in the record that once an exam is graded the category of the speed at which one read or at which one completed the exam was recorded and compared to other candidates or met a preset criterion for speed. The exam allows a candidate to spend three and one half hours answering the questions and some candidates complete the exam before the time has expired. FF 5-6. However, no analysis of their score and of the time they completed the exam was done for those who scored in the top rankings. In addition, there was no evidence of the particular rate of speed one is required to read to perform the duties of a captain. I find the exam is not a test intended to measure the applicant’s ability to read quickly or in a timely manner.

b

Safety Defense

The second part of respondent’s argument was that if a captain did not quickly process written information or read in a timely manner he could jeopardize or cause harm to public safety. R. Brief. p.28. Tr. 368-69. The respondent argued that “there is no reasonable accommodation that would allow a slow reader to safely perform the reading responsibilities of a [c]aptain acting as an incident commander at the scene of a [hazmat] emergency. R. Brief, p. 23. A safety defense may be used to constitute an

employer's BFOQ. See *Commission on Human Rights & Opportunities* v*. General Dynamics Corp., et al*. 1995 WL 264014, 8-9 (Conn.Super.); see also *Johnson* v*. State of Connecticut Department of Correction*, CHRO No. 9740163, (March 9, 2000). The respondent has the burden to prove the safety defense and meets its burden by showing "there would have been a reasonable probability of substantial harm to the applicant or others with respect to the specific jobs in issue . . .." (Citations omitted.) *Commission on Human Rights & Opportunities* v*. General Dynamics Corp.*, supra, 1995 WL 264014, 9. The federal courts give additional guidance on the safety defense.

In *Lovejoy-Wilson* v*. NOCO Motor Fuel, Inc*., supra 263 F.3d 219-20, the defendant asserted the affirmative defense that the plaintiff was not a qualified individual because she posed "a direct threat to the health or safety of other individuals in the workplace. . . . The ADA defines 'direct threat' as 'a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.' . . . Expanding on the 'direct threat' language, the EEOC has stated that it 'means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.' . . . The EEOC guidelines further provide that: An employer . . . is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e. high probability, of substantial harm; a speculative or remote risk is insufficient. . . . To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, . . . an individualized assessment of the [employee's] present ability to safely perform the essential functions of the job based on medical or other objective

evidence is required[.]" (Citations omitted; internal quotation marks omitted.) Id., 220. see also *Simms* v*. The City of New York, et al.*, 160 F.Sup.2d 398, 406-07 (E.D.N.Y. 2001); *Jansen* v*. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 375-77 (1988) (in determining a reasonable probability of substantial harm, the determination cannot be based merely on an employer's subjective evaluation or merely on medical reports, but the employer must consider employee's work history and medical history); *Mantolete* v*. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985) ("an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job").

In order to determine whether an individual would cause harm to the public safety, four criteria should be considered: "(1) the duration of the risk [how long it lasts]; 2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and 4) the imminence of potential harm . . .." (Citations omitted.) *Lovejoy-Wilson* v*. NOCO Motor Fuel, Inc*., supra, 263 F.3d 220. The complainant's learning disability in which he needs extra time to take exams is continuously present. FF 16. The complainant has never incurred an injury or caused any harm to himself or others as a result of his disability or reading ability. FF 36. Similar to *Lovejoy*, until the complainant's request for an accommodation and this litigation, the respondent had not expressed a concern about the complainant's ability to perform his job as a lieutenant or acting captain because of such a risk of potential harm.

McGrath testified that the threat to the public and the fire department personnel increases with the passage of time. Tr. 417. However, there was no actual evidence to

characterize the “nature or type of threat.” McGrath further testified, “But I would say, yes, that is a problem if you’re a slow reader and can’t make timely decisions with regard to life, safety and saving property.” Tr. 447. McGrath testified that a “timely fashion” means: “Within a few minutes after responding, getting on the scene, size up and you know you just can’t sit around and say let me read this four or five times and see if I can comprehend it. Meanwhile, the fire or the incident is escalating to the point where it can cause more damage and possibly loss of lives at the scene.” Tr. 552. Although McGrath provided an example here of the nature and severity of potential harm, there was no evidence that the complainant needed to read materials at an emergency scene four or five times. In direct contradiction to his testimony, McGrath testified that the complainant always has completed his assignments in a timely fashion. Tr. 484-85.

