State of Connecticut

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February 11, 2015

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RE: CHRO ex rel, Mark Staszewski v. Town of Wallingford CHRO No. 1030290.

FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by certified mail, return receipt requested to the complainant and the respondent. The return post office receipt shall be proof of such service.

Very Truly Yours,

Kimberly D. Morris
Secretary II

cc.
Cheryl Sharp, Esq. – via email only
Shari-Lynn Cuomo Shore, Esq. – via email only
Michael J. Rose, Esq. – via email only
Michele C. Mount, Presiding Human Rights Referee

Certified No. 7014 0150 0001 0774 2854 (M. Staszewski)
Certified No. 7014 0150 0001 0774 2861 (B. Thompson/Town of Wallingford)

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. Mark Staszewski,
Complainant

v.

Town of Wallingford,
Respondent

CHRO No. 1030290

February 11, 2015

FINAL DECISION

I.

PRELIMINARY STATEMENT

On March 17, 2010, Mark Staszewski (complainant), employed by the Town of Wallingford (respondent), filed a discrimination complaint with the Connecticut Commission on Human Rights (CHRO or Commission) alleging that he was discriminated against because of his mental disability/disorder, physical disability, and because of previously opposed discriminatory conduct in violation of Connecticut General Statutes §§46a-60(a)(1), 46a-60(a)(4), 46a-58 and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

In his complaint, the complainant alleges that he was: (1) discriminated against in terms and conditions of employment and harassed on a continuing basis; (2) suspended on or about March 5th through March 9th, 2010; (3) warned on or about January 12, 2009, January 21, 2009, and March 5th 2010; (4) retaliated against on or about January 21st, 2009, and March 5th, 2010; (5) given less training on a continuing basis, and; (6) was delegated difficult assignments on a continuing basis.

The respondent argues that the only actionable claims in this matter are incidents of alleged discrimination that occurred no later than 180 days prior to March 17, 2010. The Commission and complainant argue that incidents occurring prior to the 180 period may be evaluated as evidence of discrimination. Additionally, the respondent argues that, Connecticut General Statute 46a-58(a) does not cover discrimination claims based on mental or intellectual disability, and that the respondent has accommodated the

complainant with regard to his requests. The public hearing was held on November 7, 2013, November 18, 2013, December 19, 2013, and July 15, 2014.

The tribunal agrees with the respondent that complainant alleges several discreet and separate instances of discrimination. The actionable claims in this matter are incidents of alleged discrimination that occurred no earlier than 180 days prior to March 17, 2010, which is September 18, 2009. Other information may be considered as evidence of discrimination; however, they are not actionable. Any alleged harassment or changes in conditions of employment will be evaluated as evidence to the two actionable claims. The primary focus of this ruling is on the claims that fall within the allowed statutory time frame.[1]

The complainant alleged he was discriminated against because he was not allowed to drive heavy equipment (10 ton trucks/snowplows) after January 12, 2009. The date revoking complainant's privileges is not within the 180 days of the filing. Nevertheless, the complainant saw Dr. Morris Bell for a fitness for duties exam, the results of which were dated October 10, 2009. The complainant's driving privileges were not restored at that time. The failure to reinstate the driving privileges is within the 180 days and properly before the tribunal. The claim of alleged failure to accommodate, on March 5, 2010 is also properly before the tribunal.

II.

FACTS

The following facts apply only to the period of the complainant's allegations and the close of the public hearing. As the complainant is still employed with the respondent, none of these facts can be applied to the complainant current situation. This ruling discusses the relevant facts of the hearing that were necessary to come to a decision.

1. The complainant is a member of a protected class in that he has disabilities, which include depression, and attention deficient disorder (ADD). (Tr. 21)

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[1] General Statute §46a-80 (f) Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination, except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination.

