

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

December 10, 2015

CHRO No. 1010190 - Commission on Human Rights and Opportunities ex rel. Tammy Turner, Complainant v. Connecticut Department of Developmental Services, Respondent

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Memorandum of Decision

Procedural Background

On or about November 19, 2009, Tammy Turner (the “complainant” or “Turner”) filed an affidavit of illegal discriminatory practice (“complaint”) with the Commission on Human Rights and Opportunities (“commission”) alleging that the Connecticut Department of Developmental Service (“respondent” or “DDS”) had discriminated against the complainant on the basis of her mental disability in violation of Connecticut General Statutes § 46a-60(a)(1).¹ On September 15, 2011, the complainant amended her complaint to add additional allegations of fact that would also support a discrimination claim based on mental disability.

¹ Conn. Gen. Stat. § 46a-60(a)(1), states,

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 refuse to hire or employ or to bar or to discharge from employment any individual or 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, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness[.]

The complaint also alleged a violation of section 46a-58(a); however, at the time that the complaint was filed, mental disability was not one of the protected classes listed under that section. That claim was not pursued. Section 73 of Public Act No. 15-5 of the June 2015 Special Session (An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2017, concerning General Government, Education, Health and Human Services and Bonds of the State) amended section 46a-58(a) to add “mental disability” as a protected class.

The complaint, as amended, was certified by the commission on March 23, 2012, and received by the office of public hearings ("OPH"), on April 2, 2012, after the commission made a reasonable cause finding. The case was assigned to human rights referee Alvin R. Wilson, Jr., who issued a notice of contested case proceeding and hearing conference dated April 24, 2012. The referee issued the scheduling order on May 14, 2012. All statutory and procedural prerequisites having been satisfied, the complaint is properly before this tribunal for hearing and decision.

There were nine days of public hearings from between June 4, 2013 and November 19, 2013. The complainant was represented by attorney George C. Springer, Jr. The commission was represented by commission counsel Kimberly Jacobsen. The respondent was represented by Assistant Attorney Generals Erik T. Lohr and Carolyn Ennis. On September 2, 2014, the complainant and the commission filed a post-hearing rebuttal brief. Also, on September 2, 2014, the respondent filed a post-hearing rebuttal brief. Thereafter, the record was closed.²

On February 19, 2015, the office of public hearing received notice from complainant's counsel that the complainant had passed away unexpectedly. The letter indicated that her executor intended to substitute the complainant's estate a party complainant as soon as practicable. The office of public hearings has not received the request, as of December 10, 2015.

For the following reasons, after a thorough consideration of the evidence presented and an assessment of the credibility of the witnesses, the undersigned concludes that there has been insufficient evidence adduced to establish that the respondent's decision to terminate the complainant was motivated by a discriminatory animus. Additionally, I conclude that the evidence does not support the conclusion that the respondent failed to provide the complainant a reasonable accommodation. The complaint is dismissed.

² After the record was closed, the parties submitted requests for the undersigned to consider supplemental authorities – commission counsel submitted her request on December 1, 2014 and counsel for the respondent sent a request on March 26, 2015. Additionally, at my request, respondent's counsel delivered to the undersigned the actual medical certificates that the DDS received from the complainant and maintained in her medical file. On May 19, 2015, the undersigned convened a status conference with commission counsel, complainant's counsel and counsel for the respondent to resolve some evidentiary issues regarding the receipt of various medical certificates that had been entered into evidence.

Finding of Facts

1. The respondent placed the complainant on administrative leave in January 2009. The respondent ended the administrative leave effective, February 1, 2009, and the complainant was told to report to work that day. The complainant did not report for work.
2. On March 23, 2009, Kevin Martin, Public Programs Manager, with DDS, sent an email to Lateisha Griggs, a.k.a. Lateisha Rainey, ("Lateisha"), the respondent's Human Resources Associate for the north region DDS North Regional Office, asking for an update on Turner because she had not returned to work after February 1, 2009. Lateisha replied that Turner had not submitted any medical documentation and the Lateisha was sending her another form to request state FMLA leave. (C-3, p.6.) The first form was sent to Turner on or about March 12, 2009. (See R-2). (Note - It is not clear from the record why Lateisha sent these forms to Turner.)
3. On or about April 2, 2009, Lateisha sent a form that denied the complainant FMLA leave (Form FMLA-HR2b). R-3. The form indicated that Turner had exhausted her federal FMLA leave entitlement in the applicable 12-month period and that her request for state family/medical leave (C.G.S. 5-248a) is not approved because Turner "did not return the requested medical documentation." R-3.
4. On April 9, 2008, Sarah D. Cook, respondent's north region's human resources director, asked Lateisha if DDS had received any medical documentation from the complainant. Latiesha replied that, although two FMLA packets had been sent to Turner, no medical documentation had been received. (C-3, p. 7.)
5. On April 9, 2009, Cook sent Turner a letter stating that the complainant had failed to return to work after her administrative leave period ended, on February 1, 2009; that the complainant's request for FMLA was not granted due to lack of medical documentation; and that she was expected to return immediately with the appropriate medical documentation. The letter also notified the complainant that, according to state personnel regulation 5-240-1a, she could be dismissed from state service for being absent without leave for five or more working days. (R-4. R-33, p. 22.)
6. On April 28, 2009, Cook sent the complainant a letter, pursuant to the requirement of Loudermill and in accordance with Article 33, Section Eleven of the District 1199 contract, scheduling a pre-termination meeting for May 5, 2009 because the complainant had not returned to work after being released from

- administrative leave on February 1, 2009. (R-33, p. 23.) Turner did not appear at the pre-termination meeting. (Tr. 308-309.)
7. On May 6, 2009, Lateisha informed Cook by email that Turner had six weeks and two days of state FMLA leave entitlement remaining. Cook directed Lateisha by email to “[p]lease mail her the FMLA paperwork if you have not done so already. And make sure I get copies of any and all paperwork related to her.” (C-3, p.9.) Griggs sent the forms to Turner, on or about May 7, 2009. (R-33, p. 13.)
 8. On May 7, 2009, the complainant witnessed her psychiatrist, Dr. Lorenzo, complete, date, sign, and stamp a two-sided Form P33A, medical certificate (the “Original Lorenzo-P33A”). Lorenzo did not specify on the P33A either her medical diagnosis or any specific limitations related her medical condition.
 9. The complainant attached the Original Lorenzo-P33A to the affidavit of discriminatory conduct (“complaint” or “affidavit”) that she filed with the commission in November 2009. She labeled it “C’s Exhibit 3”. (See R-31.) Although the complainant believed that she sent the Original Lorenzo-P33A to the respondent by certified mail (Tr. 557, 939-941, 946, 1734-37, 1753 and 1764), she did not do so. (See also Tr. 1583-1585 and 1593.)
 10. The respondent never received the Original Lorenzo-P33A. The respondent did not receive any copy of the Original Lorenzo-P33A prior to July 15, 2009, the effective date of the complainant’s dismissal from state service. The respondent first received a copy of the first page of the Lorenzo-P33A on or about January 2010; it was attached to the copy of the affidavit of discriminatory conduct that was filed by the complainant in November 2009.
 11. The complainant’s therapist, Charlotte A. Ramseur, LMFT, completed and signed, but did not date, a copy of a two-page medical certificate, Form P33A-Employee (the “Ramseur-P33A”). At the top of the Ramseur P33A is the complainant’s fax machine stamp “JAN-01-2007 TAMMY_TURNER 18608458945”. The first page of the Ramseur-P33A had a fax time of 11:54 PM and P. 1; the second page of the Ramseur-P33A had a fax time of 11:59 PM and indicated that it was P.5.). The Ramseur-P33A indicates that Turner’s last appointment was on May 7, 2009, (See also R-32, copy of that was faxed to Daley on June 23, 2009; and C-54, a copy of the Ramseur-P33A that the respondent labeled “ATTACHMENT B” of its answer to the original complaint submitted to the commission, on or about January 10, 2010.)
 12. The Ramseur-P33A stated, in pertinent part, that the complainant was (1) requesting “FMLA – because of post traumatic stress disorder; anxiety; depression,” (2) the probable duration of the condition was “undetermined,” (3) the approximate date that the condition commenced was April 13, 2009, (4) the