The respondent argued that based on McGrath’s testimony, “[I]t stands to reason that as an incident commander reads materials at the scene of an emergency, the emergency will worsen as time passes until mitigation efforts begin.” R. Brief, p.19. Without any expert or any analytical support for its contention, McGrath’s testimony merely stated his own general thoughts that an increased delay over the normal period “more likely” would cause, for example, an explosion. R. Brief, p.19; Tr. 417. Here, again, McGrath provides an example of a type of potential harm, an explosion, but no evidence that the complainant’s disability would cause an increased delay. There was no explanation or definition as to what constituted the “normal period” or “increased delay.” In other words, there was no testimony as to the nature and severity of the

potential harm that would be caused by the rate at which the complainant reads at an emergency scene.

In addition, the likelihood that potential harm would occur was not established by the respondent. Murphy testified that McGrath "indicated to [him] in [McGrath's] judgment, experience and knowledge, he knew that there was a sufficiently substantial threat . . .." Tr. 142. However, in response to the question whether McGrath had documentation as to the potential likelihood of "Mr. Lenotti posing any particular harm to the safety of others," Murphy testified, "No, no there's no document giving a probability or you know, a 20 probability or 80 percent, no." Tr. 141-42. Assistant Chief Brown also testified that "there's a lot of the people that you work with and -- and public safety is a -- is of utmost importance to be able to -- to be able to read, comprehend and to take appropriate actions in a very timely fashion." Tr. 368. When asked whether he believes a slow reader can effectively be a captain, Brown testified, "I believe that there's a possibility that could have an adverse effect on the public safety." Tr. 368. However, he did not explain the amount of possibility or provide evidence as to the nature of the adverse effect to public safety.

McGrath testified that in his opinion a delay in reading material safety data sheets (MSDS) could cause additional damage to a building. Tr. 436. McGrath also testified that correlations have been established in the firefighting field between the time that passes and the increase in severity of risk of harm to people or property. Tr. 440. He testified that in his opinion a reading difficulty could result in a delay in resolving the emergency and can be detrimental. Tr. 445. He testified that "[f]or every minute that is delayed, an incident can escalate probably up to 25 to 50 percent more.**"** Tr. 440.

However, no one from the respondent's employ evaluated the amount of time the complainant used to read during an actual emergency scene or under a simulated emergency situation compared to the respondent's so-called "timely manner" requirement, to accurately determine the likelihood the complainant's learning disability would cause a substantial risk of harm. In fact, McGrath testified that before he found out that the complainant had a learning disability, there were no problems with him being a first responder at an emergency scene, but now that he knows of complainant's disability, he believes there is a possibility that there could be a problem. Tr. 492. Yet, he also testified that he had no empirical data to support this "possibility of a problem." Tr. 493.

McGrath provided examples of incidents showing that firefighting is dangerous work and any delay could be harmful to the public. Tr. 417-43. These incidents did not have anything to do with an individual or captain reading slowly which had caused additional harm. McGrath testified that a delay in general could cause problems, not necessarily particularly because of reading slowly or not reading correctly. Tr. 495-501.

This evidence does not prove the likelihood or imminence of potential harm that the complainant's disability would cause to the public safety. Just the opposite, McGrath testified that he has never seen the complainant compromise anybody's safety by not being able to read certain complex words (e.g., chemicals) used at a fire scene. Tr. 502. Hunsberger testified that during a six-month time frame while he was the complainant's supervisor in dispatch, he was not made aware of any issues regarding public safety concerning the speed at which the complainant read materials. Tr. 779. Hunsberger also negated the respondent's concern for safety because he testified that

lieutenants and acting captains read the same materials Tr. 740, 746-47. He stated that at the emergency scene, someone may have to read placards, MSDS, or other materials, which can be read by the first person arriving at the scene who can be a firefighter in the position of acting lieutenant, a lieutenant, or captain. Tr. 743-47. The rate at which the complainant read has never been a safety problem. FF 36.