2. The complainant's mental symptoms include anxiety, irritability, lack of focus, hyper focus, lack of eye contact, sensitivity to slights, paranoia, and agitation. (Tr. 392- 394, C Ex 19)
3. In his application for employment with the respondent, complainant listed his then current medications, Depakote, Valium, Trazadone, and Prevacid. (C- Ex 1)
4. The respondent Town of Wallingford is a political subdivision of the state.
5. The complainant is currently employed by the respondent. (Tr. at 20)
6. The Department of Public Works by definition includes a responsibility to the public and requires that every measure to safe guard the public be utilized.
7. The complainant is a member of a Union, 1183 AFSCME. (Tr. at 20)
8. The complainant currently holds the position of Maintainer-2. (Tr. at 24)
9. The complainant is under the care of a psychiatrist Dr. Anderson and sees him regularly, at least once every two weeks since 2000. (Tr. 111,125, 158, 387)
10. Dr. Anderson sees the complainant for attention deficit disorder (ADD) and major depressive disorder and was prescribed Adderall, Cymbalta and Ablify. (Tr. 387-388, 427)
11. Stress and anxiety exacerbated the complainant's symptoms of feeling uncomfortable in crowds, lack of eye contact, jerking movements, agitation. (Tr. 393-398)
12. In April 2004, the complainant took 10 days of FMLA leave to try different medications for his depression. (Tr. at 27)
13. The complainant was hired on May 4, 1999 by the Town of Wallingford Public Works. (Tr. 24)
14. Duties of a Maintainer 2, may include one or more of the following: semi-skilled tasks in the maintenance, repair, and construction of roads, parks, public grounds, and bridges; operation of large trucks, such as, snow plows and bulldozers, manual equipment and; erect highway signs, rough grading and tree removal on roads, sewers and other areas as directed; act as helper to skilled trades man, do simple trade work and; may serve as trainee in a craft such as carpenter, welder, electrician, mason, painter and; does lesser grade work if

required. The description also includes the ability to work well with others. (Tr. 115, R – Ex- 7, 47)

15. If you are a Maintainer 2, you may have driving privileges, not that you must have them. (Tr. 114-115)
16. According to complainant's collective bargaining, agreement a reassignment of duties is not considered discipline. (Tr. 307)
17. In April of 2004, the complainant took 11 days FMLA leave to take and try different medications for his depression to see what would work best. (Tr. 27-28)
18. The complainant was in involved in at least seven accidents at work between September 18, 2003 and January 10, 2009. (Tr. 173)
19. The complainant denies being at fault for any of the work related accidents. (Tr. 175)
20. Complainant was involved in two work-related snowplowing accidents occurred in a span of 17 days, one on December 24, 2008 and the other on January 10, 2009. (R-Ex 18)
21. On December 24, 2008, the complainant was backing up a snowplow, out of necessity, down a residential street when he backed into a stopped van. (C-Ex 8)
22. The complainant hired an accident reconstruction expert, Peter Plante (Plante) who testified at the hearing to rebut the respondent's position that complainant was at fault. (Tr. 68-101)
23. At best, the only factual determination that could be made from the testimony of the expert witness was that there could have been contributory negligence by the van operator for failure to react.
24. The complainant received a ticket from the police for being at fault for an accident on January 10, 2009. The complainant sideswiped a passenger mini-van when he pulled out into the street after failing to stop at stop sign. The police report determined it was complainant's fault (R-Ex 16)
25. On January 12, 2009, the complainant received a letter of warning based on a complaint that was received at the Mayor's office from a town resident regarding his speeding in a snowplow. (C-Ex2)