date of the employee's most recent examination was May 7, 2009, and (5) the complainant "is under care for psychotherapy for PTSD, anxiety and depression. When she is stable enough to return to work, I will release her." The Ramseur-P33A did not contain any additional information regarding the complainant's medical condition or any limitations experienced as a consequence of the diagnoses. (R-32)

13. Lorenzo's records indicate that he met with Turner on May 8, 2009. (C-37.)
Ramseur's records indicate that she met with Turner on May 7, 2009. (R-30.)
14. On May 14, 2009, the respondent's North Region Human Resources office received via fax a copy of the Ramseur P33A ("Faxed-P33A"). C-3, p. 13. Tr. 214. In addition to some fax stamp information that is found on the Ramseur-P33A, the Faxed-P33A bears a "JAN-06-2007 TAMMY_TURNER 18608458945" fax stamp. The first page of the Faxed-P33A had a time of 8:55 PM and indicated that it was page "P. 1"; the second page had a time of 8:56 PM and indicated "P.2". (See also R-7 which also bears part of a fax stamp "09/09/2009 WED (TIME?) FAX 860 263 2626 DDS HR NORTH REGION 016/024 and 017/024".)
15. On May 14, 2009, after receiving the Faxed-P33A, Lateisha sent Cook an email message, at 12:06 p.m., that stated, "I am in receipt of the medical, it was faxed and put in my in box after your email this a.m. and [your] last email prompted me to check my in box before responding." (C-3, p. 13.)
16. After reviewing the Faxed-P33A, Lateisha determined that Turner had exhausted her federal FMLA leave but had state FMLA leave available for the period of April 13, 2009 (the date that Ramseur stated the PTSD, anxiety and depression commenced) to May 26, 2009. Rainey then completed an "Agency Response: Designation Notice, Form FMLA-HR2b" that approved the state leave for the balance of Turner's entitlement and mailed it to the complainant. (R-9.)
17. In 2009, Lateisha was the only employee in the respondent's north regional office responsible for handling requests for family medical leave pursuant to state and federal law. (T. 1571 and 1704. See also T. 338.)
18. On or about May 14, 2009, Cook learned that Turner had submitted the Faxed-P33A and considered it sufficient documentation to excuse Turner for missing a Loudermill hearing that had been scheduled for May 5, 2009. Tr. 387.
19. On or about May 18, 2009, the respondent's North Region Human Resources office received the original Ramseur-P33A (Ramseur-P33A) and date stamped it received. The same day, the respondent also stamped received the original 4-page FMLA-HR1 form (Employee Request -- For Leave of Absence Under the Federal Family and Medical Leave Act (FMLA) and/or State C.G.S. 5-248a (Family and medical leave from employment)) that was completed, signed and dated

May 5, 2009 by the complainant. The request asked for leave of an undetermined duration. (R-6.)

20. On or about May 18, 2009, after receiving and reviewing the Ramseur-P33A, Lateisha completed a second Form FMLA-HR2b (C-7, Tr. 1654-1655, 1658-1660) that indicated that Turner's request for state family and medical leave was approved for the balance of the time she was entitled to and mailed it to the complainant. Regarding Turner's available state leave request, Lateisha wrote on the FMLA-HR2B form that "as of 5/27/09 24 week entitlement in a 2 year period has been exhausted." (R-10.) It also stated that Turner's request for federal FMLA leave was denied because she had exhausted her entitlement for the applicable 12-month period. R-10.
21. On May 19, 2009, Lateisha notified Cook of Turner's remaining state medical leave entitlement and that Turner had exhausted her federal entitlement. Cook asked Lateisha to notify payroll, so that Turner could use any accrued (sick, vacation, personal leave) time to be paid, if she had requested to do so. (C-3, p. 16.)
22. Despite the fact that Lateisha sent Turner two separate forms approving her leave request until May 26, 2009 (T. 1574 and 1582), the complainant did not recall receiving either document.
23. Although Turner did not receive approval of her leave request, she never contacted Lateisha or any other employee of the respondent to confirm whether her request had been approved. The complainant did not follow up on her request because she believed she had sent the Lorenzo-P33A to the respondent and that she had until August 28, 2009 to return to work.
24. The complainant, incorrectly, operated on the assumption that, on or about May 18, 2009, she had provided the respondent with sufficient documentation to qualify for and she had been approved for a medical leave of absence until August 28, 2009. She assumed that the respondent had received the Lorenzo P33A and was aware that he had indicated a return to work date of August 28, 2009.³

³ The following testimony was elicited when the complainant was questioned by respondent's counsel – A: Well all I can get out of that is they had a return to work date, which was six weeks prior to them terminating me, so they never should have terminated me. I had a return to work date. Q: Fair enough. And so you had applied for FMLA in May of 2009, correct? A: I guess. I don't – yes. Q: Okay. And so it is your understanding that you simply apply for FMLA and whatever is on your med cert is automatically granted? A: It's my belief that if the doctor put me out to the 28th, that my job should be held 'til the 28th, 'til I can return to work. Q: And where did you

