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Promoting Equality and Justice for all People

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, EX REL. AUDREY MCFARLANE-NELSON,
Complainant

v.

HARTFORD BOARD OF EDUCATION,
Respondent

CHRO Case No: 1710435
CHRO Case No: 1710448

June 15, 2023

MEMORANDUM OF FINAL DECISION

PROCEDURAL AND FACTUAL BACKGROUND

On March 28, 2017, Ms. Audrey McFarlane-Nelson filed a complaint for CHRO Case No. 1710435 with the Commission on Human Rights and Opportunities alleging, *inter alia*, that her employer, the Hartford Board of Education, failed to provide a reasonable accommodation for her physical disability in violation of the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12101 et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and the Civil Rights Act of 1991, and sections of the Connecticut General Statutes ("C.G.S."), specifically C.G.S. § 46a-58(a), and C.G.S. § 46a-60(a)(1).

On April 6, 2017, Ms. McFarlane-Nelson filed another complaint with the Commission on Human Rights and Opportunities. The second complaint, CHRO Case No. 1710448, alleged, *inter alia*, that the Hartford Board of Education failed to provide a reasonable accommodation for her physical disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., C.G.S. § 46a-58(a), C.G.S. § 46a-60(a)(1), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and the Civil Rights Act of 1991. The complaint also alleged that the Hartford Board of Education retaliated against

Ms. McFarlane-Nelson by terminating her employment for filing a complaint with the Commission on Human Rights and Opportunities in violation of C.G.S. § 46a-60(a)(4).

In response to the complaints filed by Audrey McFarlane-Nelson, hereafter referred to as the ("Complainant"), the Hartford Board of Education, hereafter referred to as the ("Respondent"), ("Board"), or ("Hartford Public Schools"), filed a motion to strike and/or for summary judgment as to the entirety of the complaint in CHRO Case No. 1710448 and to the Title VII claim of the Civil Rights Act of 1964 alleged in CHRO Case No. 1710435 on February 17, 2021. On March 2, 2021, the Commission on Human Rights and Opportunities, hereafter referred to as the ("Commission"), filed an objection to the Respondent's motion to strike and/or for summary judgment.

The motion for summary judgment for CHRO Case No. 1710448 was denied. The motion to strike CHRO Case No. 1710448 was denied in part; the Respondent's alleged violation of the Civil Rights Act of 1964 was ordered to be stricken from the 1710448 complaint. In CHRO Case No. 1710435, the complainant also alleged that the Respondent violated the Civil Rights Act of 1964. Said allegation was ordered to be stricken from CHRO Case No. 1710435.

All statutory and procedural prerequisites were satisfied, and the complaint was properly presented to this tribunal for hearing and decision. The public hearing was conducted on July 12, 2022, July 13, 2022, July 14, 2022, September 20, 2022, September 22, 2022, September 29, 2022, and it concluded on December 1, 2022. Attorney Robin Fox appeared on behalf of the Commission on Human Rights and Opportunities and Attorney Christopher Engler, from the firm of Shipman and Goodwin, appeared as lead counsel on behalf of the Respondent, along with co-counsel, Attorney Sarah Niemiroski, from Shipman and Goodwin. The Commission and the Respondent filed post-hearing briefs.

FINDINGS OF FACT

After a thorough examination of the testimony, the record file, and the admitted exhibits adduced at the public hearing, the following facts have been established.

1. The Complainant began working as a nurse for the Hartford Board of Education in August 1999. (7/12/22, Tr. 13).

2. The Complainant worked as a nurse in several schools, including most recently, High School, Inc., where she worked for her last 7 years of employment. (7/12/22, Tr. 13-14).

3. The Complainant met all the requirements of a school nurse. She holds a bachelor's degree in nursing and was certified in CPR and Basic Life Support. (7/12/22, Tr. 14).

4. The Complainant's position duties included, but were not limited to, the following: maintaining confidential medical records, administering medication, performing CPR if needed in a crisis, and providing other assistance as needed. (7/12/22, Tr. 14-15).

5. The Complainant was the "First Responder" for any medical assistance needed in the school. (7/12/22, Tr. 94-95).

6. The Complainant would perform CPR in response to a crisis; the physical education teacher and/or Principal were also trained in CPR and could perform it if necessary. (7/12/22, Tr. 96-97).

7. The Complainant could monitor seizures, administer an epi-pen, and use a defibrillator if necessary. (7/12/22, Tr. 100-103).

8. The Complainant received good performance evaluations and was never disciplined during her employment. (7/12/22, Tr. 16).

9. High School, Inc. had five (5) floors and many rooms without windows. (7/12/22, Tr. 16-17).

10. The Complainant testified that the nurse's office in High School, Inc.'s building was very small, had no window, and was either very hot or very cold. The Complainant could not control the heating or ventilation. (7/12/22, Tr. 17-18).

11. The Complainant was the nurse for approximately 400 students. (7/12/22, Tr. 19).

12. As there was no gym in the building, students went to the YMCA across the street or to Bushnell Park for physical education. (7/12/22, Tr. 20).

13. During her years working at High School, Inc., the Complainant was never tested for physical fitness such as walking up five flights of stairs or walking to the YMCA or park where students had physical education classes. (7/12/22, Tr. 20).

14. The other nurses were not tested for physical requirements. (7/12/22, Tr. 20).

15. In 2016, the Complainant was diagnosed with lung cancer. She underwent multiple tests and requested a leave of absence for testing and surgery around February 2016 through the end of the school year. (7/12/22, Tr. 24).

16. Her primary care physician, Dr. Angela Petronio, testified that the lung cancer was found during a scan to check for a hernia. (7/13/22, Tr. 10-11).

17. After a surgical procedure to remove the tumor, the Complainant had a prolonged, but not abnormal, recovery. (7/13/22, Tr. 11).

18. The Complainant met with the Hartford Board of Education in approximately July 2016 about her possible return. Her return was delayed until October 2016 because the Complainant required some additional testing. (7/12/22, Tr. 25).

19. The Respondent held a disability accommodation meeting with the Complainant, Natasha Banks (Senior Executive Director of Human Resources), Lori Mizerak, Counsel to the Board, and Deborah Chameides, Health Services Coordinator for Hartford Public Schools, [1] Audrey Boutaugh (Principal of High School, Inc.) and Kristin Garcia, the staffing specialist for Hartford Public Schools, to discuss any accommodations necessary for the Complainant to return to work. (Exhibit 5; 9/29/22, Tr. 32).

20. During the accommodation meeting on August 10, 2016, the Complainant and her primary care physician, Dr. Angela Petronio, requested that Complainant be able to return to work in a location with better air quality, fewer stairs, and closer to her home. (Exhibit 5; 7/12/22, Tr. 27-28).

21. Dr. Petronio wrote several letters to the Complainant's employer on her behalf, both before and after the initial accommodation meeting. (7/13/22, Tr. 11-12).

[1] The title for Deborah Chameides will also be referred to as "Director of Nursing and Clinical Services" for the Hartford Board of Education.

22. In her correspondence, Dr. Petronio stated that the Complainant wanted to return to work but needed accommodation. The accommodation included an office with windows to open for ventilation, a building with one or two levels, and good air quality. (7/13/22, Tr. 13-14).

23. Natasha Banks, the Executive Director for Human Resources for the Hartford Board of Education, repeatedly stated that the requested accommodations were unclear and unreasonable. (9/29/22, Tr. 29-32).

24. After the August 2016 accommodation meeting, Dr. Petronio completed a form indicating her belief that the Complainant would be able to return to work on January 17, 2017. (Exhibit 6; 7/13/22, Tr. 15).

25. Complainant remained out of work, on medical leave until January 2017. (Exhibit 6; 7/12/22, Tr. 33).

26. Respondent granted the request that the Complainant could remain on extended paid medical leave through January 17, 2017. (9/29/22, Tr. 42).

27. On January 12, 2017, the Complainant's physician submitted a letter requesting that the Complainant return to work in a newer school building, with a maximum of two levels, an office with a window, and better air quality. (Exhibit 8; 7/12/22, Tr. 44).

28. Dr. Petronio stated that the building conditions referenced in her letters were based on what the Complainant would need in order to be comfortable and perform her job to the best of her ability. (7/13/22, Tr. 48-49).

29. On January 12, 2017, Dr. Petronio updated the notice to the Respondent indicating that in addition to the accommodations already requested, Complainant might need assistance moving a student, because she worked in a high school setting and the students may be larger. (Exhibit 8; 7/13/22, Tr.17).

30. In response to that letter, Dr. Petronio received a letter from the school district and a copy of the school nurse job description, requesting that Dr. Petronio state whether the Complainant could perform the listed job duties in the description. (Exhibit 9; 7/13/22, Tr. 17-18).

31. Dr. Petronio stated that she informed the employer that the Complainant could perform all job duties with the exception of needing assistance in the event of an emergency. (7/13/22, Tr. 18-19).

32. Dr. Petronio testified that she was very specific in informing the school that the Complainant may need someone to assist with strenuous activities, such as moving a student from a wheelchair to a table or moving a student from the floor to an exam table. (7/13/22, Tr. 19).

33. Dr. Petronio stated that the Complainant could return to work if the accommodations were made. (7/13/22, Tr. 20).

34. Natasha Banks testified that this accommodation request was problematic because she believed that many nursing duties were strenuous. (9/29/22, Tr. 65).

35. Natasha Banks testified that many of the accommodation requests were unclear, such as the number of flights of stairs, the elevator requirement, and the height of the building. She stated that the Board needed full clarity. (9/29/22 , Tr. 66-69).

36. The Respondent's attorney, Lori Mizerak, reached out to Dr. Petronio on January 23, 2017, by letter requesting clarification. Dr. Petronio clarified that the Complainant's restrictions concerned the building; the Complainant could perform the job duties in a different building, limited only by excess exertion, such as lifting or carrying a student. (7/13/22, Tr. 21).