26. On January 12, 2009, respondent notified the complainant that he would not be operating any heavy-duty vehicles until further notice. (Tr. 103, R-Ex 18)
27. On January 18, 2009, the complainant received a letter of warning because Edward Niland (Niland), the Superintendent of Public Works, observed him speeding and fishtailing in a smaller truck. Niland told the complainant to slow down; the complainant responded that he was only going 17 mph and that the roads were slippery. Later, that day the complainant was told he could not drive any Town equipment until further notice. (C- Ex 2)
28. The complainant admitted he was fishtailing, but said it was because of the weather not his speed. (TR 54-55)
29. There were at least four (4) other Maintainer 2 employees who were given written warnings and or suspensions for accidents with snowplows and other equipment.[2] (See Exs. R 20-23, Tr. 313-330)
30. Discipline varied from verbal warnings to several days suspension for other drives who were involved in accidents. (Tr. 307-330)
31. The route which is the most likely to cause accidents is for the downtown area. (Tr. 310)
32. Discipline for work related accidents is based on who was at fault, the type and severity of the accidents, and if there were injuries. (See Tr. 307-330)
33. Some routes are more difficult than others due being in heavily trafficked areas,
34. When the complainant was not driving, he operated smaller equipment, worked on sidewalks, used blowers and plows, cleaned and maintained equipment. (Tr. 291,332,491-492)
35. The complainant retained his maintainer 2 titled and was paid accordingly. (See Tr. 103)
36. The complainant received raises in 2010, 2011, 2013. (R Ex-40)
37. Reassignment of duties is not considered discipline under the complainant's Collective Bargaining Agreement. (Tr. 333, 651-652)

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[2] Harrold Winne, Steven Palmero, Randy Mangino, and James Petlak.

38. One of the complainant's duties after his driving privileges were suspended was cleaning and detailing of the town's "showboat," a portable bleacher section (Tr. 36, 244, 530-531)
39. The complainant spent an inordinate amount of time and effort cleaning this piece of equipment, to the extent that he bought his own supplies and came to work while he was off the clock. (Tr.36, 179, 245)
40. The complainant was told not to buy any materials with his own money. (Tr. 180, 249)
41. The complainant was not on any deadline to or under pressure to hurry through this assignment. (Tr. 250-251)
42. The complainant would often start working before he was on the clock, which was prohibited by law and he was asked to stop. (Tr. 179)
43. The complainant was not economically harmed while he was prohibited from driving heavy equipment. (Tr. 168-169)
44. On September 15, 2009, and October 2, 2009, the complainant was examined by Dr. Morris David Bell, Ph.D., ABPP (Dr. Bell) to determine whether he was able to perform his job duties with or without reasonable accommodation. (C Ex-19)
45. The results of Dr. Bell for a fitness for duties exam were submitted on October 10, 2009. (C Ex-19)
46. Dr. Bell's report indicated that the complainant was still suffering from Major Depressive Disorder, Chronic Pain Syndrome, Anxiety and stress. *Id.*
47. The report indicates that the complainant described his situation as being demoted; however, the complainant remained a maintainer 2 throughout his employment. *Id.*
48. Dr. Bell's report stated that the complainant could return to his duties as a maintainer 2, however, his driving privileges were not reinstated. (Tr. 114, 169)
49. In or about early March 2010, the complainant told his supervisor that he was unable to assemble in the driver's room due to anxiety about being in a crowded area. He refused to assemble with the other workers in the driver's room to receive his instructions for the day. He was initially suspended for three days for not following directions. (Tr. 115-118, 180-186)

50. On March 4, 2010, Henry McCully (McCully) sent a memo to the Forman of Public Works, Joseph DaCunto (DaCunto) and instructed him to suspend the complainant for 3 days for insubordination if he continued to refuse to assemble in the driver's room. (R Ex-30)
51. The complainant did not assemble in driver's room on March 5, 2010 and was suspended for 3 days. (Tr. 119)
52. Also on March 5, 2010, the complainant gave DaCunto a note from his doctor, Dr. Anderson, stating that it is uncomfortable for complainant to be in a large crowded room, and requesting that the complainant be allowed to "elect to retire to a more secluded room "for emotional well-being. (Tr. 125, C Ex-12)
53. DaCunto gave the note to McCully who then gave it Human Resources. (Tr. 343-346)
54. On March 23, 2010, the complainant was accommodated and given instruction in a separate room. As of the date of the hearing, the complainant still receives his instructions in a separate room. Id. (Tr. 444)
55. On March 15, 2010, Mr. Staszewski filed a grievance with regard to a violation of Article 27 and section 1, (no employee shall be disciplined without just cause,) of his contract with his union regarding his suspension. (C Ex-10, Tr. 119-120, AFSCME agreement with the Town of Wallingford, July 1, 2008 to June 30, 2013)
56. The complainant reached a mutual settlement regarding the grievance filed on March 15, 2010, and the suspension was reduced to a written warning and the complainant was to be reimbursed if he was not disciplined for a year. (Tr. 343-346, C Ex-11)
57. The complainant reached a settlement regarding payment in connection with his suspension. (Tr. 351, 343-346, R Ex-33)
58. On May 5, 2011 complainant was asked to see Dr. Peter M. Zeman, M.D. (Dr. Zeman) to determine if he was able to drive twenty-ton or heavier trucks with or without reasonable accommodation. (C Ex-20)
59. The complainant refused to see Dr. Zeman (Tr. 172-173)