25. The complainant, therefore, did not return to work on May 27, 2009, when her authorized state FMLA leave ended or any time prior to her termination on July 15, 2009.
26. On June 4, 2009, Lateisha sent Cook an email stating that "Tammy Turner's state fmla was exhausted 5/27/09." C-3, p. 3-17. On June 4, 2009, Cook sent an email to Kevin Martin, the complainant's supervisor, asking whether the complainant had returned to work. C-3, p.18.
27. On June 5, 2009, Cook sent an email that (1) stated Turner should be considered on unauthorized leave of absence for all days after May 27, 2009; (2) requested that a pre-termination Loudermill meeting be scheduled; and (3) requested that Lateisha give Cook all of the complainant's FMLA and medical papers. C-3, p. 19.
28. The respondent never received any information from the complainant or her health care providers that identified any specific employment related limitations caused by her medical conditions. Prior to June 30, 2009, the only information that the respondent received was the Ramseur P33A that stated that the complainant needed leave of an undetermined duration. On June 30, 2009, Cook received the Colonial Disability form completed by Dr. Lorenzo, who stated Turner's expected return to work date was August 28, 2009.
29. Cook sent Turner a letter, dated June 10, 2009, scheduling a pre-termination meeting for June 18, 2009, pursuant to Loudermill requirements and in accordance with the District 1199 contract. The letter stated that the respondent had "concluded an investigation into allegations involving your absence without leave for five or more working days The penalty under consideration is dismissal." (R-11.)
30. The complainant did not attend the June 18, 2009 pre-termination meeting.
31. After receiving Cook's June 10, 2009 letter, on or about June 22, 2009, the complainant thought it was a mistake because Turner believed, incorrectly, that she had provided the necessary medical documentation and could remain out of work until August 28, 2009. (Tr. 917-918.)
32. Nevertheless, on June 22, 2009, the complainant called Cook and left a voice message that she had just received Cook's June 10, 2009 letter and also said she

obtain that belief? A: I just assumed it. Q: So you never asked anyone at DDS when should I be back, did you? A: No. I thought the doctor had the say over when I should be back.... Q: At some point you get indication that the agency is moving towards potentially terminating [you]? A: Correct. But I thought I had the proper documentation in.... I think I had a return to work date." Tr. 917-920.

would be sending in updated medical information.⁴ The complainant did not recall calling Cook and leaving the message. Tr. 863-865 and R-33.

33. On June 22, 2009, after Cook received the voice mail message from Turner, Cook expected to receive additional medical information because Turner said it was forthcoming. Tr. 446. R-33. Despite the fact that Turner's message stated that she just received the notice of the Loudermill hearing (after its appointed time), Cook assumed that Turner would be sending a medical explanation for failing to attend the Loudermill hearing, so that her absence would be excused. Tr. 446. Cook assumed that the medical information would come in the form of a P33A. Tr. 447. If Cook had received the P33A, she would have talked to Daley about whether the Loudermill hearing should be rescheduled. Tr. 446.
34. On June 23, 2009, Cook sent Daley a 23-page fax comprised, in relevant part, of the following: the complainant's attendance records for 2008 and 2009; a copy of the Ramseur-P33A (received by the respondent on May 18, 2009); Turner's request for leave form (FMLA-HR1), dated May 5, 2009 (received by the respondent on May 18, 2009); a copy of the agency response (form FMLA-HR2b), dated May 18, 2009, approving state leave from April 19, 2009 to May 26, 2009; and Cook's letters to Turner, dated April 9, April 28 and June 10, 2009. R-33. (The respondent's fax stamp at the top of the document was "06/23/2009 TUE

⁴The fact that the complainant was not able to remember most of the details of the events that occurred in 2009 was acknowledged on page 36 of the commission's post-trial brief. ("[The complainant's] mental status during that period explains why much of her testimony surrounding the period was hazy and her memory of interaction with her employer during the period was spotty.") For example, her testimony under questioning by respondent's counsel regarding the June 10, 2009 Loudermill letter (R-11) was: "Q: Well you were asked previously about a telephone call on or about [June] 20th or 22nd ... Do you recall making that phone call? ... A: I don't recall. Q: As you sit here today, does this jog your memory as to whether or not you contacted DDS to find out what the charges were? A: No, I don't recall. I thought it was a – I think I thought it was a mistake. Q: You thought this was a mistake? A: Yes. ... Q: The letter itself states that your failure to attend could result in disciplinary action, right? A: Right Q: ... In fact at the end of the first paragraph of this letter, it says the penalty under consideration is dismissal. Do you see that? A: Yes. Q: So, you got a letter indicating that you might be dismissed from service, state service, correct? A: Yes. Q: You thought it was a mistake? Yes? A: Yes. Q: And you have no idea whether or not you contacted the agency to find out if this was actually happening? A: No, I don't recall. I was very sick at the time. Q: Were you in the hospital at the time? A: No. Q: In fact, you went into the hospital ... July 5th of 2009, correct? A: Yes. Q: But you weren't in the hospital at any point in June 2009, correct? A: No." Tr. 821-824. Upon further questioning, the complainant testified that, in June 2009, she was very sick and almost incapacitated. Tr. 867.

[time] FAX 860 263 2626 DDS HR North Region [page] ###/023." See R-32 and R-33. Tr. 1449-1450.)

35. Page 016/023 of the fax that Cook sent to Daley was a copy of the original Ramseur P33A stamped received by the respondent on May 18, 2009. This form noted that the probable duration of the complainant's condition was "undetermined"; that Turner was not able to work "during the period of incapacity"; and noted that "when she is stable enough to return to work, I will release her." This is the only medical information that was included in the fax that Daley received. T. 1448. This was the only medical information that Daley relied on in making his recommendation to Commissioner O'Meara that Turner should be dismissed from state service. Daley relied on the information contained in the 23-page fax in making his recommendation to the Commissioner. Tr. 1530.
36. On June 25, 2009, Edgardo D. Lorenzo, M.D met with the complainant. He wrote on a disability claim form ("Colonial Form") (C-6, R-21), in relevant part, that Turner's primary disabling condition was "posttraumatic stress disorder, severe anxiety, flashbacks, nightmares of having been physically abused" Lorenzo wrote that the complainant was "unable to work," and "unable to provide direct care to mentally retarded clients." Lorenzo wrote that (1) he expected significant improvement in the patient's medical condition in "3-4 months," (2) patient was not "permanently disabled," and (3) he expected that she would return to work by August 28, 2009.
37. Lorenzo wrote in his medical records for Turner's June 25, 2009 appointment include that "[s]he also decided to apply for disability due to the severity of her symptoms and her inability to presently work with her mentally retarded clients." R-29. The notations were consistent with the information Lorenzo provided on the Colonial Form. C-6. R-21.
38. On June 30, 2009, Cook received a copy of the page of the Colonial Form completed by Lorenzo. Cook wrote on the copy "SDCook 6/30/09 No Med cert still". R-21. C-6. Although Cook had received the voice message from Turner on June 22, 2009, stating that she had belatedly received the notice of the Loudermill hearing and was sending in updated medical information, Cook did not read the information on the Colonial Form when she realized that it was a disability insurance claim form. She disregarded the claim form because she expected to receive a P33A (medical information) that explained Turner's absence from the hearing.
39. Cook placed did not consider the information that Lorenzo wrote on the Colonial disability form because it was not a P33A medical certificate. Cook did not