37. Dr. Petronio received a call from Attorney Mizerak on February 8, 2017, to which she responded: "As discussed, in our conversation this morning, I have thoroughly reviewed Ms. McFarlane-Nelson's job duties with the nurse and it is my medical assessment that she is capable of performing all of the functions of her position, once again stating only being limited by strenuous activity and the building requirement restrictions outlined in my previous letters." (Exhibit 17; 7/13/22, Tr. 22).

38. Dr. Petronio acknowledged that she could not articulate every possible situation involving strenuous activity and that lifting and carrying a student may not be the only scenario where the Complainant requires assistance. (7/13/22, Tr. 69-70).

39. Dr. Petronio clarified that she did not list every accommodation/situation in every letter because she wrote them after hours and assumed that people reviewed the letters that were written earlier. (7/13/22, Tr. 82).

40. Ms. Banks also stated that the change in terms from "moderate exertion" to "excess exertion" created uncertainty for the district. (9/29/22, Tr. 75).

41. Dr. Petronio also testified that the Complainant could climb two flights of stairs, which would be present in a three-story building. (7/13/22, Tr. 87).

42. Ms. Verna Jones, the President of the union for healthcare workers and a former nurse during the time Complainant was still working, testified that she had no knowledge of any tests for nurses to determine their fitness, such as walking or running up the stairs, or lifting a particular amount of weight. (7/13/22, Tr. 118-19).

43. Ms. Jones testified that there was at least one nurse that she knew of who used a cane and had difficulty walking but was still employed as a nurse. (7/13/22, Tr. 120).

44. Dr. Petronio sent a subsequent letter to Respondent clarifying that she never meant or implied that Complainant needed another nurse to assist in performing her duties. (Exhibit 19; 7/13/22, Tr. 23).

45. Dr. Petronio specifically stated in her letter that Ms. McFarlane-Nelson could perform all duties limited to only strenuous activities such as lifting a student alone. (Exhibit 19; 7/13/22, Tr. 23).

46. Dr. Petronio stated that if there were a school with two floors or fewer, and windows that opened, she believed that the Complainant could have returned to work earlier than February/March 2017. (7/13/22, Tr. 26).

47. At some point, the Complainant was apprised of an opening for a school nurse at Great Path Academy. (7/12/22, Tr. 36).

48. Complainant took a tour of the building from a friend who was a guidance counselor at the school, and then reached out to the union president to inquire about transferring to that school upon her return. (7/12/22, Tr. 37-38).

49. Deborah Chameides, Director of Nursing and Clinical Services, suggested that the Complainant apply for the position because it is part of the required process for an internal transfer. However, in December 2016, the Complainant had not yet been released by her physician to return to work. (9/22/22, Tr. 116).

50. Complainant applied for an extended medical leave and a return date of January 17, 2017. (Exhibit 6).

51. Natasha Banks testified that the Great Path Academy position was posted in December 2016 and the Complainant was on medical leave until January 17, 2017. Thus, the Complainant had not been released to return to work and was ineligible for consideration for the Great Path Academy position. The Board's policy was to hold a person out on leave in their current position. (9/29/22, Tr. 44-46).

52. In addition, Ms. Banks testified that, as of December 2016, the Complainant had not been released to return to work. (9/29/22, Tr. 46).

53. The Board does not handle employee accommodations until the employee is ready to return to work. (9/29/22, Tr. 55).

54. A nurse was hired from outside of the district for the Great Path Academy position and started in approximately February 2017. (7/12/22, Tr. 42).

55. As of January 24, 2017, Dr. Petronio stated that the Complainant was able to perform the job functions of a school nurse with the only limitation being the building. (Exhibit 14; 7/12/22, Tr. 45).

56. Ms. Deborah Chameides testified that she had concerns about Complainant's ability to perform her job duties, such as her ability to run up the stairs, within or outside a building, to administer CPR, or to administer an Epi Pen or seizure medication. (9/22/22, Tr. 94-95).

57. Ms. Chameides also testified about her concern with Complainant's ability to participate in the crisis team for the school, which might involve running to respond in any area of the building where there is a crisis. (9/22/22, Tr. 98).

58. Ms. Chameides believed that many of the activities required of a nurse, such as running, climbing stairs, administering CPR or chest compressions, and administering seizure medication could be considered strenuous and so she was concerned that the Complainant could not perform her job if strenuous activities were limited. (9/22/22, Tr. 103-104).

59. Dr. Petronio authorized the Complainant to return to work, subject to only building restrictions and assistance with excess exertion, such as lifting or carrying a student. (Exhibit 17; 7/12/22, Tr. 52).

60. According to a letter by Dr. Petronio dated February 21, 2017, she stated that the Complainant did not need the assistance of another nurse, contrary to the understanding of the Respondent. (Exhibit 19; 7/12/22, Tr. 54-55).

61. On or about February 21, 2017, the Respondent held another accommodation meeting with Complainant, Jay Guttierez (Complainant's union representative), Natasha Banks, Deborah Chameides, and Lori Mizerak to discuss accommodations. (Exhibit 21; 9/22/22, Tr. 12).

62. Jay Gutierrez testified that the problem with High School, Inc., where the Complainant was currently assigned, was that it was five (5) stories high with the Complainant's office on the 5th floor, had an elevator that periodically malfunctioned, and had poor air ventilation. (9/22/22, Tr. 13-14).

63. The Respondent wanted more clarification from the Complainant's physician regarding the accommodation requests. (9/22/22, Tr. 16).

64. Dr. Petronio was unable to identify every possible situation that may occur where the Complainant may require assistance. This was not acceptable to the Respondent as they were concerned about unanticipated emergencies that could arise. (9/29/22, Tr. 82-83).

65. Ms. Banks testified that there was not enough clarity to the Complainant's physical limitations and the specific accommodations that were being requested. (9/29/22, Tr. 89).

66. Mr. Guttierez, the union representative, requested a list of schools to which the Complainant could transfer but the list was not provided. (9/22/22, Tr. 20-21).

67. Mr. Guttierez testified that his impression was that the Respondent was trying to get Complainant back to work, but not as a nurse. (9/22/22, Tr. 22-23).

68. On March 2, 2017, the Complainant was instructed to return to her previous position at High School, Inc. on March 6, 2017. (Exhibit 21; 7/12/22, Tr. 57).

69. Deborah Chameides testified that this accommodation was offered based on the letter from Dr. Petronio, confirming a telephone conversation with Ms. Mizerak, which stated that the Complainant could climb the stairs in the event that the elevator was not working, could perform CPR, and did not need an assistant assigned to her. (Exhibit 20; 9/22/22, Tr. 106).

70. Respondent stated that this was also the only available nursing position at the time. (9/29/22, Tr., 115-116).

71. Ms. Chameides believed that High School, Inc. met all the conditions needed by the Complainant. (9/22/22, Tr. 108).

72. Although Ms. Chameides could not say whether the elevator was working at the time the Complainant was instructed to return to work, she believed the Complainant could run up or down the stairs if needed, based on a letter from Dr. Petronio. (Exhibit 20; 9/22/22, Tr. 108).

73. Ms. Chameides also believed that the school was amenable to relocating the nurse's office although it had not been done. (9/22/22, Tr. 109).

74. The Respondent was waiting for the Complainant to return to work to implement the accommodations. (9/22/22, Tr. 125, 131).

75. Complainant did not believe that High School, Inc. was an appropriate accommodation, as the school building had five floors, and the Complainant felt that the elevator was frequently out of order with poor ventilation. The Complainant testified that she was not informed who would assist her in lifting or carrying a student. (7/12/22, Tr. 57; 9/20/22, Tr. 75).

76. Natasha Banks testified that most nurses' offices do not have windows or do not have windows that fully open for safety reasons. (9/29/22, Tr. 132-133).

77. Ms. Banks testified that the Respondent could provide an air purifier and possibly even a window. However, those items had not been specifically offered because they were still uncertain about the requirements for the Complainant's accommodations. (9/29/22, Tr. 134-35).

78. Dr. Petronio stated in a letter dated March 2, 2017, that the Complainant was unable to return to work in a building with five flights of stairs, no windows, and/or poor ventilation. (Exhibit 22; 7/12/22, Tr. 60).

79. After Dr. Petronio issued the letter on March 2, 2017, the Complainant remained on medical leave. (7/12/22, Tr. 60-61).

80. The Respondent eventually deduced that the Complainant was unable to perform her nursing duties and contacted her to explore other positions for the Complainant's employment. (Exhibit 24; 7/12/22, Tr. 63-64).

81. On or about March 16, 2017, the Respondent sent the Complainant a letter asking her to contact them by March 24, 2017, if she was interested in exploring other opportunities within the Hartford Board of Education. (Exhibit 24; 9/29/22, Tr. 148-149).

82. The positions offered for exploration included a position in payroll/finance and as an executive secretary. The Complainant would have had to take a test for these positions. (7/12/22, Tr., 142-143).

83. The Complainant testified that she did not believe that she was qualified for a finance or clerical position, especially one for which she might have to take a test. (7/12/22, Tr. 65-66).

84. On March 28, 2017, the Complainant filed a complaint of discrimination with the Commission on Human Rights and Opportunities' Capitol Region Office. (Exhibit 25; 7/12/22, Tr. 66).

85. On March 28, 2017, the Complainant testified that she spoke to Natasha Banks to tell her that she was not qualified for either the clerical or financial position and would therefore not apply for them. The Complainant testified that she told Ms. Banks that she had just filed her Commission on Human Rights and Opportunities ("CHRO") complaint against the Hartford Board of Education. (7/12/22, Tr. 66).

86. Thereafter, the Complainant received a letter from the Respondent dated March 29, 2017, stating that her employment had been terminated. (Exhibit 26; 7/12/22, Tr. 67-68).

87. After receiving her termination notice, the Complainant filed her second complaint No. 1710448. (7/12/22, Tr. 68).

LEGAL STANDARD

The Complainant alleges that the Respondent discriminated against her by terminating her employment as a school nurse from the Hartford Board of Education due to her disability. As a general proclamation against discrimination, the Connecticut General Statutes §46a-58(a) mandates:

> 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, gender identity or expression, sexual orientation, blindness, mental disability, physical disability, status as a veteran or status as a victim of domestic violence.