The respondent's belief that complainant's disability would cause harm to public safety is mere speculation. In *Dipol* v*. New York Transit Authority*, 999 F.Sup. 309, 316 (E.D.N.Y 1998), the court held "[a] slightly increased risk is not enough to constitute a direct threat; there must be a high probability of substantial harm. . . . Moreover, a mere speculative or remote risk is not sufficient . . .." (Citations omitted.) Similarly, in *Jansen* v*. Food*, supra, 110 N.J. 377-78, the court held "to invoke the safety defense as a justification for otherwise unlawful discrimination, the employer must reasonably conclude that the employee's [disability] poses a materially enhanced risk of serious injury. . . . [I]n the absence of expert testimony linking the likelihood of a seizure to the likelihood of harm, the lower courts should not have assumed that Jansen was unable to work as a meat cutter without materially enhancing the risk of harm to himself or others. Jansen's work involved the use of sharp instruments, . . . [the employer] must prove, not assume, that [the plaintiff] was dangerous." Here, the evidence shows that the respondent did not consult medical experts, the complainant or any professionals other than Chief McGrath (FF 28), which it should have done in order to determine whether the complainant's disability would pose a significant risk of substantial harm to others or that he could not safely work as a captain.

The respondent argued that Boller's report (C. Ex. 4) constituted an individualized assessment and, therefore, the "[r]espondent had no reason to question the report's findings. The complainant, through the Boller report, substantiated that he was a slow reader. No further assessment of his reading ability was needed." R. Reply Brief, p. 11. The respondent clearly did not link the complainant's ongoing learning disability with the likelihood of harm. The respondent argued that *Lovejoy* and the many cases that the complainant cited involved an employee seeking an accommodation to perform his job and which do not apply to a testing accommodation case where the "focus" is on whether the accommodation would render the test ineffective at testing the skills of the job. R. Reply Brief, p.12. While the respondent's argument has some merit, the respondent ignores its own contention in this "testing accommodation case." The psychologist, Boller, determined that the complainant was in need of an accommodation for his disability for taking standardized exams. FF 17. Aronin even said the complainant only needs an accommodation for test taking, not for reading to perform his job. FF 17; Tr. 210-11, 258. Epstein also recommended that the complainant be given additional time to take exams. FF 17. There was no evidence that he needed an accommodation to perform his job as acting captain or the captain position. The respondent not only made the focus of this testing accommodation case whether the exam tests the ability to quickly process written information under time constraints, but the respondent also contended that its denial of the accommodation was justified because the captain position requires an employee to read in a timely manner in order to safely perform the duties. R. Reply Brief, pp. 6-8.

Similar to respondent's criticism of the commission's cited cases involving accommodations for jobs, the respondent raised the safety defense as its BFOQ and cited cases that do not apply to testing accommodations but involve safety concerns while performing jobs. R. Brief, p. 28-30; See e.g., *Johnson* v*. State of Connecticut Department of Correction*, CHRO No. 9740163 (March 9, 2000) and *DiPompo* v*. West Point Military Academy, et al.,* 770 F.Sup. 887 (S.D.N.Y. 1991). The respondent argued that the present case is similar to that of *Johnson* v*. State of Connecticut Department of Correction*, supra, CHRO No. 9740163, where the employer asserted the safety defense and the issue was whether the complainant could "run" and here, the issue is whether the complainant can "read in a timely manner" in order to avoid harm to public safety. R. Brief 28. However, unlike *Johnson,* in which the complainant's job required her to run to help others in an emergency, which she could not do, the captain position did not require Lenotti to read in a timely manner under emergency scenarios; however, he is able to read, which is a function of the job. FF 35 and 42.

The complainant's ability to read is not at issue; it is how quickly he can read, which was proffered by the respondent for the reason for denying his accommodation. As mentioned above, the respondent does circles around the word "read" by arguing many different qualifiers for the word, e.g., read fast, read correctly, read quickly, read in a timely fashion, and read in general. The respondent's business necessity or BFOQ argument is highly inconsistent and incredible. Obviously the complainant can read since the respondent has placed and kept him in a position where he must read for his job. Reading quickly or in a timely manner is not an essential function of the captain position. The complainant did not request an accommodation to do the job as captain,

but requested an accommodation to take an exam for the captain position. The respondent has failed to assess the complainant's disability with the job requirements and instead has made assumptions regarding the complainant's limitations as they relate to the captain position and potential harm to the public safety.