- consider the form to be the additional medical information that Turner said, in her June 22, 2009 voice mail message, she would be sending to the respondent. Cook believed that Turner would provide a form P33A medical certificate, as she had on numerous occasions and as recently as May 2009. Tr. 393.
40. Cook did not notify the complainant that she disregarded the Colonial Form without considering the specific information provided by Lorenzo because it was an insurance application. Tr. 390-391.
 41. The substance of the information satisfied "the requirement to submit a medical certificate/letter from a doctor stating the date on which he/she saw [her], the reason for [her] absence, the date from which [she] was incapacitated and the date on which [she] may return to work," as set forth in Article 22, Section 9 of the District 1199 contract to explain an unauthorized leave of five or more days. R-4. Tr. 387-389.
 42. Cook considered the Colonial Form to be an application for insurance, not an attempt by the complainant to request a reasonable accommodation. Tr. 389, 393, 398, and 399.
 43. Cook did not consider the complainant's May 2009 request for medical leave under state or federal FMLA or the Ramseur medical certificates, received by the respondent in May 2009, to communicate a request by the complainant for a reasonable accommodation. Tr. 389.
 44. Although Turner's June 22, 2009 voice message stated that she missed the June 18, 2009 Loudermill hearing because she "just received the hearing notice," Cook did not reschedule the hearing.
 45. Cook did not have the Colonial Form (C-6, R-21) on June 23, 2009, when she recommended to Daley, that the complainant be dismissed for absence without leave for five or more working days pursuant to state personnel regulation 5-240-1a 9. R-33.
 46. It did not occur to Cook to send the Colonial Form to Daley to consider in his evaluation of whether to recommend the termination of the complainant's employment. Tr. 398. Tr. 1496-1497.
 47. Daley testified that the respondent "would have considered any medical documentation that [Turner] provided ... and if we felt it was insufficient, [we] would have asked her for more." Tr. 1494. Daley also testified that if he had seen the Colonial Form, he would have had the respondent ask the complainant for a medical certificate, the Form P33A.
 48. On July 5, 2009, the complainant was admitted to the hospital after suffering a seizure at home. C-30. She was placed in the intensive care unit and remained in the hospital until August 13, 2009, when she was sent to a rehabilitation

facility. She was released from the rehabilitation facility on or about August 26, 2009.

49. There is no evidence that, prior to July 15, 2009, the effective date of the Turner's dismissal from state service, any employee of the respondent was notified that the complainant was hospitalized and was suffering from serious medical issues.
50. The only evidence of attempts by the complainant to communicate with the respondent from February 1, 2009 to June 29, 2009, are the documents received by DDS on May 14 and 18, 2009 (Ramseur P33A and Turner's form, dated May 5, 2009 requesting FMLA leave) and the voice message left for Cook on June 22, 2009. The complainant did not contact the respondent to confirm that her FMLA leave request was approved.
51. There is no evidence that the complainant authorized the respondent to obtain any information from any of her medical providers or her therapist. There is no evidence that the respondent received any information from Ramseur except the limited information that was contained in the P33A form. There is no evidence that the respondent received any information from Lorenzo except the limited information contained on the Colonial Disability insurance form. The respondent received no information from any of the complainant's medical providers regarding any limitations on her ability to perform her job functions resulting from her diagnosed conditions -- PTSD, depression or anxiety.
52. On July 9, 2009, John Houchin, the director of the respondent's North Region, issued a letter that stated that the complainant was "being dismissed from state service effective ... July 15, 2009." The letter referenced points made in the correspondence that Cook sent to the complainant in June 2009 and reiterated that the complainant had been granted leave up to May 27, 2009. It also noted that "[on] June 22, 2009, you called to say you had received the [Loudermill] notice and would be sending updated medical documentation. No such medical documentation has been received." R-12.
53. The complainant's brother showed Turner the letter terminating her employment during the time that she was hospitalized.
54. The complainant's mother notified Dr. Lorenzo, on July 8, 2009, that Turner had been hospitalized, C-37.
55. There is no evidence that, from July 5, 2009 to August 26, 2009, the complainant or any representative of the complainant communicated with the respondent.
56. The complainant filed a grievance to be reinstated to her job. The grievance was denied on September 25, 2009. Subsequently, on August 31, 2010, an arbitrator

issued a decision that upheld the grievance decision not to reinstate the complainant.

57. The respondent has procedures for processing requests for a reasonable accommodation. The procedures set forth employer and employee responsibilities. C-46. Tr. 1461-1460.

58. There is no evidence that a medical professional cleared the complainant to resume her employment with the respondent for any period of time on or after July 15, 2009.

Analysis

The purpose of the ADA and section 46a-60 is to prohibit discrimination against an individual with a disability (1) because of the disability and (2) by failing to provide a reasonable accommodation that would permit an otherwise qualified person to perform the essential functions of a job. These statutes seek:

“to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation’s life, including the workplace.... These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike.... They do not, however, demand action beyond the realm of the reasonable.”

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

The ADA intended to accomplish the latter purpose by requiring an employer to remove any barriers necessary to allow the person with a disability to work, as long as it did not place an undue burden on the employer. “In order to establish a prima facie case of disability discrimination under the ADA for failure to provide reasonable accommodation, a plaintiff must establish that: (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.” Williams v. British Airways, PLC, 2007 WL 2907426 (E.D.N.Y. 2007) (quoting Rodal v. Anesthesia Group of Onandago, PC, 369 F.3d 113, 118 (2d Cir.2004)).⁵ See also, Sclafani v. PC

⁵ A failure to provide a reasonable accommodation claim is not a disparate treatment claim; therefore, it is not analyzed using the McDonnell-Douglas burden-shifting method of proof. Bultmeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1283-1284 (7th Cir.1996) (“Because this is not a disparate treatment case, the McDonnell-Douglas

Richard & Son, 668 F. Supp.2d 423, 441 (E.D.N.Y. 2009)(quoting Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir.2000); Curry, 286 Conn. at 408 (The complainant must establish that she will be able to perform the essential functions of

burden-shifting method of proof is unnecessary and inappropriate here.”) The Curry court also discussed the distinct standards for deciding a claim of disparate treatment of an individual with a disability. Curry states that, “[i]n the disability context, a prima facie cases for disparate treatment is established under the McDonnell-Douglas Corp. framework if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by the [applicable statute]; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) the defendant took an adverse employment actions against him because of, in whole or in part, his protected disability.” Curry, 286 Conn at 426. See also Humphrey v. Memorial Hospital’s Association, 239 F.3d 1128, 1133 (9th Cir.2001)(“To prevail on a claim of unlawful discharge under the ADA, the plaintiff must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability.” (citation omitted)).