The Complainant also alleges the Respondent's violation of the Connecticut Fair Employment Practices Act ("CFEPA") which is specified within C.G.S. §46a-60(a)(1) and avers the following:

> (a) It shall be a discriminatory practice in violation of this section:
>
> (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to 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, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness.

The Complainant is also alleging that the Respondent violated federal law by failing to provide a reasonable accommodation in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. This tribunal may refer to analogous federal law as a reference for interpreting state employment discrimination or disability discrimination claims. *Levy v. Commission on Human Rights and Opportunities,* 236 Conn. 96, 103, 671 A. 2d. 349 (1996).

> Our Supreme Court has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws.... While certain elements of the Fair Employment Practices Act and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012) (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...." *Thompson v. Department of Social Services*, 176 Conn. App. 122, 128, 169 A. 3d 256 (2017).

"[W]e review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes." *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 944 A. 2d 925 (2008).

> Under federal law, there are four general theories of employment discrimination: disparate treatment, adverse or disparate impact, perpetuation into the present of the effects of past discrimination, and failure to make a reasonable accommodation…….. To date, in Connecticut, we have recognized the disparate treatment and adverse impact theories of employment discrimination. (Internal citations omitted). *Levy v. Commission on Human Rights and Opportunities,* 236 Conn. 96, 103-104, 671 A. 2d. 349 (1996).

In alleging disability discrimination in employment, the applicable sections of the American Disabilities Act, 42 U.S.C. § 12112, in pertinent part, apply:

> 42 U.S.C. § 12112(a):
>
> No covered entity shall discriminate against a qualified individual on the basis of disability 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.
>
> 42 U.S.C. § 12112(b)(5)(A):
>
> 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; or
>
> 42 U.S.C. § 12112(b)(5)(B):
>
> 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 such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

ANALYSIS

I. COMPLAINANT MUST ESTABLISH A PRIMA FACIE CLAIM OF DISABILITY DISCRIMINATION

The Commission and Complainant assert that the Complainant has a disability due to her lung cancer diagnosis and the subsequent removal of her lung. The Complainant is alleging that she has been discriminated against because the Respondent did not provide a reasonable accommodation under the ADA, and that the Respondent terminated her in retaliation for filing a complaint with the Commission.

In *McDonnell Douglas Corporation v. Green*, the court set forth a methodology to provide guidance to adjudicators of discrimination cases. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); See also *Craine v. Trinity College*, 259 Conn. 635, 637 (2002). The methodology is the following:

> [T]he plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (Internal quotations and citations omitted). *Craine v. Trinity College*, 259 Conn. 635, 637 (2002), citing *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

In order to advance the claim of disability discrimination, the Complainant, under the *McDonnell Douglas* evidentiary framework, must first prove the elements of a prima facie claim of discrimination. Id. In *Curry v. Goodman,* the elements of a prima facie discrimination claim were set forth as the following:

(1) the complainant suffers from a disability or handicap, as defined by the applicable statute; [2] (2) the Complainant was able to perform essential job functions, with or without reasonable accommodation, and (3) the employer instituted an adverse employment action against the complainant, in whole or in part, because of the complainant's disability. *Curry v. Allan Goodman, Inc.*, 286 Conn. 390, 415, 944 A. 2d 925 (2008).

The Complainant does suffer from a disability or handicap under C.G.S. §46a-60(a)(1). (Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 8;[3] 7/12/22, Tr. 24-25). However, the Complainant has asserted that she can perform essential job functions without an accommodation, (Exhibit 14, Exhibit 17, Exhibit 19, Exhibit 20, Exhibit 22; 7/12/22, Tr. 45-47, 80-81), whereas other functions she is unable to fully perform without assistance. (Exhibit 14, Exhibit 17, Exhibit 19, Exhibit 20; 7/13/22, Tr. 64-67, 78-79).

In cases alleging disability discrimination, the moving party must also assert a failure to accommodate. In disability discrimination cases, the provision or denial of reasonable accommodations are often the issue levied to determine discrimination in disability cases. As a result, case law expands the elements required to establish disability discrimination. In *Graves v. Finch Pruyn & Co., Inc.* , the plaintiff's burden requires:

> a showing that the (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 accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations. *Graves v. Finch Pruyn & Co., Inc.*, 457 F. 3d 181, 184 (2006).

Per testimony of the parties and witnesses, the Complainant has satisfied the first element of

[2] The applicable statute is Connecticut General Statutes §46a-60(a)(1).
[3] The exhibits denoted in this decision are referenced from the Commission's/Complainant's exhibits offered as evidence during the public hearing, unless otherwise indicated.

a prima facie discrimination claim. The Complainant does suffer from a disability. The second element has also been satisfied; the Respondent was aware of the Complainant's disability. (Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 8 Exhibit 9, Exhibit 16, Exhibit 21; 9/29/22, Tr. 40-42, 46-49, 73-79, et al.).

The third element is not as definitive. Per testimony, the Complainant indicated that she could perform duties with an accommodation. However, the requested accommodation continually changed, and thus will need to be examined. The fourth element concerning the Respondent's alleged refusal of a reasonable accommodation will also be examined.

A. THIRD ELEMENT OF A DISABILITY DISCRIMINATION CLAIM

Under *Graves v. Finch,* the third element of a prima facie disability discrimination claim concerns whether an employee could perform the essential functions of the job with a reasonable accommodation. *Graves v. Finch Pruyn & Co., Inc.,* 457 F. 3d 181, 184 (2006). In order to examine whether the Complainant would have been able to efficiently execute her job duties, the definition of a reasonable accommodation under the law must be examined.

1. Complainant's Ability to Perform with a Reasonable Accommodation

Pursuant to Connecticut General Statutes §46a-60(a)(2), a reasonable accommodation includes, but is not limited to the following:

> being permitted to sit while working, more frequent or longer breaks, periodic rest, assistance with manual labor, job restructuring, light duty assignments, modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth or break time and appropriate facilities for expressing breast milk; (Internal quotation marks omitted.)

In *Thomson v. Department of Social Services,* the court asserted that the Plaintiff must

establish that the requested accommodation would enable her to perform essential functions around the time it is sought. *Thomson v. Department of Social Services*, 176 Conn. App. 122, 130, 169 A. 3d 256 (2017). In the case at hand, it must be determined whether the Complainant would be able to fulfill her duties as a school nurse within the Hartford Public Schools if she were granted a reasonable accommodation as defined by statute. In order to determine the effectiveness of such accommodation, a review of the Complainant's duties must be considered as outlined in the Hartford Board of Education's employee handbook. Exhibit three sets forth the "Health Services School Nursing Guidelines" ("Guidelines") for the Hartford Public Schools. The Guidelines state the following:

> School nurses provide basic nursing services, including EPSDT screenings (vision, hearing, scoliosis), first aid, administration of immunization and medications (daily or on an as-needed basis), and provide all necessary special procedures such as tube feedings, catheterizations, tracheotomy care, or suctioning. They make assessments in cases of illness or injury and contact school administration and parents as needed in this regard. School nurses work collaboratively with other school personnel in matters of educational planning of students and how the health of a student may impact his/her education. (Exhibit 3, p. 29).
>
> Qualified personnel who have been properly trained are allowed to administer injectable medication to students with a medically diagnosed bee sting or food allergy, which may require prompt treatment to protect the student against serious harm or death or emergency injectable medication to students diagnosed with Type I Diabetes. They are also allowed to administer injectable medication as first aid[e] to students experiencing an allergic reaction without a previously diagnosed allergy if they have been properly trained per HPS policy. (Department of Health Services Regulations Section 10-212a-2. (f)). (Exhibit 3, p. 41).

While there are numerous responsibilities for a school nurse, there are some duties that must be specifically considered through the lens of a disabled employee with limited lung capacity. Some of the duties outlined in the Board's employee handbook may involve physical exertion or strenuous activity. Examples of potentially strenuous duties are the following: the administration of CPR, the transport of an injured student, the care of a student during an epileptic seizure, and the performance of First Aid.

The Complainant testified to restrictions concerning strenuous activity, such as lifting or carrying a student. "I think the only limitation she [4] had—she had concern about was lifting or carrying a student, lifting." (7/12/22, Tr. 45). The administration of first aid and CPR is an essential component of a school nurse's duties. The Complainant testified to the exigency of CPR and first aid and how she would be required to perform. (7/12/22, Tr. 96-104). "But if I'm there first, then I perform CPR." (7/1/22, Tr. p. 97). The Complainant also testified to the unpredictability of when CPR and/or first aid may need to be administered, along with the instances constituting an emergency. "You don't know—it's unpredictable. I don't know when you're going to have an emergency, no." (7/12/22, Tr. 97-98). In the Guidelines, it even states that at least two staff members in each school should be currently certified in first aid and CPR, illustrating the importance of this skill, but also indicating that it may be a task that is strenuous, requiring assistance. The Guidelines state:

> At least two staff members in each school should be currently certified in First Aid and Cardiopulmonary Resuscitation to assist the nurse, or in the absence of the nurse, be able to recognize life threatening emergencies and to provide life sustaining support until emergency transportation and qualified assistance arrives. (Exhibit 3, p. 61).
>
> Failure to give First Aid to an injured student may constitute negligence, and inappropriate and/or delayed care may result in more serious morbidity or death. (Exhibit 3, p. 61).
>
> All persons supervising a school lunch program should have training in foreign body airway obstruction and shall demonstrate proficiency to the school nurse annually. Nursing staff are required to maintain and forward documentation of demonstrated proficiency each school year to Health Services Department. (Exhibit 3, p. 61).
>
> Nurses, mid-level practitioners and medical assistants will have biyearly CPR certification according to the standards established by the American Heart Association and/or the American Red Cross. (Exhibit 3, p. 61).