The respondent has not proven its safety defense. The respondent failed to conduct a reasonable assessment of the complainant's request for an accommodation before denying his request. Most, if not all of the respondent's evidence was speculative at best with regard to the likelihood and imminence of potential harm to others. Of course, the respondent presented evidence that a fire or an emergency scene is already an imminent situation, and testified that any delays could cause the situation to get worse. Tr. 440. However, the respondent failed to establish the likelihood that potential harm would occur based on a delay in reading or that the complainant's learning disability poses a materially enhanced risk of serious injury to an already dangerous situation. Evidence was not presented of an actual assessment or evaluation conducted of complainant's learning disability, medical or work history and job duties to determine, for example, that if he takes five minutes longer to read at an emergency scene than a captain without a known learning disability; he would cause substantial specific harm or damage, than would have occurred if the extra five minutes were not taken. There have been no reported public safety problems concerning the complainant with respect to his job duties either as a lieutenant or acting captain. FF 36.

In *Lovejoy-Wilson* v*. NOCO Motor Fuel, Inc*., supra, 263 F.3d 218, the court held that the plaintiff "was entitled to a reasonable accommodation, if one is available, to permit her to compete with nondisabled applicants on an equal basis/footing to become

an assistant manager." Similarly, in the present case, the respondent should have allowed the complainant to compete with non-disabled applicants on an equal basis by providing him with a reasonable accommodation to take the captain exam. In addition, unlike the plaintiff in *Lovejoy,* where the plaintiff requested a reasonable accommodation to perform an essential function of the position that she desired, here the complainant is not asking for an accommodation to eliminate reading or to be allowed to read slower in order to perform the essential functions of the captain position, but is merely asking for an accommodation to take the captain exam.

II

CONCLUSION

The complainant has proven that the respondent discriminated against him when it failed to accommodate his disability. The respondent failed to prove that the accommodation was unreasonable by failing to prove the exam was job-related and by failing to prove its safety defense. The respondent failed to accommodate the complainant by failing to engage in an interactive process to determine whether a reasonable accommodation exists. The complainant's claims of failure to promote, denial of a raise and differential rate of pay are dismissed.

III

DAMAGES

Pursuant to General Statutes § 46a-86 (a), the presiding referee has the authority to order the respondent "to cease and desist from the discriminatory practice

and further requiring the respondent to take such affirmative action as in the judgment of the presiding officer will effectuate the purpose of [chapter 814c, discriminatory practices]." Pursuant to General Statutes § 46a-86 (b), the presiding referee has the authority " to order the hiring or reinstatement of employees . . .." The Connecticut Supreme Court has further stated that "the victim of a discriminatory practice is to be accorded his rightful place in the employment scheme, that is he has a right to be restored to the position he would have attained absent the unlawful discrimination . . . such an order for relief may include retroactive and prospective monetary relief . . . where prohibited discrimination is involved the hearing officer has not merely the power but the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (Citations omitted; internal quotation marks omitted.) *State* v*. Commission on Human Rights & Opportunities*, 211 Conn. 464, 478 (1989); *Silhouette Optical Limited* v*. Commission on Human Rights & Opportunities*, No. CV92520590 (Superior Court, Judicial District of Hartford/New Britain at Hartford, Jan. 27, 1994, Maloney, J.).

"This remedial goal is furthered by vesting in a [human rights referee] broad discretion to award reinstatement, back pay or other appropriate remedies specifically tailored to the particular discriminatory practices at issue. . . . [Section 46a-86 (b)] vests discretion in a [human rights referee] to grant such relief under the proper circumstances." *Commission on Human Rights & Opportunities* v. *Truelove and Maclean*, *Inc. et al*., 238 Conn. 337, 350-51 (1996). Consistent with federal law, the goal of the courts is to make the complainant whole and put him in the position he would

have been in absent the discriminatory conduct. See *Landgraf* v*. USI Film Prods*., 511 U.S. 244, 254 (1994).

The complainant has requested that he be placed in the position of captain. Doing so would eliminate him from having to take the captain promotional exam, which is required by all candidates pursuant to the civil service rules. FF 2. As this case centers on a claim for failure to reasonably accommodate a disability for an exam, I do not believe bypassing the exam for which the complainant requested an accommodation would be prudent or proper. In the alternative, the complainant requested that he be given the accommodation he requested in order to take the captain promotional exam to be appointed to captain. Tr. 1160-61. I have found that the respondent failed to accommodate the complainant and therefore is liable for damages resulting from such failure. Had the respondent provided the complainant with the accommodation he requested in 2005, the complainant would have known whether he would have scored high enough (obtained the required score (FF 2)) to be certified for appointment. Although the next step in the civil service rules after receiving the required score on the exam is for the fire commission to interview the candidate and select a candidate for appointment to captain, I do find that this particular step can be bypassed.