60. The complainant sent back the request to McCully stating, "You can send somebody that really needs this doctor more than me McCully, Niland and Steve Palermo (Palermo), two of which were his supervisors. (Tr. 190-191)
61. In September 2011, the complainant was involved in an incident where he was in his vehicle and asked to report to McCully by another employee at McCully's request. He refused to do so because there was only 7 minutes left on the clock. (Tr. 187-190)
62. When the complainant continued to refuse, McCully went to search for him and found him in the restroom. McCully was upset, spoke sternly with him, and told him to report to his office when he was done. This reprimand caused the complainant to become anxious, angry and agitated. (Tr. 410-411, C-Ex 18, R Ex.35)
63. Complainant filled a complainant with Human resources alleging Mr. McCully harassed him by yelling at him in the restroom. After a thorough investigation by Mr. Sullivan in Human Resources, these allegations were determined to be unsubstantiated and that harassment did not occur. (R Ex-43)
64. Work stress created a greater manifestation of the symptoms of the complainant's diagnosis. (Tr. 415-416)
65. Dr. Bell described that the complainant's perceptions could be "skewed, in terms of looking at the environment because of his pre-existing depression and ADD." (Tr. 450)
66. The complainant was also disciplined in September 2011, for wearing a skeleton mask and top hat to work which co-workers deemed as scary as the behavior came on the heels of the shooting in a movie theater in Aurora Colorado. He was told not to wear costumes at work. (Tr. 372-374)
67. A week after the complainant was told not to wear costumes after work he was disciplined for wearing extravagant and bejeweled sunglasses to work. (Tr. 375-377, 453-456)
68. Additionally, in September 2011, the complainant posted a poem in the workplace that was disturbing to co-workers, it contained the line "do not support

Halloween-looking individuals, "and "It's all tricks there are no treats." (Tr. 356, R Ex-34)

69. The complainant was allowed to drive heavy trucks again in 2012 despite never acquiescing to see Dr. Zeeman. (Tr. 102-103, 168)

70. On occasion, the complainant would make hostile or insulting comments to his co-workers. (See Tr. 370, 610, 629, 637 R Ex-44)

71. The complainant went to the Town Clerk's office inquiring about McCully's marriage certificate, which made McCully uncomfortable that one of employee's was looking into his personal information. (Tr. 235-236)

72. Complainant testified at the hearing that his symptoms over the past four years included anxiety where he did not want to be around other people, that you are alone and everybody seems to be staring at him or looking at him. He also experienced becoming shaky and perspiring quite a bit. (Tr. 156)

73. During the public hearing, on a few occasions, this tribunal observed the complainant becoming very agitated, had outbursts of anger and had difficulty restraining his reactions.

74. The complainant's driving privileges were restored in 2012.

75. The complainant's duties require an utmost concern for public safety. As a town employee, he represents the Town of Wallingford when he is on the clock for work.

III.

LAW

"... [T]he commission *could* properly dismiss [a complaint] if it was not filed within 180 days of the alleged act of discrimination." (Emphasis in original.) *Id.* The trial courts in this and the federal arena extend this conclusion to judicial actions premised on CFEPA, that is, they have determined that courts also can properly decline to consider allegations that occurred more than 180 days before the date that the plaintiff filed a complaint with the CHRO. See *Vollemans v. Wallingford,* Superior Court, judicial district of New Haven at Meriden, Docket No. CV 04 0286311 (January 10, 2006, Tanzer, J.)