[4] The "she" refers to the Complainant's physician, Dr. Angela Petronio.

Page eight of the Guidelines mandates that a school nurse provide, "first aid and emergency care in case of injury or sudden illness, utilizing currently accepted practices and procedures of the American Red Cross, American Heart Association and State of Connecticut." The Guidelines also define medical emergencies for which a school nurse may have to intervene. Some of the emergencies were the following: cardiac arrests, coronary occlusion, drowning, and movement of patients with head or spinal cord injuries. (Exhibit 3, p. 62). The aforementioned duties may require physical exertion that are strenuous.

Another set of duties outlined in the Guidelines is that of seizures. If a student is experiencing a seizure, a school nurse may need to perform pulmonary resuscitation if the student has stopped breathing. (Exhibit 3, p. 92). Additionally, if a student is seizing, a school nurse is instructed to do the following:

> Lay the student down, if possible. Place the student in the Recovery Position and turn head to the side. Do not press head to side if there is resistance. If the student is in a wheelchair, you must use your judgment whether or not the child can be moved to the floor with a second person helping. (Exhibit 3, p. 91).

A school nurse may also be required to administer Diastat which is antiepileptic medication that must be rectally administered, requiring a school nurse to turn and maneuver a student. (Exhibit 3, p. 93).

Therefore, a school nurse may be required to expeditiously conduct tasks that are strenuous and within an emergency context. The requirement that a school nurse perform strenuous tasks may garner concern if the Complainant is unable to adequately perform the customary tasks of strenuous activity per her job duties.

Dr. Angela Petronio, the Complainant's physician, testified concerning the Complainant's limitations involving strenuous activity. "[M]y understanding is that her—like most school nurses, there are routine chores that need to be done, like any other job. Including emergencies. In such an emergency she would have difficulty running up stairs and would certainly be short of breath and would have difficulty if the child was in extrem[i]s." (7/13/22, Tr. 17). "That she would have difficulty moving someone who was unconscious

and might need assistance with something like that." (7/13/22, Tr. 17). Therefore, in accordance with the Board's Guidelines, strenuous activity is a part of a school nursing position. Per testimony from the Complainant, and her treating physician, strenuous activity is a limitation for the Complainant. Moreover,

2. Medical Documentation of Complainant's Ability to Perform Nursing Duties

As a result of her physical limitations, the Complainant met with her treating physician to define the limitations of her disability and to ascertain what accommodations would be required. As a result of such discussions, a series of notes from the Complainant's physician were issued to the Board. The summation of the letters is conveyed in the chart below, as Figure 1.

In this series of letters, Dr. Petronio described the physical limitations of the Complainant's condition by stating that the Complainant has a permanent deficit in her lung capacity and that her condition will not change. In several letters, Dr. Petronio outlined the Complainant's physical condition, physical limitations, and the specific accommodations the Complainant needed due to her disability. Eleven letters were sent to the Respondent concerning the Complainant's limitations and accommodation requests, and said letters are summarized below in the chart. (Figure 1).

Title of Letter	Date and Exhibit Number	Description of Complainant's Physical Limitations and/or Description of Accommodation Requests
Letter from Dr. Petronio to Labor Department (Respondent)	July 18, 2016; Exhibit 4	Complainant had left lung removed and is more prone to respiratory infections; will require follow-up treatment and lifelong monitoring; Complainant

		requires newer building, better ventilation, an elevator, and a shorter commute.
Hartford Board of Education-Confidential Leave Request	No date; Exhibit 6	Complainant has post-operative fatigue, shortness of breath with exertion, and unable to perform job duties as a school nurse.
Letter from Dr. Petronio	January 12, 2017; Exhibit 8	(1) Staff to "assist with delegated tasks outside her primary job function, (2) episodic and unexpected periods of time off, (3) a reduction to a part-time or modified schedule as she returns to work; (4) transfer to a newer school location, closer to her home, (5) work environment that is one level with well-controlled air quality, and (6) office with a window. Dr. Petronio asserted "Not complying with the requests outlined in this letter poses a substantial risk to [Complainant's] future health and continuing recovery. These are a medical necessity for [Complainant].
Confidential Leave Request	January 19, 2017; Exhibit 13	(1) No significant stair climbing, (2) assistance for strenuous activities, and (3) shorter commute because prolonged sitting causes discomfort.
Letter from Dr. Petronio to Lori Mizerak	January 23, 2017; Exhibit 14	Request different school building to perform job functions; If placed in different building, Complainant would only need assistance with excess exertion such as lifting or carrying a student.
Letter from Dr. Petronio to Lori Mizerak	February 8, 2017; Exhibit 17	Complainant can perform all job functions, except strenuous activity.

Letter from Dr. Petronio to Natasha Banks	February 8, 2017; Exhibit 18	Complainant could return to work if accommodations specified in all previous letters are met.
Letter from Dr. Petronio to Lori Mizerak	February 21, 2017; Exhibit 19	Complainant does not need the assistance of another school nurse; she can perform all job functions except for strenuous activity, such as lifting a student. Complainant requests to be transferred to newer school location, closer to her home. The school should be one level (two maximum) with well-controlled air quality with a window for ventilation.
Letter from Dr. Petronio to Respondent; (Respondent representative not specified).	February 28, 2017; Exhibit 20	Complainant does not require an individual assistant; Twenty-minute commute; Complainant can handle crisis, such as CPR, until assistance arrives; Complainant can get upstairs or run down a hall during a crisis.
Letter from Dr. Petronio to Lori Mizerak	March 2, 2017; Exhibit 22	Complainant cannot be in a building with more than two flights of stairs even if there is an elevator; Complainant should be assigned to newer school building with quality air control and have a window in her office; Complainant still requires assistance with strenuous activity.
Letter from Dr. Petronio to Respondent; (Respondent representative not specified.)	March 9, 2017; Exhibit 23	Complainant is experiencing stress, insomnia, and headaches due to no resolution regarding her employment accommodation.

FIGURE 1.

In Figure 1, six letters specifically stated that the Complainant could not perform strenuous activity or would need assistance with strenuous activity. Additionally, the letter, "Hartford Board of Education-Confidential Leave Request" (Exhibit 6) indicated that the Complainant is "unable to perform job duties as

a school nurse." The aforementioned letter was not dated but it was sent after Dr. Petronio's letter dated July 18, 2016, (Exhibit 4) and before Dr. Petronio's letter dated January 12, 2017. (Exhibit 8). The letter stated that the Complainant could not perform her duties as a school nurse. [5]

As time progressed, Dr. Petronio indicated that the Complainant could perform her job as a school nurse with accommodation. However, the accommodations in Dr. Petronio's letters often differed. Some of the accommodations contradicted requests in previous letters. Thus, it is difficult to discern which accommodations were actually required. [6] Although the accommodations varied in different letters, the most consistent accommodation requested assistance with strenuous activity. It is still not clear whether the Complainant would be able to perform her duties with or without an accommodation. Notwithstanding the foregoing, if the Complainant could perform her job with occasional assistance for strenuous activity, then it is tentatively deemed that the Complainant has satisfied the de minimis requirements for the third element of a prima facie case of disability discrimination.

II. FOURTH ELEMENT OF A DISABILITY CLAIM: PROVISION OR REFUSAL OF A REASONABLE ACCOMMODATION

Pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) and 42 U.S.C. § 12112(b)(5)(B), C.G.S.§46a-60(a)(1), and C.G.S.§46a-58(a), employers cannot discriminate against disabled employees, and employers must grant reasonable accommodations. The Connecticut Fair Employment Practices Act, C.G.S.§46a–51 et seq., however, does not fully align with similar disability statutes, as underscored in *Trimachi v. Connecticut Workers Compensation Committee. Trimachi v. Connecticut*

[5] Judicial notice has been taken concerning the fact that the Complainant did travel to Europe around the time Dr. Petronio's letter indicated that she could not perform her duties as a nurse. (7/13/22; Tr. 43).
[6] Accommodation requests need to be clear, or it makes it difficult or impossible to provide a reasonable accommodation if the request is unclear or continually vacillates.

Workers Compensation Committee, 2000 WL 872451, *6, 27 Conn. L. Rptr 469. In this case, the court asserted:

> [U]nlike the federal statutes, such as the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq. (ADA), and Rehabilitation Act of 1973, 29 U.S.C. § 793 et seq. and 41 C.F.R. 60–741.6(d), the CFEPA, General Statutes 46a–51 et seq., does not, on its face, require an employer to provide accommodation, reasonable or otherwise, to a disabled employee." Id.

Notwithstanding the foregoing, the court also declared that Connecticut antidiscrimination statutes are coextensive with federal law, and thus, an employer shall provide a reasonable accommodation to a disabled employee. Id at 7-8. In *Cimino v. Pratt & Whitney*, the court held that CFEPA requires employers to cover a reasonable accommodation and that such duty exists. *Cimino v. Pratt & Whitney*, 2007 WL 4577957, *6, 44 Conn. L. Rptr. 621.

The courts have also further defined an employer's duty regarding reasonable accommodation as one that is effective for a qualified individual. "An ineffective modification or adjustment will not accommodate a disabled individual's limitations." *US Airways, Inc. v. Barnett*, 535 US 391, 400, 122 S. Ct. 1516, 1522 (2002). A "reasonable accommodation means modification or adjustment….that enables a qualified individual with a disability to perform the essential functions of [a] position." Id. at 399.

A. RESPONDENT'S DUTY TO ENGAGE IN BILATERAL COMMUNICATION REGARDING ACCOMMODATATION

From the correspondence from the Complainant's physician, it appeared that the Complainant may be able to perform her job duties, and would only need assistance with strenuous activity. This preliminary belief is based on multiple letters from Dr. Petronio stating that the Complainant could perform all essential

functions of her job, coupled with an ambiguous request citing the occasional need for assistance with strenuous activity. In response, the Board had a duty to meet with the Complainant and/or her representatives to ascertain the information needed to formulate an accommodation that would assist the Complainant with strenuous activity. The duty to accommodate is a continual duty that is not exhausted by a singular effort. *McAlindin v. County of San Diego et al.*, 192 F. 3d 1226, 1237 (1999). In *Thompson v Department of Social Services,* the court averred that the employer and employee had a duty to meet and

> 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.... 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. *Thompson v. Department of Social Services*, 176 Conn. App. 122, 129, 169 A. 3d 256 (2017).