The fire commission interviews the candidates and makes the selections for appointment to captain. FF 2. Chief McGrath testified that he has provided the fire commission with information regarding a candidate's character, attendance, performance and leadership skills, and if asked about Lenotti, he would tell the fire commission that the complainant always did his assignments in a timely fashion and he

is an excellent candidate. FF. 3; Tr. 484-85. McGrath also believes that the complainant would probably be promoted if he received an interview. Tr. 486. Also, the interview process is not always necessary in the event that the respondent has the same number of candidates as open positions. FF 9. Thus, all of the eligible candidates may be placed in the open positions without the need for a thorough interview by the fire commission. FF 9.

Unlike *Bartlett* v*. New York State Board of Law Examiners,* 226 F.3d 69 (2nd Cir. 2000) and *D'Amico* v. *New York State Board of Law Examiners,* 813 F. Sup. 217 (W.D.N.Y. 1993)*,* where the defendants were entities with only the authority to grant a testing accommodation and bar admittance to practice law, not with the authority to provide a position for employment, in the present case, the respondent is the employing entity with the authority to grant a testing accommodation, to certify the eligible candidate for appointment and ultimately to appoint the candidate to the desired position.

If the complainant had been granted an accommodation to take the exam, it is speculative whether he would have obtained the required score and been appointed by the fire commission to the captain position. However, the complainant firmly believes that he would obtain the required score if provided with the accommodation of additional time. Tr. 1163. Since the respondent denied the accommodation in 2005, the complainant has been placed at least three years behind his goal to become captain. Therefore, in light of the discrimination by the respondent, the fact that the respondent is the same entity to grant an accommodation and to make appointments to the captain position, the relaxed nature of the interview process, the evidence establishing that the

complainant can perform the essential functions of captain with or without an accommodation and the testimony of McGrath that he would provide a positive recommendation of the complainant to the fire commission, the interview process here shall be bypassed. Accordingly, the respondent shall provide the complainant with additional time to complete the captain exam and if the complainant obtains the required score on the captain exam, which would certify him to be eligible for appointment, he shall be appointed to the captain position. See *Commission on Human Rights & Opportunities, ex rel Pamela Hodge* v*. State of Connecticut, Department of Public Health*, CHRO No. 9710032, October 6, 1999 (complainant was awarded promotion without having to interview for position).

The eligibility lists expire every two years and the eligibility list created from the April 28, 2007 exam would be due to expire in two years, approximately April 28, 2009 or soon thereafter, unless the list was exhausted sooner. FF 4 and 8. The complainant shall have the option to take the next regularly scheduled captain exam or a captain exam administered between September 1 and December 31, 2008 (the ordered exam). If he chooses to take the ordered exam and he passes it, he shall be placed on the current existing eligibility list and if he obtains the required score pursuant to the civil service rules to be certified for appointment, he shall be placed on any subsequent eligibility lists. If he chooses to take the next regularly scheduled exam and he obtains the required score, placing him on the respective eligibility list and certifying him for appointment, he shall be placed on any subsequent eligibility lists. As a result, the complainant shall not be required to take any further captain promotional exams and he shall be appointed to the current or next available captain position without having to

interview with the fire commission. After taking either the ordered exam or the next regularly scheduled exam and in the event there is not a captain position available, he shall be paid the difference in the captain salary and his current salary until a captain position becomes available. If the complainant chooses not to take either the next regularly scheduled captain exam or the ordered captain exam, but instead takes a subsequent captain exam and obtains the required score; he shall not receive the advantages of: 1) being placed on subsequent eligibility lists without having to take subsequent captain exams; 2) being awarded the next available captain position without having to interview with the fire commission; and 3) being paid the difference of the lieutenant and captain's salaries until a captain position becomes available.

Additionally, the complainant testified that he lost sixteen days of vacation for having to participate in this litigation at the commission's offices. Tr. 1151-52. The complainant did not provide evidence as to the specific vacation days lost. The respondent argued that the complainant provided no proof of the number of vacation days lost and the presiding referee has no authority to award lost vacation days. R. Reply Brief, 18-19. However, the respondent did not provide evidence at the hearing to rebut the complainant's testimony regarding the sixteen days lost; instead, it attempted to provide new evidence in its brief. R. Reply Brief, 19. The respondent contended that seven days were used to meet with the commission's staff both during the investigative and public hearing processes. R. Reply Brief, 19. The respondent's evidence will not be accepted. I find from the record of the public hearing file, the complainant participated at the public hearing office attending settlement conferences, a pretrial conference and the public hearing on a total of approximately seven days. In addition, the commission's

regulations provide for the commission investigator to conduct intake, fact finding, mediation and conciliation meetings and the complainant testified that he attended meetings with an investigator at the Bridgeport regional office. Tr. 1070; Regs., Conn. State Agencies § 46a-54-1a. I find the complainant to be credible, but without specific evidence (testimony or documentation) regarding the type of meetings he attended on each of the sixteen vacation days lost, I find reimbursement for ten days of vacation time to be reasonable and fair. FF 44.

There is evidence in the record to show the complainant is able to perform the essential functions of the captain position with or without a reasonable accommodation. Here, I find, in order to make the complainant whole, it is necessary to bypass the interview process and appoint the complainant to the next available position of captain in the event that he completes either of the above stated captain exams with an accommodation and obtains the required score.

IV

ORDER

1. The respondent shall issue the captain promotional exam to the complainant either between September 1 and December 31, 2008 and provide the complainant with at least four months prior written notice of the exam issuance date;

   or the complainant may take the captain exam on the next regularly scheduled date that the captain exam is due to be administered. The complainant shall

inform the respondent in writing within two weeks of this decision as to which option above he has chosen in order to take the captain exam.

2. The respondent shall provide the complainant with the additional time, one and one half (1 ½) the standard time, to complete the captain promotional exam.
3. If the complainant chooses to take the captain exam between September 1 and December 31, 2008 and he obtains the required score (within the top three or five scores as required by the civil service rules) based on the current existing eligibility list, the respondent shall appoint the complainant to the next available position of captain.
4. If the complainant chooses to take the exam on the next regularly scheduled date that the captain exam is due to be administered and provided the complainant's score on the exam is within the top three or five scores on the respective eligibility list as required by the civil service rules, the respondent shall appoint the complainant to the current or next available captain position.
5. If the complainant's score on the captain exam from one of the two options stated above is within the top three or five scores on the respective eligibility list as required by the civil service rules certifying him for appointment and there are no available captain positions, the respondent shall place the complainant on any subsequent eligibility lists until he is appointed to a captain position and, as a result, the complainant shall not be required to take any subsequent captain exams.
6. If the complainant's score on one of the above stated exams is within the top three or five scores on the respective eligibility list as required by the civil service

rules certifying him for appointment and there are no available captain positions, the respondent shall pay the complainant the difference in the appropriate captain's salary and his then current salary from the time certifying him for appointment until the next captain position becomes available.

7. The respondent shall on an ongoing basis provide the complainant with reasonable accommodations for his disability in regard to exam taking.
8. The respondent shall provide the complainant with ten days of vacation.
9. The Respondent shall cease and desist from engaging in any further discriminatory conduct towards the complainant or any employees, as well as from any retaliatory conduct against the complainant or any person who participated in this proceeding.
10. The respondent shall participate in training in the areas of federal and state disability laws on accommodations for disabled employees. The respondent shall submit to the commission the name and contact information of the trainer and a copy of the curriculum/agenda within a reasonable period of time prior to commencement of the training. The commission shall be given an opportunity to review and comment upon said agenda/curriculum or any other training tools, and any commission recommendations shall be incorporated into the training.
11. The respondent shall develop and maintain a written policy for all municipal employees to utilize when requesting testing accommodations under state law and the ADA. The written policy shall include but not be limited to: the name and/or title of the person receiving requests and reviewing the requests, and the necessary documents to be submitted for the review.

_____
Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

David L. Lenotti
City of Stamford c/o Felicia Wirzbicki, Human Resources Generalist
Attorney Michael Colombo, Jr.
Attorney Michael Toma
Margaret Nurse-Goodison, Assistant Commission Counsel II