(40 Conn. L. Rptr. 600), and *Kahn v. Fairfield University,* 357 F.Sup.2d 496, 503 (D.Conn.2005). *Tosado v. State,* No. CV030402149S, 2007 WL 969392, at *2 (Conn. Super. Ct. Mar. 15, 2007)

"'Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice.'" (Emphasis added.) Jackson v. Water Pollution Control Authority, 278 Conn. 692, 706, n. 12 (2006) (quoting National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 114-15 (2002). "[A]s a general rule, 'discrete discriminatory acts are not actionable if time barred, even when they relate to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act.'" Tosado v Connecticut, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-CV-03-0402149-s (March 15, 2007) (2007 WL 969392, 33) (quoting National Railroad Passenger Corp. v. Morgan, supra, 536 U.S. 113. "The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *National Railroad Passenger Corp. v. Morgan*, supra, 536 U.S. 113, *Commission on Human Rights and Opportunities ex rel. John Caruso, Jr. v. State of Connecticut, Western Connecticut State University*, 2009 WL 910174, at 4.

Connecticut General Statute § 46–60(a) provides in relevant part that, "[i]t shall be a discriminatory practice in violation of this section: (1) For an employer ... except in the case of a bona fide occupational qualification or need ... to bar or discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of ... present or past history of mental disability. "Mental disability" is defined in the statutes as "refer[ring] to an individual who has a record of, or is regarded as having one or more mental disorders. Conn.Gen.Stat. § 46a–51(20). Courts in Connecticut will look to federal precedence for guidance in enforcing claims brought under the CFEPA. *Levy v. Comm'n on Human Rights & Opportunities,* 236 Conn. 96, 103, 671 A.2d 349 (1996). In fact, Connecticut has adopted the burden shifting framework set forth by the Supreme Court in *McDonnell–Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668

(1973), for resolving discrimination claims brought under CFEPA." *Craine v. Trinity College,* 259 Conn. 625, 636, 791 A.2d 518 (2002). Under this approach, the plaintiff must first establish a prima facie case of discrimination. *Vollemans v. Wallingford,* 103 Conn.App. 188, 220, 928 A.2d 586 (2007). If the plaintiff does so, the burden of production then shifts to the defendant to articulate a nondiscriminatory reason for the employment action. *Id.* If the employer does so, the burden then shifts back to the employee to prove that the reason articulated by the employer is only pretext and that the employment action was in fact motivated by illegal discrimination. *Id.*

To establish a prima facie case of discrimination, the plaintiff must demonstrate: (1) that he is within the protected class; (2) that he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances that give rise to an inference of discrimination. *Id.* " *Drolett v. Town of E. Windsor*, No. CV085003212S, 2010 WL 3039597, at 2 (Conn. Super. Ct. July 12, 2010)

Our Supreme Court "has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." Id., at 407, 944 A.2d 925. While certain elements of the Fair Employment Practices Act and the ADA differ, "[c]laims for violations of the [Fair Employment Practices Act] are analyzed under the same standards as claims for violations of the ADA." *Chasse v. Computer Sciences Corp.*, 453 F.Supp.2d 503, 514 n. 4 (D.Conn.2006). "[D]iscrimination on [the] basis of [a] disability under [the] ADA includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." (Internal quotation marks omitted.) *Curry v. Goodman,* 286 Conn. 390 (2008) "Under the ADA, a qualified individual with a disability is one who is capable of performing the essential functions of the desired job with or without reasonable accommodation." Id., at 402 n. 8, 944 A.2d 925. In Curry, the court concluded that the legislative intent with regard to the Fair Employment Practices Act requires "employers to make a reasonable accommodation for an employee's disability." *Langello v. W. Haven Bd. of Educ.*, 142 Conn. App. 248, 259-60, 65 A.3d 1, 8 (2013)