In *White v. York International Corporation*, the court noted:

> the interactive process is triggered only if the employee is "qualified," and, as discussed above, the term "qualified" is defined to include the concept of reasonable accommodation. Thus, the employer necessarily must make a threshold determination that the disabled employee may be accommodated, and is, therefore, qualified within the meaning of the ADA. It is at that point, the regulations recommend, that the employer and employee work together in order to identify how best to accommodate the employee. *White v. York International Corporation*, 45 F. 3d 357, 362 (10th Cir. 1995).

"The interactive process does not dictate that any particular concession ... be made by the employer .. All the interactive process requires is that employers make a [good faith] effort to seek accommodations." *Kovachich v. Department of Mental Health and Addiction Services,* 344 Conn. 777, 804, 281 A. 3d 1144, 1161 (2022).

From the testimony and documented evidence presented, the Board adequately engaged in the interactive process of discussing and formulating an accommodation for the Complainant. Dr. Petronio sent a letter to the Respondent, dated July 18, 2016, informing them of the Complainant's diagnosis and

disability. (Exhibit 4). Shortly thereafter, the Respondent held an ADA accommodation meeting with the Complainant on August 10, 2016. (Exhibit 5). On January 18, 2017, Lori Mizerak, the Board's legal counsel, sent a list of the school nurse job duties to Dr. Petronio for her review in determining if there were duties that the Complainant was unable to perform. (Exhibit 9). On February 6, 2017, a letter from the Respondent was sent to schedule an accommodation meeting for February 9, 2017. (Exhibit 16).

On February 21, 2017,[7] an ADA accommodation meeting between the Complainant and the Respondent took place to discuss the correspondence received from Dr. Petronio regarding the Complainant's need for a disability accommodation. In addition to the Complainant, the following were present at the meeting: Natasha Banks, Senior Executive Director of Human Resources for the Hartford Board of Education, Deborah Chameides, Health Services Coordinator for the Board, Audrey Boutaugh, Principal of High School, Inc., Jay Gutierrez, Complainant's union representative, and Lori Mizerak, legal counsel for the Hartford Board of Education. (Exhibit 21). [8]

After the Board reviewed the school nurse job description, there were some concerns regarding strenuous activity that the Complainant may not be able to perform. The Complainant would need an assistant to perform strenuous activities which are a routine part of a school nurse's job. However, the Board did not find it feasible to provide an assistant for each instance when the Complainant had to perform strenuous activity. Natasha Banks testified, "That's not a reasonable accommodation for us, to have to pay for two nurses for one job." (9/29/22; Tr. 143). The Complainant's union representative

[7] The ADA accommodation meeting was originally scheduled for February 9, 2017, but had to be rescheduled for February 21, 2017. (9/29/22; Tr. 81).
[88] The discussion at the February 21, 2017 meeting was memorialized in a letter dated March 2, 2017. and issued by Lori Mizerak.

inquired whether modifications could be made to High School, Inc., which was the current school to which the Complainant was assigned.

On February 27, 2017, Natasha Banks and Lori Mizerak spoke to Dr. Petronio regarding concerns of unpredictable or crisis situations and whether the Complainant needed some assistance in handling such situations. In response to this conversation, Dr. Petronio issued a letter updating the Complainant's abilities and accommodation requests. (Exhibit 20). As a result of the conversation on February 27, 2017, and Dr. Petronio's letter dated February 28, 2017, the Board offered via its letter dated March 2, 2017, (Exhibit 21), the following accommodation:

> (1) you will be assigned to a building that has an elevator or that is limited to one or two floors and (2) in situations where you may be required to lift a student from, for example, a wheelchair to an examining table, assistance will be provided to you and your administrator will identify who can assist in such a situation. It is HPS' understanding, after numerous follow-up with your doctor, that you can return to work and these accommodations will assist you in the performance of your job duties. Thus, it is expected that you return to work on Monday, March 6, 2017, at High School, Inc.

On March 2, 2017, Dr. Petronio issued a letter to Lori Mizerak indicating that the Complainant could not return to High School, Inc. because it has more than two flights of stairs, despite the building having an elevator, and that the Complainant needs to be assigned to a newer building with quality air control and an office with a window that opens to access fresh air.

In response to Dr. Petronio's letter of March 2, 2017, the Board asserted in a letter dated March 16, 2017, the following:

> [Y]ou need assistance with strenuous activity, while providing no description as to when that assistance would be needed and/or for what activities. As previously discussed, such a restriction would require HPS to provide assistance to you in any building that you are assigned to, but with no predictability as to when the assistance would be needed, for what duties, etc. As we have further discussed, this is not a reasonable accommodation that HPS can agree to. In addition, the opinion now apparently is that you cannot be in a building with

> more than two flights of stairs even if there is an elevator, and there is a request for a transfer to a newer building with quality air control. Again with no indication as to how old of a building would be appropriate and what quality air control means. HPS thus has no assurance that the requested accommodation of a transfer would be effective in addressing the recommendations of your doctor as related to a newer building and quality air control. Please also note that even if a transfer was an effective accommodation, which HPS does not believe that it is, there are no open positions for school nurses in other buildings. (Exhibit 24).

Pursuant to *Thompson v. Department of Social Services,* the Board has satisfied its duty of engaging in bilateral discussions to acquire information about the accommodations that are being requested, along with attempting to formulate a reasonable accommodation. *Thompson v. Department of Social Services,* 176 Conn. App. 122, 129, 169 A. 3d 256 (2017).

Since the Board was notified of the Complainant's illness via letter from Dr. Petronio dated July 18, 2016, there had been good faith efforts to meet with the Complainant and/or her physician to gain clarity of the Complainant's requests and to implement the accommodation. Within a month of being notified of the Complainant's illness, there was a meeting in August to discuss the accommodation. Thereafter, the Board responded to a series of letters from Dr. Petronio regarding the Complainant's condition and her requested accommodation but there was lack of clarity regarding the accommodation requests. The Complainant, in her testimony, even stated that the Board had met with her to devise an accommodation but there was lack of clarity. "What I'm saying, there was previous meeting leading up to this, and they, too, was trying to get some clarification as far as the accommodation also. I think you—the entire meeting is for me to get the accommodation." (9/20/22; Tr. 129).

B. COMPLAINANT'S DUTY TO REQUEST PLAUSBILE ACCOMMODATION

The Complainant was cleared to return to work on January 17, 2017, although she did not return to work on that date because the accommodations had not been implemented. The accommodation had not been implemented because there was a lack of clarity as to the specific accommodation requests. As illustrated in Figure 1, there were letters drafted by Dr. Petronio requesting specific accommodations on behalf of the Complainant. In reviewing the series of letters, a vacillation of the Complainant's physical limitations and requested accommodations was evident.

The Complainant carries the burden of persuasion on the question of reasonable accommodation, and whether the accommodation unduly burdens the employer. *Borkowski v. Valley Central School District*, 63 F. 3d 131, 137 (1995). The "[p]laintiff satisfies its burden of proof by demonstrating plausible accommodation." *US Airways, Inc. v. Barnett*, 535 US 391, 402, 122 S. Ct. 1516, 1524 (2002). *See also Barth v. Gelb*, 2 F. 3d 1180, 1187 (1993). In *Reed v. LePage Bakeries, Inc.*, the court asserted that the Plaintiff/employee must provide some evidence that the "proposed accommodation is reasonable, or at least plausible." (Internal quotations omitted.) *Reed v. LePage Bakeries, Inc.*, 244 F. 3d 254, 257 (2001).

1. Reasonableness of Requested Accommodation

Per the law set forth in *Borkowski, U.S. Airways, and Reed,* the Complainant has not satisfied her burden of demonstrating a reasonable or plausible request for accommodation because some of her requests were not feasible to the employer. For example, when questioned about providing another nurse to assist the Complainant with strenuous activity, Natasha Banks testified, "That's not a reasonable accommodation for us, to have to pay for two nurses for one job." (9/29/22; Tr. 143).

The Complainant, by way of her physician, requested several times that the Complainant be transferred to a newer building with limited floors, better air ventilation, temperature control, and a window in the nurse's office. During direct examination, Dr. Petronio testified that the Complainant "be assigned to a school with no more than two flights of stairs, that she still experienced some degree of shortness of breath with exertion, she should have a temperature control and be well ventilated." (7/13/22, Tr. 29). Dr. Petronio also requested that the Complainant be returned to a school with a working elevator, which High School, Inc. had.

When asked on cross-examination if she was aware of whether the elevator was working when the Complainant was asked to return to High School, Inc., Dr. Petronio responded, "No, I did not know one way or the other." (7/13/22, Tr. 110). Dr. Petronio was also asked on cross-examination if she was aware of the availability of the facility for which she and the Complainant were requesting. Specifically, the request was a newer school building, with better ventilation and no more than two stories high. When asked about whether she knew if such a building existed, Dr. Petronio answered, "Unless someone informed me, I would not have known that." (7/13/22, Tr. 109-110).

The newer buildings have multiple floors so they would not meet the Complainant's initial request for a single-level building or a building with a maximum of two floors. Testimony revealed that there are no single-level buildings within Hartford Public Schools and few buildings with less than three floors. "We have no single-level buildings. Not one single-level building." (9/29/22, Tr. 170). "Two-story, if you consider that there might be a basement, so there's, you know, one story down, one story up, we might have a few of them. But very few." (9/29/22, Tr. 170).