The Second Circuit, in McBride v. BIC Consumer Products Mfg. Co., Inc, 583 F.3d 92 (2009), noted that “[d]iscrimination in violation of the ADA includes, inter alia, ‘not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. § 12112(b)(5)(A)...In addition, for purposes of the ADA, a ‘qualified individual’ is ‘an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8). In light of this substantive standard, a plaintiff makes out a prima facie case of disability discrimination arising from failure to accommodate by showing each of the following: ‘(1) [P]laintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodation.’” McBride, 583 F.3d at 96-97 (2009) (citing Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 184 (2d Cir.2006)(citations omitted). The Second Circuit continued, stating (1) that the parties did not dispute that McBride was disabled, (2) that BIC had notice of her disability and (3) that “[o]ur inquiry therefore concerns only whether McBride made a sufficient showing that, with reasonable accommodation, she could perform the essential functions of the relevant job and that [her employer] failed to make the appropriate accommodations.” McBride, 583 F.3d at 97.

her job with or without an accommodation.); Taylor, 184 F.3d at 319-320; Festa, 145 Conn. App. at 114 (citing Curry, 286 Conn. at 415-416).

The Curry court concluded that section 46a-60(a)(1)⁶ “implicitly imposes the same duty on employers to provide reasonable accommodation to disabled individuals that expressly is required under the federal ADA.” Curry, 86 Conn. at 403-404 and 415.⁷ More precisely, the court recognized that discrimination on the basis of disability under

⁶ Section 46a-60(a)(1) states, in pertinent part, that “(a) It shall be a discriminatory practice in violation of this section: (1) For and employer, by the employer or the employer’s agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or 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 the individual’s ... present or past history of mental disability”

Compare 42 U.S.C. § 12112(a) of the ADA which states that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

“To prevail on an unlawful discrimination claim under the ADA a plaintiff must prove three things by a preponderance of the evidence. First, she must show that she was disabled within the meaning of the Act; second, she must prove that with or without reasonable accommodation she was a qualified individual able to perform the essential functions of the job; and third she must show that the employer discharged her because of her disability.” Criado v. IBM Corp., 145 F.3d 437, 441 (1998).

⁷ The Curry court noted that unlike the ADA, disability discrimination under section 46a-60(a) does not “on its face” include an employer failing to make a “reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer].” *Id.* at 408 (quoting the ADA definition of discrimination, 42 U.S.C. § 12112(b)(5)(A)).

Discrimination under 42 U.S.C § 12112(b)(5)(B) also includes “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make a reasonable accommodation to the physical or mental impairments of the employee or applicant.”

section 46a-60 must include, not only discrimination based on the disability, but also failing to make a reasonable accommodation. *Id.* at 408.⁸

The Curry court stated that under section 46a-60(a)(1), just as with the ADA, a “reasonable accommodation is a part of the employee’s prima facie case that focuses on an individual employee’s particular disability and the job requirements – i.e., that, despite their protected trait, they will be able to perform the essential functions of the job with some type of assistance.”⁹ Under this framework, if the employee makes such a showing, then the burden of production shifts to the employer to show that the accommodation would constitute an undue hardship.” Curry, 286 Conn at 409-410 (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 401-402 (2002)(discussing reasonable accommodation framework under ADA). The reasonableness of a requested accommodation is a question of fact. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601 (7th Cir.1998)(upholding a jury verdict noting that the plaintiff had extensive communication with her employer about her disabling condition and that there was sufficient evidence in the record from which a reasonable juror could have

⁸ “The provisions of the ADA relating to employment protect only a “qualified individual,” 42 U.S.C. § 12112, one who with or without a reasonable accommodation by the employer can perform the essential functions of the job. § 12111(8).... [If] she can’t perform the essential functions of her job, so that she would have been fired anyway, there has been no violation ... and she has no right to relief.” Miller v. Illinois Dept. of Corrections, 107 F.3d 483 (1997).

⁹ The Seventh Circuit described the factors to be determined in deciding whether an employer failed to provide a reasonable accommodation in violation of the ADA to include: (1) proof that the complainant is disabled under the Act, (2) the employer must be aware of the disability, and (3) the complainant is “an otherwise qualified individual,” i.e., a person who, “with or without an accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).” Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1284-1285 (1996). To satisfy the last requirement, the complainant must “demonstrate that he satisfies the prerequisites for the position, i.e., that he has the proper training, skills, and experience. Second he must show that he could perform the essential functions of [the] job, either with or without reasonable accommodation.” *Id.* (citing 29 C.F.R. app. § 1630.2(m), Bombard, 92 F.3d at 563.)

concluded that the plaintiff's request for a 2-4 week medical leave was a reasonable accommodation.)

ADA jurisprudence developed to include as a reasonable accommodation authorization for an employee with a disability to take a leave of absence. See Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 783 (6th Cir.1998)(reversing summary judgment and finding that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances); Criado v. IBM Corp., 145 F.3d 437, 443-444 (1st Cir.1998)(upheld a jury verdict finding that IBM had violated the ADA by firing an employee who requested temporary leave and her physician was optimistic that treatment would ameliorate her disability, citing 29 C.F.R. pt. 1630, App., EEOC interpretive guidance, stating reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"); Humphrey, 239 F.3d at 1135-1136 (citing 29 C.F.R. 1630 app. § 1630.2(o) to support the proposition that "[a] leave of absence for medical treatment may be a reasonable accommodation under the ADA."); Nunes, 164 F.3d at 1247 (citing 42 U.S.C. § 12111(9) and (10) for the proposition that under the ADA unpaid medical leave may be a reasonable accommodation); Powers v. Polygram Holding, Inc., 40 F.Supp.2d, 195, 201 (S.D.N.Y. 1999) (court, considering summary judgment motion, noted that leave of absence is unreasonable only in unusual circumstances).

The Curry court looked to federal precedent for guidance in enforcing the state's disability discrimination law, and concluded that, once a disabled individual has suggested to his employer a reasonable accommodation, section 46a-60, just as the ADA, requires "that the employer and employee engage in an informal, interactive process ... [to] identify the precise limitations resulting from the disability and potential accommodations that could overcome those limitations." Curry, 286 Conn at 415-416 (citing 29 C.F.R. § 1630.2(o)(3)).¹⁰ "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." Id. at 416 (citing Humphrey v. Memorial Hospitals Assn.,

¹⁰ 29 C.F.R. § 1630.2(o)(3) says that "it may be necessary for the [employer] to initiate an informal interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." See also Louisegeed v. Akzo Nobel Inc., 178 F.3d 731, 735-736 (5th Cir. 1999)(quoting 29 C.F.R. § 1630.2(o)(3)). "The EEOC's interpretive guidelines reinforce this directive, but also stress that the interactive process requires the input of the employee as well as the employer." Louisegeed v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999)(citing 29 C.F.R. Pt. 1630, App. § 1630.9).

239 F.3d 1128, 1137 (9th Cir.2001), cert denied, 535 U.S. 1011 (2002); Saksena v. Dept. of Revenue Svcs., CHRO Opinion No. 9940089). “[G]enerally, ‘it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.’ 29 C.F.R. pt. 1630, app. at 363 (2003); accord Flemmings v. Howard Univ., 198 F.3d 857, 861 (D.C.Cir.1999)(‘An underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation....’)” Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 184-185 (2d. Cir.2006).