"A medical examination is job-related and consistent with business necessity if an employer reasonably believes that its employee is having mental health issues that may affect his/her job or the safety of the employee and/or the public. *Davis–Durnil v. Village of Carpentersville,* 128 F.Supp.2d 575, 580 (N.D.Ill.2001) (citing *Krocka v. City of Chicago,* 203 F.3d 507, 515 (7th Cir.2000)); *Conroy v. New York Dep't of Correctional Serv.,* 333 F.3d 88, 97–98 (2d Cir.2003); *see also Watson v. City of Miami Beach,* 177 F.3d 932, 935 (11th Cir.1999) ("In any case where a [fire] department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity.")." *Coffman v. Indianapolis Fire Dep't*, 619 F. Supp. 2d 582, 594 (S.D. Ind. 2008) aff'd, 578 F.3d 559 (7th Cir. 2009)

"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.F.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. See *Humphrey v. Memorial Hospitals Assn.,* 239 F.3d 1128, 1137 (9th Cir.2001), cert. denied, 535 U.S. 1011, 122 S.Ct. 1592, 152 L.Ed.2d 509 (2002); see also *Saksena v. Dept. of Revenue Services,* supra, Commission on Human Rights & Opportunities, Opinion No. 9940089 (citing employer's duty to engage in interactive process in good faith)." (Internal quotations omitted) *Curry v. Allan S. Goodman, Inc.,* 286 Conn. 390, 416, 944 A.2d 925, 940 (2008)

"A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment.... To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities." (Citation omitted; internal quotation marks omitted.) *Brown v. American Golf Corp.,* 99 Fed.Appx. 341, 343 (2d Cir.2004). "[A]n adverse employment action [has been defined] as a significant change in employment status,

such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Internal quotation marks omitted.) *Reynolds v. Dept. of the Army,* 439 Fed.Appx. 150, 153 (3d Cir.2011). *Amato v. Hearst Corp.,* 149 Conn. App. 774, 781, 89 A.3d 977, 982 (2014) "To be 'materially adverse,' the action must [result] in a change in responsibilities so significant as to constitute a setback to the plaintiff's career ... [S]ubjective dissatisfaction with assignments does not constitute adverse employment action." (Citation omitted; internal quotation marks omitted.) *Simmons–Grant v. Quinn Emanuel Urquhart & Sullivan, LLP,* 915 F.Sup.2d 498, 504 (S.D.N.Y.2013). "[A] plaintiff's subjective perception that a demotion has occurred is not enough.... Other considerations include allegations of harm to [the] plaintiff's reputation, limited opportunities for advancement, and reduced earning potential ...." *Lizee v. Yale Univ.,* No. CV136038928S, 2014 WL 4099324, at *3 (Conn. Super. Ct. July 15, 2014)

There are many situations where accommodations have been denied all together. For example, in *Ezikovich v. CHRO*, 57 Conn.App. 767 (2000), the plaintiff requested an accommodation from her employer for chronic fatigue syndrome asking that she be allowed to work a "no fixed start work schedule." *Id.* at 769. The employer, the Department of Public Health, denied the request and instead offered a modified work schedule, in which the plaintiff could work reduced hours but would continue to be classified as a full-time employee. *Id.* The Appellate Court held the department properly accommodated her condition with the offer of a reduced schedule, "while permitting the department to satisfy its own management needs of having the plaintiff work a regular and predictable schedule." *Id.* at 775. The Appellate Court explained, that while the plaintiff may prefer a flexible and open-ended work schedule, "an employer is not obligated to provide an employee the accommodation she requests or prefers, the employer need only provide some reasonable accommodation." *Id.*[3]

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[3] An additional example can be found in *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d. Cir. 1992), a former head nurse filed a discrimination claim against her employer, the Secretary of Veterans Affairs, for failure to accommodate based on disability (and race). *Id.* at 796. As head nurse, the plaintiff was required to work a tour

The complainant in the instant matter also alleged that the respondent violated the ADA when it discriminated against him because of his mental disability. Although the commission can enforce certain federal laws through General Statutes § 46a-58 (a), it cannot prosecute an ADA claim based on mental disability discrimination. Section 46a-58 (a) states: "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, blindness or physical disability." Because mental disability is not enumerated as a protected basis under § 46a-58 (a), the tribunal will not address the complainant's ADA-based claim. See *Commission on Human Rights and Opportunities ex rel. Edgardo Cosme v. Sunrise Estates, LLC.*, 2007 WL 2619062, at 9.