The Complainant also requested a window in her office that opened for access to fresh air. Per her testimony, Natasha Banks stated, "many nurses' offices don't have windows." (9/29/22, Tr. 133). Ms. Banks further explained that most windows do not fully open, because:

> [in] most cases they don't. There are times in an older building that there is an opportunity to slide it open some. They have those like cranking things that pull out, or a little but push up and then, you get a little bit of air. But, no, they don't wide open. No window is wide open for safety reasons, especially when you have floors to a school, and all our buildings have floors. (9/29/22, Tr. 133).

The Complainant also requested a building with better air quality. During cross-examination, Dr. Petronio was asked about the specifics of air quality and whether she knew of any tests that were conducted on the air quality in High School, Inc. as compared to the newer buildings. Dr. Petronio could not attest to the fact that newer school buildings within the Hartford Public Schools had better air quality than older buildings, but could only base her assertion on the opinion that older buildings may have more air quality issues in general. (7/13/22, Tr. 89-90). "A lot of the older buildings in the Hartford area have had issues with air quality and mold and things like that." (7/13/22, Tr. 89). Thus, the issue of air quality may be mitigated by a window that fully opens, which was not available, especially in the newer buildings. There was no preponderance of evidence presented that the air quality in High School, Inc. was diminished in comparison to a newer building.

Prior to her return to work, the Complainant also requested a placement at Great Path Academy in Hartford. However, this accommodation was also not plausible. The Complainant was not scheduled to return to work until January 17, 2017. On the same day, there was already a recommendation to hire another nurse for the position at Great Path Academy, and the nurse was hired by January 30, 2017.

(Exhibit 11). Thus, the Complainant was on medical leave when other candidates were being considered for the position.

Moreover, the Complainant could not have been hired prior to being medically cleared to return to work. "When employees are unable to work, then we hold them in the location because there is a responsibility obviously to their current position, but there is no movement that occurs during that time." (9/29/22; Tr. 43). Thus, the Great Path Academy position was unavailable due to the Complainant's extended medical leave. The Complainant's request for placement at Great Path Academy before she was medically cleared to return to work, coupled with the fact that another nurse had already been considered, is not a reasonable request for accommodation.

2. Clarity of Complainant's Accommodation Requests

The Complainant also failed to make a reasonable accommodation request because her physical limitations and accommodation needs were unclear. A reasonable accommodation must involve bilateral discussions between employee and employer. "[C]ourts 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." (Internal quotations omitted.) *Loulseged v. Akzo Nobel Inc.*, 178 F. 3d 731, 736 (5th Cir. 1999).

A failure by a party to make reasonable efforts to help the other party determine what specific accommodations are required may be viewed as acting in bad faith. As a result, tribunals isolate the cause of the breakdown in communication and assign responsibility. *Beck v. University of Wisconsin Board of Regents*, 75 F. 3d 1130, 1135 (1996). The cause of the breakdown in communication may be missing information. "[I]n some instances neither the individual requesting the accommodation nor the employer can

readily identify the appropriate accommodation." Id. at 1135-1136. As a result, the onus is placed on the party who is providing insufficient or inaccurate information during the discussion process. Id.

While the Complainant was not necessarily acting in bad faith per se, the continual vacillation in the Complainant's physical limitations made the accommodation process difficult because it was not clear what was required and what was being requested. The amalgamation of letters from Dr. Petronio asserts several contradictory requests. Dr. Petronio states that the Complainant does not need an assistant. However, in several letters, Dr. Petronio avers that the Complainant can perform all job functions but needs assistance with strenuous activity. As indicated above in the position duties for a school nurse, See Supra p. 17-18 of this decision, strenuous activity is a part of a nurse's job function. When Dr. Petronio requested assistance with strenuous activity, she exemplified the request by stating that strenuous activity may involve lifting a student. Beyond the example of lifting a student, there is no other specification as to what strenuous activity would entail.

Dr. Petronio asserted that the Complainant can perform crisis procedures, such as CPR, and can run up the stairs and down the hall, but also requested a single-level building, or a building with no more than one flight of stairs. However, on cross-examination, Dr. Petronio was asked about the Complainant's physical condition as it pertained to shortness of breath and the ability to perform CPR. "Her concern that she described was getting to the CPR that was on the fifth floor. That would be difficult, and then she might not be able to perform the duties because she'd be short of breath." (7/13/23, Tr. 51). When asked whether shortness of breath could hinder the Complainant's ability to perform CPR, Dr. Petronio responded, "Significantly short of breath, yes." (7/13/23, Tr. 52). Therefore, the physical limitations of the Complainant remain unclear, as well as the accommodation requests.

The Complainant's unclear accommodation request caused delay in implementing an accommodation. "[I]f the Plaintiff needs a specific accommodation, then she needs to provide the board with enough information for the board to understand why only that accommodation is sufficient. " *Festa v. Board of Education of Town of East Haven*, 145 Conn. App. 103, 117, 73 A. 3d 904, 912 (2013). In the Commission's post-hearing brief, it was asserted that the Respondent requested that the Complainant return to work without the accommodations in place. (Commission's Post-Hearing Brief, p. 22-24). However, an accommodation had already been offered, but was counteracted by additional accommodations. Therefore, it was unclear what physical limitations the Complainant had and what accommodations were being requested. For example, Natasha Banks testified to the lack of clarity in Dr. Petronio's letters explaining:

> So it didn't provide any clear understanding of the situation because the doctor was still indicating that she needed assistance and was not giving us an understanding of what that could be; in fact was actually indicating that it was not predictable. (9/29/22, Tr. 88).

Therefore, the Complainant's overall request for accommodation was infeasible to the Respondent because the requests were unclear, and some requests were not reasonable because they imposed an undue hardship on the Respondent. "An accommodation is unreasonable if it imposes an undue hardship on an employer's operation." *McElwee v. County of Orange*, 700 F. 3d 635, 641 (2012).

C. RESPONDENT PROVIDED A REASONABLE ACCOMMODATION

The fourth tenet of a disability claim concerns whether the employer provided or refused to provide a reasonable accommodation. Statutory authority does not specifically define the term reasonable accommodation. The court in *Lyons v. Legal Aid Society*, noted,

> Neither the ADA nor the Rehabilitation Act provides a closed-end definition of "reasonable accommodation." The ADA sets out a nonexclusive list of different methods of accommodation encompassed by that term, stating that

> [t]he term "reasonable accommodation" *may include*—
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. *Lyons v. Legal Aid Society*, 68 F. 3d 1512, 1515 (2d Cir. 1995).

"EEOC guidelines provide that reassignment may be considered as a reasonable accommodation." *White v. York International Corporation*, 45 F. 3d 357, 362 (1995). However, the ADA may only require an employer to reassign a disabled employee to a position for which the employee is otherwise qualified." *Gile v. United Airlines, Inc.*, 95 F. 3d 492, 499 (1996). The "ADA does not require an employer to promote a disabled employee as an accommodation, nor must an employer reassign the employee to an occupied position, nor must the employer create a new position to accommodate the disabled worker." *White v. York International Corp.*, at 362.

The Respondent provided a reasonable accommodation to the Complainant and attempted to make such modifications as iterated in *Lyons.* *Lyons v. Legal Aid Society*, 68 F. 3d 1512, 1515 (2d Cir. 1995). The first accommodation concerned extended medical leave. The Board granted the Complainant's request for an extended medical leave until January 17, 2017, which was beyond the Complainant's original leave request. (Exhibit 6). In *Garcia -Ayala V. Lederle Parenterals, Inc.,* the court affirmed that an extended leave of absence constitutes an accommodation by an employer. *Garcia-Ayala V. Lederle Parenterals, Inc.*, 212 F. 3d 638, 647-8 (2000).

Thereafter, the Respondent had several meetings with the Complainant, along with calls with the Complainant's physician, to ascertain the needs of the Complainant. After several ADA accommodation meetings, the Respondent granted a reasonable accommodation to the Complainant as memorialized in a

letter dated March 2, 2017. (Exhibit 21). The Respondent provided an accommodation based on recent discussions and a letter from the Complainant's physician dated February 28, 2017. (Exhibit 20; 12/1/22; Tr. 56-57). Dr. Petronio's letter (Exhibit 20) stated the following: (1) the Complainant did not need an individual assistant assigned to her, (2) a twenty-minute commute to work is acceptable, (3) the Complainant could handle crisis situations, and (4) the Complainant could run up the stairs and down the hall during a crisis. Based on Dr. Petronio's letter, the Respondent provided an accommodation by agreeing to provide assistance to the Complainant for strenuous activity. As a result, the Complainant was told to return to High School, Inc. because that facility would accommodate the needs of the Complainant. High School, Inc. had an elevator [9] and was within a twenty-minute commute time, satisfying the commuting request. During her testimony, Dr. Petronio affirmed that High School, Inc. met the accommodation request for commuting time. (7/13/22, Tr. 98-99).

Therefore, the Respondent satisfied the fourth tenet of a disability claim by providing several accommodations, including extended medical leave, assistance with strenuous activity, and a school facility with an elevator and a twenty-minute commute. In this matter, the issue is not that the Respondent failed to provide an accommodation, the issue is that the Complainant was not satisfied with the accommodation that was granted to her. "An employer is not obligated to provide an employee the accommodation [s]he requests or prefers, the employer need only provide some reasonable accommodation." *Malabarba v. Chicago Tribune Co.,* 149 F. 3d. 690, 699 (1998). "Although a public entity must make reasonable

[9] Concerning the issue of air quality, the Respondent offered to review whether there is other available space with a window where the nurse's office could be moved in High School, Inc. However, that offer was not satisfactory to the Complainant because the Complainant claimed that the ventilation was problematic in the entire school.

accommodations, it does not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice." *McElwee v. County of Orange,* 700 F. 3d 635, 641 (2012); *See also Festa v. Board of Education of Town of East Haven,* 145 Conn. App. 103, 117, 73 A. 3d 904, 912 (2013). "Reasonable accommodation does not require an employer to provide literally everything the disabled employee requests." *Schmidt v. Methodist Hospital,* 89 F. 3d 342, 344 (7th Cir. 1996).