“The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process.” Barnett v. U.S. Air, 228 F.3d 1105, 1114-1115 (9th Cir.2000); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir.1996)(“A party that obstructs or delays the interactive process is acting in bad faith”). A requirement of the interactive process is that an employer makes a reasonable effort to understand the needs of an employee whose disability impairs the employee’s ability to communicate his or her needs effectively, if the employer has notice of the disability and that impairment. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d at 1285-87 (Employer was well aware that employee suffered with bipolar disorder and paranoid schizophrenia and had previously provided an accommodation requested by his psychiatrist).

“Employers, who fail to engage in the interactive process in good faith, face liability for remedies imposed by the statute if reasonable accommodation would have been possible.” Humphrey, 239 F.3d at 1137-1138. (Citing Barnett, 228 F.3d at 1116.)¹¹
“However, an employee cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process.... Rather, the employee must demonstrate that the employer’s failure to engage in the interactive process resulted in the failure to identify an appropriate accommodation for the

¹¹ “Most circuits have held that liability ensues for failure to engage in the interactive process when a reasonable accommodation would otherwise have been possible. See Smith, 180 F.3d at 1174; Taylor, 184 F.3d at 317-318; Bultemeyer, 100 F.3d at 1285; Principal, 93 F.3d at 165. [A]n employer who acts in bad faith in the interactive process will be liable if the jury can reasonable conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations. Taylor, 184 F.3d at 317-318.” Bartlett v. U.S. Air, Inc., 228 F.3d at 1115-1116, judgment vacated on other grounds by U.S. Airways, Inc. v. Bartlett, 122 S.Ct.1516 (2002).

disabled employee.” Walter v. United Airlines, Inc., 232 F.3d 892, *5 (4th Cir.2000) (citing Rehling v. City of Chicago, 207 F.3d 1009, 1016 (7th Cir.2000)). “[A]n ADA plaintiff ultimately can prevail on a failure to accommodate claim only if he or she proves a reasonable accommodation would have been possible.” Witt v. Northwest Aluminum Co., 177 F.Supp.2d 1127, 1133 (D.Oregon 2001).

“[A]n employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations. On the other hand ... ‘[t]he ADA ... is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee’s disability could reasonably have been made.’” Taylor v. Phoenixville School District, 184 F.3d 296, 317-318 (1999)(citing Mengine, 114 F.3d at 420 (quoting Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir.1997)). “[A]n employee may not recover based on his employer’s failure to engage in an interactive process if he cannot show that a reasonable accommodation existed at the time of his dismissal.” McElwee v. County of Orange, 700 F.3d 635, 642 (2d Cir.2012) (citing McBride, 583 F.3d at 99-101).

Furthermore, “recognizing that the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer ... courts have held that an employer cannot be found to have violated the [ADA] when responsibility for the breakdown of the informal, interactive process is traceable to the employee and not the employer.” Festa v. Bd. of Educ. of Town of E. Haven, 145 Conn. App. 103, 115(2013) (citing Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir.1999)(Citations omitted; emphasis omitted; internal quotation marks omitted.)

“Neither the ADA nor the regulations assign responsibility for when the interactive process fails. No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may ... be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.” Festa v. Bd. of Educ. of Town of E. Haven, 145 Conn. App. 103, 115-116 (2013) (quoting Beck v.

University of Wisconsin Board of Regents, 75 F.3d 1130, 1135 (7th Cir.1996)(emphasis added).

Additionally, the Second Circuit has held that “the plaintiff bears the burden of production and persuasion on the issue of whether she is otherwise qualified for the job in question.... A plaintiff cannot be considered ‘otherwise qualified’ unless she is able, with or without assistance, to perform the essential functions of the job in question. Arline, 480 U.S. at 287 n. 17...; Gilbert, 949 F.2d at 641-42. It follows that the plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job’s essential functions.” Borkowski v. Valley Cent. School District, 63 F.3d 131, 137-138 (2d cir.1995) (Discussing requirements to establish a violation of Section 504 of the Rehabilitation Act, essentially identical to requirements of the Title I of the ADA).

Complainant and Commission Argument - Failure to Provide a Reasonable Accommodation Claim

Complainant and commission argue that by sending one or more of the following documents to the respondent’s agents, Turner communicated a request for an accommodation that initiated the interactive process: (1) the Faxed-Ramseur-P33A (received on May 14, 2009); (2) the Original-Ramseur-P33A (received on May 18, 2009); (3) the request for medical leave of absence under either federal or state law on (received on May 18, 2009); and (4) the page from her application for disability insurance completed by Lorenzo (received by Cook on June 30, 2009, after Turner left a message, on June 22, 2009, for Cook that she was going to send additional medical information.)¹² The complainant and the commission conclude that the failure of the respondent to communicate with the complainant to identify an accommodation constituted a violation of section 46a-60(a)(1).

There, however, is no support in either the statutory text or the extensive case law to support this position. The complainant’s burden is to prove that the respondent failed to provide a reasonable accommodation that would have permitted her to return to work and perform the essential functions of her job, with or without some reasonable accommodation. The complainant has failed to make this case.

¹² As noted in the finding of facts, the evidence establishes that the respondent never received the Lorenzo-P33A, so that document is not relevant to a consideration of whether the respondent had received information under such circumstances that constituted notice of a request to provide a reasonable accommodation.

The complainant and commission assert that the respondent should have recognized the form submitted by the complainant, in May 2009, requesting FMLA leave; the Ramsey P33A (that stated that Turner's return to work date was "undetermined"); the Colonial disability insurance form (received June 30, 2009, stating that Turner's expected return to work date was August 28, 2009), to be a request for a reasonable accommodation. The complainant and the commission argue that the respondent's receipt of these documents was sufficient notice to trigger the interactive communication process necessary to determine if a reasonable accommodation was plausible and that the respondent's failure to do so is a violation of the ADA, and, in turn, section 46a-60(a)(1). C-brief 33. The complainant and the commission note that an employee need not mention disability discrimination laws or the phrase reasonable accommodation, citing Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694 (7th Cir.1998) ("A request as straightforward as asking for continued employment is a sufficient request for accommodation,") and Schmidt v. Safeway, 864 F. Supp. 991, 997 (D. Or. 1994)("Defendant contends it is entitled to summary judgment because plaintiff failed to affirmatively request an accommodation pursuant to the ADA. The [ADA] does not require the plaintiff to speak any magic words before he is subject to its protections. The employee need not mention the ADA or even the term 'accommodation.' Of course, the employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it.")