IV.

ANALYSIS

In this case, complainant has proven that he is within the protected class of having a mental health a disability. The complainant is qualified for the position of maintainer 2 as he has remained, and continues to remain, in that position since he was promoted from maintainer 1. Thus, he satisfied the first 2 elements in establishing his prima facie

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of duty of either 7:30am-4:00pm or 8:00am-4:30pm. *Id.* at 795. Plaintiff suffered from depression, severe anxiety, insomnia, and migraine headaches and began antidepressant and sedative drug therapy upon her physician's recommendation. *Id.* at 796. The medication made it difficult for plaintiff to get out of bed in the morning, causing her to arrive regularly late to her shift around 10:00am. *Id.* Plaintiff subsequently requested an accommodation asking to work a later shift of 10:00am-6:30pm. *Id.* The request for a changed tour of duty was denied and the employer offered the plaintiff a position as a staff nurse with the hours requested and no loss of grade, salary, or benefits. *Id.* at 798. Though the plaintiff viewed the offer as a demotion, the Court held that it constituted a reasonable accommodation and that, "when an employer offers an employee an alternative position that does not require a significant reduction in pay and benefits, that offer is a reasonable accommodation virtually as a matter of law." *Id.*

case. However, element 3, that he suffered an adverse employment action, and 4 that the suffered adverse action which occurred under circumstances that give rise to an inference of discrimination, are problematic.

A. Failure to Accommodate

The complainant fails to show that he suffered an adverse action for failure to accommodate his request of meeting in a separate room. The complainant's initial accommodation request was that he be given his daily work instructions in a private space apart from his coworkers to alleviate the stress and discomfort he feels in the loud driver's room in which workers are typically given instruction. The respondent ultimately granted this accommodation after the complainant brought in a note by his doctor, Dr. Anderson. The complainant continues to receive his daily instructions privately as he is still employed by the respondent.

The note did not directly address the situation of getting instructions in the driving room. It stated that sometimes the complainant was uncomfortable being in a large open crowded room. He suggested a solution that the complainant should be allowed to elect to retire to a more secluded room "for [his] emotional well-being." After an accommodation was requested, the respondent made a good faith effort to work with the complainant to arrive at a solution. The employer is allowed to time arrive at a solution and that includes having discussions with Human Resources and the employee's supervisors, as long as they are acting in good faith. The respondent did act in good faith, the complainant was provided with an accommodation and he did not suffer any material harm.

The complainant also alleges that he suffered harm due to being suspended for 3 days for failing to assemble, prior to the discussion of his doctor's note. This is issue was also addressed by a union grievance, as initially the complainant was suspended for insubordination. Any possible harm was redressed when the parties reached an agreement. The terms of the grievance settlement included that the suspension was reduced to a written warning and the complainant was paid for his suspension time. The complainant also alleges he was retaliated against for filing a request for

accommodations. The complainant was accommodated and continues to be accommodated.

B. Driving Privileges

In January of 2009, the complainant was told that his driving privileges for large vehicles and then later smaller vehicles were being suspended due to several accidents and incidents of speeding. While removed from his driving duties, the complainant believes that he was delegated undesirable assignments on the basis of his mental disability, such as the cleaning and detailing of the town's "showboat," a portable bleacher section, as well as operation of the water tanker to water grass, shrubs, and trees, in addition to other regular duties. It is difficult to establish harm, as these duties are included in the job description of a maintainer 2.

A change of duties, especially those described as part of the complainant's job duties, is not an adverse action. The respondent did not demote, cut the complainant's salary, or fail to give promotions to the complainant. The respondent did not give complainant duties outside his job description. His union bargaining agreement stated a change of duties was not discipline. The respondent continually worked with the complainant to return his driving privileges, which in fact were ultimately restored. He was not terminated because his driving privileges were suspended. The complainant's job assignments were changed to accommodate for his driving suspension. These changes did not result in any reduction in pay or benefits. As of the fall of 2012, the complainant was returned to driving snowplows and trucks.

The fact the complainant's driving duties were not restored immediately after Dr. Bell's fitness for duty evaluation cannot be considered adverse under the circumstance presented in this case. The performance of the complainant's job necessarily involves the safety of the public. The respondent has a duty to the public to perform in a manner that does not put the public and its property in danger. Further, liability cannot be imposed on the respondent for failure to restore complainant's immediately driving duties after his fitness for duty exam with Dr. Bell. Dr. Bell's opinion that the complainant could return to all of his job duties was just a threshold matter to these privileges being restored.

Dr. Bell's report also noted that the complainant was in "partial remission," and that the complainant still suffered from mood instability and anxiety. He further noted that the complainant could be insensitive, defensive, and anxious about getting his work done and may have sacrificed caution for speed. Dr. Bell also opined, "Demotion for recklessness should serve as an indelible lesson." Nevertheless, he was cleared psychiatrically cleared to return duties. The complainant never suffered an interruption of his job as maintainer 2; he was only reassigned different duties within his job description. Questions remained as to complainant's ability to operate vehicles in a safe manner. The question must be asked whether a complainant can safely perform his job duties with or without reasonable accommodation. The answer in this case is, he can perform some of them. There was no requirement that respondent allow him to perform all of the tasks in his job duties all of the time.

In this tribunal's opinion, Dr. Bell's report does not instill confidence that the complainant was ready to drive heavy equipment that posed a deadly threat to public safety if operated in an unsafe manner. There is an implied requirement that a person driving heavy equipment for a municipality must do so in a safe manner. If the respondent had any doubts about a driver's ability to drive safely, they are required to prevent such a driver from operating heavy equipment. The complainant had a history of accidents, complaints from the public regarding his speeding and was observed speeding by his employer. In the period between Dr. Bell's examination and the restoration of his driving privileges, the complainant at times exhibited questionable behavior[4] that would not be tolerated in any circumstance and warned about that behavior.

The changes to the complainant's duties were not materially adverse; they did not affect his salary or promotion chances. The complainant continued to receive raises in salary and testified that he is very happy in his job at the present time. The respondent also testified that the complainant was doing a good job and that the behavior that had concerned them was abated. The complainant did not provide persuasive evidence that

[4] Questionable behavior includes, the incident with the skeleton mask, posting of the poem, checking into personal matters of his supervisor, making hostile comments to co-workers.

he suffered any actionable adverse actions while his driving privileges were temporarily suspended, as those privileges were only a part of his job duties. No inference of discrimination could be found in the decision to suspend those privileges.

Arguendo, even if his change in duties can be construed as objectively adverse, there is no inference that respondent based any of its decisions with regard to complainant with discriminatory animus. Furthermore, the respondent had a legitimate business reason, as well as an affirmative duty to the public, for suspending complainant's driving privileges. The complainant could not demonstrate any evidence that the suspension was anything other than for the legitimate reason. The respondent had a legal duty to operate with safety as their paramount concern. The respondent performed its duty to the public, while continually employing the complainant who suffered no monetary loss as result of having his driving privileges suspended. The complainant has failed to meet the 3rd and 4th requirement to establish a prima facia complaint and this tribunal rules in favor of the defendant.

V

CONCLUSION

Respondent in this case has a duty to the public, as well as to it employees. Respondent navigated a rocky road between ensuring the safety of public and accommodating its employee's disability. The job duties assigned to the complainant were tailored to the assignments that he was fit and qualified to perform at that time. Respondent's actions do not constitute actionable harm to the complainant. In light of the foregoing, complainant has failed to establish a prima facia case of discrimination or retaliation and finds in favor of the respondent.

It is so ordered this 11th day of February 2015.

Michele C. Mount,
Presiding Human Rights Referee

cc.

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