In addition to the Respondent's accommodation, the Complainant wanted a newer building with no more than two flights of stairs, with windows that fully opened. However, in requesting accommodations, the Complainant must make a reasonable request. "The plaintiff is not entitled to the accommodation of her choice; she is entitled to a reasonable accommodation." *Festa v. Board of Education of Town of East Haven*, 145 Conn. App. 103, 116-117, 73 A. 3d 904, 912 (2013).

After the Complainant did not agree to the Respondent's accommodation, an additional accommodation was offered to the Complainant. In a letter dated March 16, 2017, the Board informed the Complainant that there may be other available employment opportunities that the Complainant was qualified for within the Hartford Public Schools. (Exhibit 24). At a meeting with Natasha Banks on March 29, 2017, the Complainant was apprised of non-nursing positions within the Hartford Board of Education that were amenable to her physical limitations. (Exhibit 26). However, the Complainant was not interested in those positions because she felt that she was not qualified. The Complainant stated, "Well, I informed her during our conversation that I don't believe that I was qualified for those jobs." (7/12/22; Tr. 66).

In *Curry v. Goodman,* it was averred that "A reasonable accommodation does not have to relate to the qualifications of the job." *Curry v. Goodman, Inc.*, 286 Conn. 390, 410, 944 A.2d 925 (2008). "[T]he ADA may require an employer to reassign a disabled employee to a different position as reasonable

accommodation where the employee can no longer perform the essential functions of their current position." *Gile v. United Airlines, Inc.*, 95 F. 3d 492, 498 (7th Cir. 1996). "If an employee requests a transfer as reasonable accommodation and the employer offers alternative reasonable accommodation, which the employee then refuses, the employer cannot be liable for failing to reasonably accommodate the employee by not transferring him to another position." Id at 499.

The Complainant indicated that the positions that were offered would be for lower pay. In *Gile v. United Airlines*, the court noted that an employer is potentially obligated to reassign an otherwise qualified individual with a disability. Id at 497-98. Reassignment to equitable positions is preferable, but the assignment to lower positions is permissible. Id. Reasonable accommodation may involve reassignment to a position completely distinct and different from the prior position held by the disabled employee. Id.

III. UNDUE HARDSHIP

In providing an accommodation, there is a calculus that must be considered as to what is reasonably appropriate to restore a disabled person's ability to safely and competently perform their job, while not constituting an undue hardship to the employer. If an employee has established a prima facie claim of disability, then the burden shifts to the Respondent to demonstrate that the accommodation would create an undue hardship. *Kovachich v. Department of Mental and Addiction Services*, 344 Conn. 777, 802, 281 A. 3d. 1144, 1160 (2022). "Claims alleging disability discrimination in violation of the ADA are subject to the burden-shifting analysis originally established by the Supreme Court in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

In *Humphrey v. Memorial Hospitals Association*, the court averred, "[A]n employer must consider each request for reasonable accommodation, and ... [i]f a reasonable accommodation turns out to be

ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." (Citation omitted; internal quotation marks omitted.) *Humphrey v. Memorial Hospitals Association*, 239 F. 3d 1128, 1138 (9th Cir. 2001). "Credible evidence that reasonable accommodation is not possible or would be unduly burdensome shifts the burden back to the plaintiff to rebut the employer's evidence." *Barth v. Gelb*, 2 F. 3d 1180, 1187 (1993).

Pursuant to 29 C.F.R.§ 1630 (p)(1)(2)), an undue hardship is defined as the following:

(p) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) ***Factors to be considered.*** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

In the matter at hand, the issue is slightly different than the typical disability claim where an employer either refuses to provide an accommodation or is unable to provide a reasonable accommodation. In this case, the employer, the Hartford Board of Education, did provide an accommodation based on recent communication from the Complainant's physician, as evidenced by the letter dated March 2, 2017. (Exhibit 21). However, after the accommodation was offered, the Complainant's physician sent another letter contradicting the previous letter on which the Respondent based its accommodation. Testimony concerning Dr. Petronio's letter revealed, "We were moving forward with having Ms. McFarlane-Nelson return. And then we got this, that went back. After the conversation that we had, it was a whole contradiction to everything that was said by Dr. Petronio. And we no longer felt like she was credible in everything she was going to give us." (9/29/22; Tr. 142). Thus, the Complainant refused the accommodation that was offered via the letter dated March 2, 2017, (Exhibit 21) and did not return to High School, Inc.

As a result, the Complainant made additional accommodation requests to which the Respondent could not agree. Under the ADA and prevailing case law discussing the CFEPA, an employer must provide accommodations to a disabled employee unless said accommodations are unreasonable or impose an undue hardship on the Board. *US Airways, Inc. v. Barnett*, 535 US 391, 395, 122 S. Ct. 1516, 1517 (2002).

Per the evidence and testimony, the Board could not grant all the accommodations that the Complainant requested. In a letter dated March 16, 2017, the Respondent expressed its difficulty in providing the additional accommodations that the Complainant requested after the accommodation was made. The Respondent expressed the hardship of this matter by stating the following:

> The most recent medical note referenced about reverts to the statement in previous letters that you would need assistance with strenuous activity, while providing no description as to when that

> assistance would be needed and/or for what activities. As previously discussed, such a restriction would require HPS to provide assistance to you in any building that you are assigned to, but with no predictability as to when the assistance would be needed, for what duties, etc. As we have further discussed, this is not a reasonable accommodation that HPS can agree to. In addition, the opinion now apparently is that you cannot be in a building with more than two flights of stairs even if there is an elevator, and there is a request for a transfer to a newer building with quality air control, again with no indication as to how old of a building would be appropriate and what quality air control means…. HPS thus has no assurance that the requested accommodation of a transfer would be effective in addressing the recommendations of your doctor as related to a newer building and quality air control. Please also note that even if a transfer was an effective accommodation, which HPS does not believe that it is , there are no open positions for school nurses in other buildings. (Exhibit 24).

Per testimony and written evidence, there were no newer buildings with windows that fully opened. Thus, in order to satisfy the request, the Board would somehow have to construct windows that fully opened. Any accommodation requiring more than a de minimis cost constitutes an undue hardship and not considered a reasonable accommodation. *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 328, 334 (1995). Even if the Board were able to construct such windows, it would be a safety hazard to the students it is serving. "No window is wide open for safety reasons, especially when you have floors to a school, and all our buildings have floors." (9/29/22, Tr. 133). Thus, the cost of constructing a new window, coupled with the safety hazard of windows that fully opened, would impose an undue hardship on the Respondent.

Moreover, there were no open positions at the schools in which the Complainant was requesting. In *US Airways, Inc. v. Barnett*, "[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees-say because it will lead to dismissal, relocations, or modifications of employee benefits….." *US Airways, Inc. v. Barnett*, 535 US 391, 400-1, 122 S. Ct. 1516, 1522 (2002). In *Eversley v. MBank* Dallas, the court found that it was an undue hardship for the employer to require an existing employee to forego his shift preference. *Eversley v. MBank Dallas*, 843 F. 2d 172, 175 (1999). Thus, it is unreasonable to request that another school nurse be

removed or relocated from another school, especially since the requested buildings do not possess the Complainant's requested accommodations.

Moreover, the Complainant requested a building with no more than two floors. Per the testimony of Natasha Banks, there are no single-level buildings within Hartford Public Schools and few building buildings with less than three floors. Therefore, the Complainant's request for a single-level building or a building with no more than two floors would have been burdensome for the Respondent because the single-level buildings do not exist, and buildings with no more than two floors, are very sparse. Even if there were a two-level building available, there were no openings at the other buildings for school nurses.

Although the Complainant requested to be sent to a newer building due to better air quality, the Complainant or the Commission did not present a preponderance of evidence that the air quality was better in the newer buildings or requested a reasonable accommodation to enhance the air quality.

Thus, the additional accommodations requested by the Complainant constitute an undue hardship for the Respondent. The Respondent has satisfied its burden of proof of undue hardship under the *McDonnell Douglas* evidentiary framework. The Complainant's additional accommodations would be unduly burdensome to the Respondent because the combination of requests is for facilities that either do not exist, are unavailable, or would pose an unreasonable expense of time and money.

IV. PRETEXT

In a discrimination case, intentional discrimination or discriminatory pretext must be examined or proven. [10] If the Plaintiff succeeds in proving a prima facie case of discrimination, the burden shifts to the

[10] Although this matter does not allege a violation of Title VII of the Civil Rights Act of 1964, discriminatory pretext is being addressed within the scope of discrimination against disabled individuals.

Respondent "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 1091 (1981). If the Respondent assumes the burden, the Complainant has the opportunity to prove that the reasons offered by the Respondent for its decision to terminate were not truthful reasons, but a "pretext for discrimination." Id.

The Respondent produced a series of letters, along with testimony, to indicate that the Complainant's termination was not due to discriminatory animus, but due to a medical separation because the Complainant could not perform her duties as a school nurse. The Respondent offered an accommodation to the Complainant based on documentation from the Complainant's physician. However, when the Complainant rejected the accommodation and added other requests that could not be reasonably provided by her employer, it became evident that the Complainant could not perform her essential duties as a school nurse with or without accommodation.

Now that the law and facts have been examined, the second element of a prima facie case of disability discrimination will be revisited. The second element is the following: "Complainant was able to perform essential job functions, with or without reasonable accommodation." *Curry v. Allan Goodman, Inc.*, 286 Conn. 390, 415, 944 A. 2d 925 (2008). The Complainant's request for additional accommodation, after a reasonable accommodation had been added, demonstrated that the Complainant could not perform her duties as a school nurse and thus negated her claim for disability discrimination.

As the court in *Texas v. Burdine* declared, the Plaintiff must first establish a prima facie case of discrimination before the burden shifts to the employer to explain why an adverse employment action was levied against an employee. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 1091 (1981). In the matter at hand, the Complainant failed to prove all element of a discrimination

claim and thus the burden does not need to shift to the Respondent to establish the reason why the Complainant was terminated. However, to demonstrate the absence of discriminatory animus in this matter, the reasons for termination will be examined through the lens of discriminatory pretext.

The Complainant was unable to demonstrate that she would be able to perform the essential functions as a school nurse with or without an accommodation. The Complainant also failed to prove that the Respondent did not provide a reasonable accommodation. As discussed, supra, the Respondent offered a reasonable accommodation based on the ADA meetings, discussions, and medical documentation from the Complainant. After the offer of the accommodation, the Complainant requested additional accommodations that were infeasible to the employer and would pose an undue hardship.

In *Reeves v. Sanderson*, the plaintiff had to prove that the employer's legitimate, nondiscriminatory explanation for a decision should be rejected due to intentional discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097 (2000). In this matter, the Respondent's nondiscriminatory explanation for its decision to terminate is based on the Complainant's inability to perform her duties as a school nurse and the Respondent's inability to reasonably accommodate her. The Complainant's termination was due to medical reasons and not pretextual.

The Complainant failed to establish a prima facie case of discrimination. The Respondent satisfied its burden of proving nondiscriminatory reasons for terminating the Complainant's school nursing position by offering evidence of the following: (1) the Complainant's inability to perform her nursing duties, (2) an offer of an accommodation, and (3) the imposition of an undue hardship if additional accommodations were provided. Therefore, the Complainant failed to provide a preponderance of evidence that her termination was due to the Respondent's intentional discrimination.

V. CHRO COMPLAINT NO. 1710448

The Complainant alleged that the Respondent retaliated against her by terminating her employment for filing a complaint with the Commission on Human Rights and Opportunities. Pursuant to Connecticut General Statutes § 46a-60(b)(4), it is unlawful for any person to "discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint." A factor in determining retaliation is whether any discriminatory incidents occurred after the complaint with the Commission was filed. *Mallison v. Connecticut Office of Early Childhood & Commissioner Beth Bye,* 2023 WL 2139510 *7. "The significance of any given act of retaliation will often depend on particular circumstances." *Thompson v. North American Stainless LP,* 562 U.S. 170, 175, 131 S. Ct. 863 (2011). "Courts approach [claims of retaliation in violation of the CFEPA] in generally the same manner as they do retaliation claims brought under federal antidiscrimination laws." *Perez v. State Judicial Department,* 2018 WL 793980 *21.

> To establish a prima facie case of retaliation, an employee must show (1) that she participated in a protected activity; (2) that the defendant knew of the protected activity; (3) that the defendant caused an adverse employment action to be taken against the employee; and (4) that there is a causal connection between the protected activity and the adverse employment action."*Ayantola v. Board of Trustees of Technical Colleges,* 116 Conn. App. 531, 536 (2009).

The facts of this case have established that the Complainant was involved in protected activity. However, the facts do not fully indicate that the Respondent knew of the protected activity.

> The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination. The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges." (Citations omitted; internal quotation marks omitted.) *Soyka-Knopf v. Bach Investments Plus, LLC,* 2018 WL 4655958 *4.

The Complainant testified that the Respondent knew about the protected activity. The Respondent indicated that the Board was unaware of the protected activity. Therefore, this element of a prima facie case of retaliation will need to be further examined.

As the third element of a prima facie retaliation case, the Complainant must experience an adverse employment action. The Complainant experienced an adverse employment action because her employment as a school nurse was terminated. However, the evidence in this case indicates that the Complainant was terminated because she could no longer perform the essential functions of her job due to her physical limitations. A letter dated March 16, 2017, from the Assistant Corporation Counsel, Lori Mizerak, addressed the Respondent's inability to provide the additional accommodations as requested by the Complainant, along with the Board's concern that the Complainant could not perform her duties as a school nurse. The last paragraph of the letter stated the following:

> In light of the above, HPS is left to conclude that there are no reasonable accommodations that would enable you to perform the duties of your position as School Nurse. HPS can, however, explore whether there are other available employment opportunities for which you are qualified and may be interested. Please contact Ms. Banks by March 24, 2017 if you would like to engage in this discussion. (Exhibit 24).

Therefore, the letter of March 16, 2017, already addressed the Board's concerns and indicated that the Complainant would not be able to continue in her school nursing position. This letter was sent almost two weeks before the Complainant filed the Commission complaint. Thereafter, a letter was sent offering the option of scheduling a meeting to explore alternative positions.

A letter was issued on March 29, 2017, terminating the Complainant's employment. The letter specifically stated:

> In light of the above, and for all of the reasons stated in the March 16, 2017 letter, your restrictions render you unable to perform the essential duties of your position as a School Nurse, there are no

reasonable accommodations that would enable you to perform them, and your employment in that position cannot continue. (Exhibit 26).

The letter terminating the Complainant's position was due to the informed belief that the Complainant could not perform her duties as a school nurse, as well as the Board's inability to accommodate. However, the termination letter was issued after the Complainant informed the Board that she was uninterested in other positions. The letter expressed that the Complainant was unable to work as a school nurse based on her additional accommodation requests that were infeasible and unduly burdensome to the Respondent. Based on the most current medical information that was provided to the Board, the Complainant was incapable of performing the essential duties of a school nurse. (9/29/22; Tr. 165). Banks testified that the reason for her separation "was a medical separation due to the fact that she was not able to complete the essential functions of a school nurse." (9/29/22; Tr. 165). Therefore, the Complainant's termination was not an adverse employment action due to retaliation, but due to medical separation.

The fourth element of a prima facie claim of retaliation is the causal link between protected activity and an adverse employment action. The Complainant testified that she met with Natasha Banks on March 28, 2017, and informed Ms. Banks that she had filed a complaint with the Commission. "And during that conversation—the last thing she said to me was, at this point, 'Then our conversation is over.'" (7/12/22; Tr. 66). The Complainant also stated, "And then the Monday after I got the letter saying I was terminated." (7/12/22; Tr. 66; Exhibit 26). On direct examination, Natasha Banks testified that the Complainant never mentioned the Commission complaint during the meeting or prior to receiving the Commission complaint. (12/1/22, Tr. 67). Therefore, it is the Complainant's testimony against the Respondent's testimony concerning whether the Respondent was aware of Complainant engaging in protected activity. Because the Complainant's and the Respondent's testimony contradicts, other evidence, as well as the weight of the

evidence must be considered. "[R]elevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without evidence. " (Internal quotations omitted). *Kovachich v. Department of Mental Health and Addiction Services,* 344 Conn. 777, 813, 281 A. 3d 1144, 1167 (2022).

While the testimony concerning the causal link between protected activity and an adverse employment action may contradict, the written dates on the complaint and the notice of service to the Respondent are more relevant and persuasive. The initial complaint (No. 1710435) was filed with the Commission on March 28, 2017, but was not served (via facsimile) to the Respondent until April 17, 2017. (Exhibit R-2).[11] Therefore, the date indicated that the Respondent was not served the complaint until after the Complainant was terminated. The burden is that of production instead of persuasion; it does not involve a credibility assessment. *St. Mary's Honor Center, et al. v. Hicks,* 509 U.S. 502, 509, 113 S. Ct. 2742 (1993). The Respondent produced written evidence indicating that the Hartford Board of Education was unaware of the Complainant's filing. Thus, the Complainant presented did not present persuasive evidence that the Respondent was aware of the Complainant's protected activity or that there is a causal link between the Complainant's protected activity and the adverse employment action. As the court found in *Mallison,* it must be determined if there were any discriminatory instances after the filing of the complaint. *Mallison v. Connecticut Office of Early Childhood & Commissioner Beth Bye,* 2023 WL 2139510 *7.

The Complainant failed to prove that the Respondent was aware that she filed a Commission complaint prior to being terminated. If the Complainant were terminated without cause, or for no defensible reason, then the termination letter may indicate retaliation. Given that this matter was a medical separation

[11] This exhibit is being referenced from the Respondent's exhibits.

due to the inability of the Board to accommodate the Complainant, and the evidence signaling that the Complainant could no longer perform her duties as a school nurse, the retaliation claim does not prevail. Commission complaint No. 1710448 is hereby dismissed.

CONCLUSION

In order for the Respondent to grant an accommodation, there must be clarity as to what the accommodation is. As illustrated in Figure 1, the series of letters from the Complainant's physician did not grant clarity, due to continual vacillation in the requests made, and reversions to previous requests. Nevertheless, the Respondent has a duty to engage in bilateral discussions to ascertain the specific accommodation requests by the Complainant. The Respondent satisfied such duty. Although there was some confusion as to what the actual requests were, the Respondent devised an accommodation based on the most recent correspondence from the Complainant's physician.

Thereafter, the Complainant made additional accommodation requests beyond the most recent correspondence from her physician, for which the Respondent satisfied its burden of proving that such requests were an undue hardship under the law. Moreover, the Complainant's additional and multiple requests negated the Complainant's claim of a prima facie case of discrimination by weakening the argument and evidence that she could perform her job with or without reasonable accommodation. *Lyons v. Legal Aid Society,* 68 F. 3d 1512, 1515 (2d Cir. 1995).

In concert with the precedent in *Humphrey v. Memorial Hospitals Association,* the Respondent considered whether there were any alternative reasonable accommodations that would not impose an undue hardship. *Humphrey v. Memorial Hospitals Association,* 239 F. 3d 1128, 1138 (9th Cir. 2001). In accordance, the Respondent informed the Complainant of alternative positions that would meet her

physical limitations. The Complainant did not agree to the positions. As a result, the Respondent instituted a medical separation of the Complainant's employment because the additional accommodation requests were unduly burdensome to the Respondent, and it was evident that the Complainant could no longer perform her duties as a school nurse.

Additionally, the Complainant failed to prove the requisite elements of the prima facie retaliation claim in Commission complaint No. 1710448.

ORDER

For the foregoing reasons, the complaint for 1710435 is hereby DISMISSED.

For the foregoing reasons, the complaint for 1710448 is hereby DISMISSED.

It is so ordered this 15th day of June 2023.

/s/ Cherron Payne
Honorable Cherron Payne
Presiding Human Rights Referee

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