In support of its argument, the complainant and the commission also quote from the EEOC Fact Sheet regarding the FMLA, the ADA and Title VII of the Civil Rights Act of 1964, last modified on July 6, 2000 ("EEOC Fact Sheet")¹³ -- "[i]f an employee requests time off for a reason related or possibly related to a disability ... the employer should consider this request for ADA reasonable accommodation."¹⁴ C-brief 34. The

¹³ The document states that, "[t]his fact sheet was prepared by the Equal Employment Opportunity Commission's (EEOC) Office of Legal Counsel. It is intended to provide technical assistance on some common questions that have arisen about the Americans with Disabilities Act of 1990 (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) when the Family and Medical Leave Act of 1993 (FMLA) also applies." As with the EEOC's ADA appendix and interpretive guidance, its fact sheet, by reason of its authority, is not controlling on a tribunal charged with interpreting the ADA. See, Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672-673 (1st Cir.1995) (The EEOC's ADA regulations appendix and the Enforcement Guidance for use by its investigators, while not binding law, may aid a court's interpretation of the statute).

¹⁴ The quote provided at C-brief 34, is contained in the "ADA Compliance When the FMLA Also Applies" section of the EEOC Fact Sheet. Question 16 is, "[i]f an individual

complainant and the commission assert, on the basis of this statement, that the respondent has violated the ADA (and, in turn, the CFEPA) because its agents "did not consider the complainant's FMLA or the Colonial Medical Form to be a request for an accommodation." C-brief 34, 52. The complainant and the commission, however, offers no support for this assertion in either the express terms of the ADA or its extensive case law.¹⁵

requests time off for medical treatment, should the employer treat this as a request for FMLA leave and ADA reasonable accommodation?" The answer given is:

If an employee requests time off for a reason related or possibly related to a disability (e.g., "I need six weeks off to get treatment for a back problem"), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. The employer may require FMLA certification and may make additional disability-related inquiries if necessary to decide whether the employee is entitled to reasonable accommodation because s/he also has a covered disability. However, if the employee states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage.

It is not clear how the EEOC reached this conclusion, but it appears to be a recommended approach, not a legal mandate. Section 16 cites no case law or statutory provision that obligates an employer to consider a request for FMLA also to be a request for a reasonable accommodation.

¹⁵ The complainant and the commission also note that "a disabled complainant would be entitled to additional leave time beyond the time permitted under the FMLA, so long as that additional leave time would not constitute an undue hardship on the respondent," citing subsection (b) of 29 C.F.R. § 825.702 of the FMLA regulations promulgated by the Secretary of Labor pursuant to § 404 of the FMLA. C-brief 34. SEC. 401 of the FMLA makes it clear that "[n]othing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability." Congress did not intend for the FMLA or any regulation promulgated by the Secretary of Labor to modify the coverage of the ADA. The FMLA regulations acknowledge this intent.

Subsections (a) and (b) of 29 C.F.R. § 825.702 of the FMLA regulations, states, in pertinent part, that:

Although, the undersigned agrees with the sentiment expressed in the EEOC fact sheet that it is prudent for an employer to discuss alternatives with an employee faced with an exhaustion his medical leave entitlements, and unable to return to work, including the possibility of additional leave, paid or unpaid, in the form of a reasonable accommodation, I find no legal support for the conclusion that failure to do so, in and of itself, is a violation of the ADA.

The complainant and the commission assert that the respondent's duty under section 46a-60(a) to engage in the interactive process was triggered when the complainant submitted (1) a medical leave request under the state and federal FMLA and a supporting medical certificate in mid-May 2009 and (2) the Colonial disability form that was received by Cook on June 30, 2009. C-brief 37. The complainant and the commission argue that because Cook possessed these documents as of June 30, 2009

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is "not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S. Rep. No. 103-3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired). Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation....

and also knew then that the complainant had exhausted her federal and state medical leave entitlements in late-May 2009, Cook should have construed the information she possessed to be a request from the complainant for a reasonable accommodation. Specifically, the complainant and the commission argue that Cook should have interpreted the information on the disability insurance form to be a request for a leave of absence until August 28, 2009.

Analysis – Section 46a-60(a)(1) Failure to Accommodate Claim

The evidence adduced establishes that the complainant's communication with the respondent was comprised entirely of her May 2009 FMLA request, the May 2009 Ramseur P33A and the Colonial disability form received on June 30, 2009. Beyond these documents and the June 22, 2009 voice message, there is no evidence in the record that the complainant, or any person authorized by the complainant, communicated with the respondent regarding the complainant's a need for a reasonable accommodation related to any specified limitations caused by a specified disability, prior to July 15, 2009, the effective date of her dismissal from state service. Additionally, there is no evidence that the complainant authorized the respondent to contact any health care provider to determine what, if any, limitations needed to be accommodated in connection with her PTSD, anxiety, and depression diagnosis.

From Turner's perspective, as of May 18, 2009, she had provided the respondent the information necessary to qualify for FMLA leave and not report to work until August 28, 2009. She believed that she had provided her employer with the Lorenzo P33A and that her leave automatically was approved to August 28, 2009. She assumed it was a fait accompli and did not verify whether her leave request was granted.

Turner maintained this belief even after she received, on or about June 22, 2009, Cook's Loudermill hearing notice because she had failed to report to work for five or more days. Turner's reaction to this notice was to leave a message for Cook that additional medical information was forthcoming. This time, Turner did send information from Lorenzo, on the Colonial disability form, stating his opinion that Turner should be able to return to work on August 28, 2009. After this and prior to her hospitalization on July 6, 2009, she did not communicate with her employer because she continued to believe that she submitted the information necessary to take time off until the end of August.

It is clear that Cook did not consider any of the information she reviewed to be a request for an accommodation for a disability. From Cook's vantage point, Turner had (1) failed to communicate with the respondent or report to work from February 1, 2009 to May 14, 2009 (notwithstanding the fact that the respondent, during this period,

unilaterally sent Turner 3 FMLA packets for her to request medical leave); and (2) failed to provide, on or after June 22, 2009, sufficient information to excuse her from missing the June 18, 2009 Loudermill hearing.

From Cook's perspective, Turner's May 2009 request for FMLA leave was merely that; and, the complainant had received all the FMLA leave she was entitled to as of May 26, 2009. From Cook's perspective the application for disability insurance form that she received, on June 30, 2009, was only an insurance application form and nothing more. The application did not conform to her expectation because it was not a medical certificate that explained why Turner missed the June 18, 2009 Loudermill hearing. She, therefore, never considered the specific information on insurance form.

In the opinion of the undersigned, both the complainant and the respondent are responsible, to varying degrees, for the lack or breakdown in communication that occurred. There is, however, no evidence that either Turner or Cook acted in bad faith.¹⁶ The evidence demonstrates the parties failed to communicate effectively, in part, because both were operating from misguided perceptions.

The issue, however, is not whether under the circumstances, Cook's or Turner's conclusions and actions were reasonable or unreasonable. The issue is whether the evidence adduced at the hearing establishes that the complainant was deprived of a reasonable accommodation that would have allowed her to perform the essential functions of her job. Liability can only be established if the complainant proves that a reasonable accommodation existed that would have allowed her to perform the essential functions of her job.¹⁷

The complainant failed to do so in this case. There was no evidence introduced that supports the conclusion that the complainant was able to return to work at any time on or after August 28, 2009. In fact, the only evidence that the complainant may have been

¹⁶ "[A]n employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations." Taylor, 184 F.3d at 317-318.

¹⁷ "[A]n employer's failure to engage in a sufficient interactive process does not form a the basis of a claim under the ADA and evidence thereof does not allow a plaintiff to avoid summary judgment unless she also establishes that, at least with the aid of some identified accommodation, she was qualified for the position at issue." McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 101 (2d Cir.2009).

able to return to work as of August 28, 2009, was the notation made by Lorenzo on June 28, 2009, on the Colonial Disability Form. There was no evidence in record from which it can be inferred that the complainant was ever well enough, after her employment was terminated, to have performed her job monitoring clients in the group homes operated by the respondent. No medical professional with information about the complainant's actual fitness to return to work was called as a witness in this hearing. There appears to be nothing in the complainant's medical records that were entered into evidence that demonstrates that the complainant was able return to work at any point after her dismissal from state service.

Analysis – Section 46a-60(a)(1) Discrimination based on Disability Claim

In the disability context, there appears to be a number of ways to establish a prima facie case for disparate treatment is established under the McDonnell Douglas Corp. framework. The elements of proof in employment discrimination cases are not "rigid, mechanized or ritualistic." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

First, a claim for disability discrimination may be established "if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by the [applicable statute]; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) [the defendant] took an adverse employment action against him because of, in whole or in part, his protected disability." Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 426 (2008) (citing Tobin v. Liberty Mutual Ins. Co., 433 F.3d 100, 104 (1st Cir.2005); Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir.1998)). See also Yester v. Town of Branford, 2010 WL 4075324, at *4 (Conn. Super. Ct., Sept. 22, 2010)(citing Curry, 286 Conn., at 426).

With respect to the second prong of this test, whether the complainant was able to perform the essential functions her job with or without an accommodation, the complainant and the commission put forth no argument because they relied on the more general disparate treatment test set forth in McDonnell Douglas. See Complainant/Commission Joint Brief pp. 40-47. Since their brief relies on the more generic standard to prove a disability-based disparate treatment claim, it offers no argument that the complainant was able to perform the essential functions of her job at any time after her employment was terminated. As noted above, reviewing the record, I find no evidence to support such an inference.

Second, a claim for disability discrimination may be established on the more generic formulation of the McDonnell Douglas three-prong test relied upon by the complainant

and the commission. This version of the test requires a finding that the employer's adverse employment action was motivated by a discriminatory animus based upon the complainant's protected class. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-42, (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 ... (1993)).

To satisfy the first-prong, the complainant would need to establish by a preponderance of the evidence, that: (1) she belongs to a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in that class. Levy, 236 Conn. at 107 (citing Burdine, 450 U.S. at 252- 253). This burden is not onerous. *Id.* (citing Burdine, 450 U.S. at 253). "The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor. Fisher v. Vassar College, 114 F.3d 1332, 1337 (2d Cir.1997)." Craine v. Trinity Coll., 259 Conn. 625, 638 (2002).

If the complainant satisfies her burden at the first stage, the burden next shifts to respondent to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Burdine, [450 U.S. 248, 254 (1981)].... This burden is one of production, not persuasion; it "can involve no credibility assessment." St. Mary's Honor Center, [509 U.S. 502, 509 (1993)]." Reeves, 530 U.S. 133, 142 (2000).

If the respondent satisfies this burden, the presumption of discrimination established by the prima facie case disappears and the complainant must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias. Craine v. Trinity College, 259 Conn. 625, 637 (2000) (citing McDonnell Douglas at 802-804). "The principal inquiry in a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status." Levy v. CHRO, 236 Conn. 96, 104 (1996). It is the complainant's ultimate burden to prove that the respondent intentionally discriminated against her; "the burden of persuasion remains with the plaintiff." *Id.*, at 108.

There is no dispute that the complainant satisfies two of the prongs of her prima facie case – she was disabled under section 46a-51(20) and she suffered an adverse employment action when her employment was terminated.

Regarding the "qualified" prong, the complainant and commission argue that "if Ms. Turner could have performed the essential functions of her position after her medical leave then she would have been considered qualified." Complainant/Commission Joint

Brief, p. 44. The complainant and the commission argue that Ms. Turner should be considered qualified, in satisfaction of her prima facie burden, because she was qualified when she was hired.

As discussed above, there is no evidence that she was qualified for her position at the time of her discharge. It is the opinion of the undersigned, that this is actual intent of the qualification prong established by the Supreme Court in McDonnell Douglas decision, even at the prima facie stage. Recognizing that the test is not intended to be "rigid, mechanized, or ritualistic" and that the prima facie case is to be established by a preponderance of the evidence, this seems to be a reasonable interpretation of the "qualified" prong.

But assuming arguendo, that the complainant has satisfied her prima facie case, the respondent has offered, as its legitimate business reason for terminating Ms. Turner, evidence she failed to report to work after her FMLA leave expired and, provided medical information that stated her leave was to be of "undetermined" duration. Respondent brief pp. 7-8. The respondent also explained that this was the culmination of two periods of unauthorized leave and minimal communication from the complainant about her status. *Id.* The respondent argues that the final decision makers (the Commissioner and Daley) relied on information that they received from Ms. Cook that indicated the complainant did not report to work after her FMLA leave was exhausted and had only submitted medical information indicating that duration of her leave was undetermined. Respondent brief p. 9. This evidence satisfies the respondent burden of production. *Id.*

The complainant must offer evidence that the respondent's reasons are a pretext and that the respondent harbored a discriminatory animus based on her disability. The complainant argues that the respondent terminated her employment after she failed to return to work "due to her disability" and because Ms. Turner "ask[ed] for an additional period of unpaid leave due to her disability." Complainant/Commission Joint Brief p. 47. The complainant argues that because the respondents received medical documentation stating that she had been diagnosed with PTSD, "this is strong evidence that the complainant was terminated because of her disability." *Id.* 47.

The evidence demonstrates that Daley made his recommendation to the Commissioner based on the he received from Ms. Cook. There is no evidence that Daley or the Commissioner harbored any discriminatory animus toward Ms. Turner. Therefore, it appears that the complainant and the commission are insinuating that Ms. Cook harbored a discriminatory animus toward Ms. Turner based on her disabilities.


The evidence reveals that Ms. Cook took steps to have the respondent's human resources department reach out to Ms. Turner on a number of occasions, when Ms. Turner failed to communicate with the respondent. Although, the evidence indicates that towards the end of June 2009, Ms. Cook may have become frustrated and dismissed, out of hand, the disability insurance form that was placed in her in-box, there is no evidence that she took action to terminate Ms. Turner because of her disability.

In the opinion of the undersigned, the evidence does not support the conclusion that the respondent discriminated against the complainant because she had a disability.

Decision and Order

In light of the foregoing, I find in favor of the respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 10th day of December 2015.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee