COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION AND SEAN EVERS, COMPLAINANTS v. NEXT STEP FRANCHISING, INC. D/B/A LAPELS DRY CLEANING, NEXT STEP FRANCHISING, LLC, CLEAN FRANCHISE BRANDS, INC., CLEAN FRANCHISE BRANDS, LLC, AND KEVIN DUBOIS RESPONDENTS	DOCKET NO.18BEM02826

Appearances:

Sam Kennedy Smith, Esq., counsel for Sean Evers

Timothy Kenneally, Esq. and Martine Wayne, Esq., counsel for Next Step Franchising, Inc. d/b/a Lapels Dry Cleaning and Kevin Dubois

Jeffrey Dretler, Esq., counsel for Next Step Franchising, LLC, Clean Franchise Brands, Inc. and Clean Franchise Brands, LLC

DECISION OF THE HEARING OFFICER

On October 1, 2018, Sean Evers filed a complaint with the Massachusetts Commission Against Discrimination against Lapels Dry Cleaning, Next Step Franchising and Kevin Dubois alleging disability-based discrimination. The case was certified to public hearing, and the Certification Order dated October 3, 2023, named five respondents: (1) Next Step Franchising, Inc. d/b/a Lapels Dry Cleaning ("NSF"); (2) Next Step Franchising, LLC; (3) Clean Franchise Brands, Inc.; (4) Clean Franchise Brands, LLC; and (5) Kevin Dubois. The Certification Order identified five issues certified to public hearing.

1. Whether any Respondent discriminated against Evers on the basis of his disability in the refusal to provide reasonable accommodation in violation of M.G.L. c. 151B, § 4(16).[1]
2. Whether any Respondent discriminated against Evers on the basis of disability in the terms and conditions of his employment, other than the failure to provide reasonable accommodation, in violation of M.G. L. c. 151B, § 4(16).
3. Whether any Respondent retaliated against Evers on the basis of his protected activity in violation of M.G.L. c. 151B, § 4(4) when his employment was terminated.
4. Whether any Respondent coerced, intimidated, threatened, or interfered with Evers in the exercise or enjoyment of his rights to engage in protected activity and to enjoy a workplace free of disability discrimination, in violation of M.G.L. c. 151B, § 4(4A).
5. If it is determined that Evers was subjected to discrimination and/or retaliation, to what extent did Evers suffer damages as a result of that discrimination and/or retaliation?

On September 9-11, 2024, I conducted a public hearing. Eight persons testified: (1) Sean Evers, (2) Kevin Dubois, (3) Danielle Evers, (4) Jessica Chaudhary, M.D. (testifying remotely), (5) Michael Eisner, (6) David Grippi, (7) Neeta Baley and (8) Robin Shannon.[2] There were 34 exhibits admitted into evidence. The stenographic transcription is the official recording of the hearing. All parties filed a post-hearing brief. In this decision, *unless stated otherwise*, where testimony is cited, I find it credible and reliable, and where an exhibit is cited, I find it reliable to the extent cited.

[1] Chapter 151B uses the term "handicap" which has fallen into disfavor. Where possible, the terms "disabled", and "disability" will be used in place of "handicapped" and "handicap" in this decision.

[2] Neither Ms. Baley nor Ms. Shannon was available to testify at the hearing. Both were deposed in this case. The parties agreed the following procedure would be utilized for their hearing testimony. Attorney Wayne respectively "acted" as Ms. Baley and Ms. Shannon. Counsel asked questions to the "witness" that had been asked at the witness' deposition. Attorney Wayne stated the answer stated at the deposition. Counsel could object to the questions and move to strike the answers, and when they did, I ruled on those issues.

I. FINDINGS OF FACT

A. INTRODUCTION

1. Sean Evers ("Evers") graduated from Weymouth Vocational Technical High School in 2006. From 2006 to 2010, he was a foreman for Groom Construction. From 2010-2016, Evers operated his own business, S.P. Evers Construction. In 2016-2017, he was employed as project manager for ATL Construction which performed civil construction and worked on commercial projects. (Evers I at 55-58; Exhibit 1).
2. In January 2018, Evers was seeking a position with NSF (which he obtained as detailed below). NSF was a franchisor for the Lapels dry-cleaning brand. NSF entered into agreements with individuals (franchisees) who paid NSF for supporting their operations and marketing of a dry-cleaning business using the Lapels brand. (Dubois I at 295; Dubois II at 7, 9-12, 20-22; Evers I at 61, 63).
3. NSF also aided franchisees with the real estate and construction phases of their projects. Immediately before Evers became employed by NSF, Michael Eisner ("Eisner") was the person at NSF responsible for assisting franchisees with real estate matters which included finding a location for the franchisee to build a dry-cleaning business, negotiating letters of intent and reviewing proposed leases. The letter of intent included the terms that were agreed upon by the franchisee and the owner of the land that the franchisee wanted to build upon. The lease was the subsequent agreement between the franchisee and the owner by which the franchisee took possession of the land. The lease included the agreed upon terms that had been reached in the letter of intent. The construction phase of a project commenced upon the signing of the lease and concluded upon the opening of the site as a dry-cleaning business. Immediately before Evers joined NSF, David Grippi ("Grippi") was the person at NSF responsible for assisting franchisees with the construction phase which included aiding franchisees with the submission of design

plans, obtaining permits, issuing bids for general contractors and overseeing the construction work. (Eisner III at 98; Dubois II at 15-16, 23-26; Grippi III at 152, 157, 159).[3]

4. In January 2018, Evers had two interviews with NSF. The first was with Kevin Dubois ("Dubois"), NSF's President and "CEO"; the second was with Dubois, Eisner and Grippi. In January 2018, NSF offered Evers the position of Director of Construction and Real Estate, despite Evers not having experience in real estate. Dubois hired Evers because Dubois believed that: Evers' background as a business owner would aid him in working with franchisees starting their own business; Evers had experience in construction management; and Evers had "good people skills." Dubois knew that Evers lacked real estate experience but believed that the real estate part of Evers' position at NSF was easier to learn than the construction part. Evers started working for NSF in February 2018 and reported to Dubois. (Dubois II at 28-31, 36-37; Evers I at 60-63; Eisner III at 97; Exhibit 3; Exhibits 22 (referencing Dubois's title at NSF); Exhibit 28).

5. After joining NSF, Evers received training from Eisner and Grippi. Eisner trained Evers in real estate matters. The training included searching for locations for a dry-cleaning store, building relationships with realtors, working on letters of intent and reviewing leases. Evers "sat in" on Eisner's telephone calls with realtors and franchisees, and "shadowed" Eisner on projects. (Evers I at 64-65, 82, 164-166; Dubois II at 38; Eisner III at 100-101, 134, 138). Grippi trained Evers in construction matters. Evers joined Grippi for telephone calls with general contractors, franchisees, architects and the equipment installer. (Evers I at 165-166; Grippi III at 164-165).

6. During Evers' employment, NSF had seven employees. Its office was located on the second floor of a building in Hanover, Massachusetts ("Office") that did not have an elevator, thus requiring employees to use stairs to access it. Between February 2018 and July 12, 2018, Evers regularly

[3] At all material times, Eisner was the person at NSF responsible for finding new franchisees, (Dubois II at 14; Evers I at 63), and Grippi was the person at NSF responsible for assisting franchisees with their operations. (Grippi III at 152-154, 169).

worked in the Office with Grippi, Eisner, Dubois and the other NSF employees. (Dubois I at 296; Dubois II at 31; Evers I at 109, 163; Grippi III at 165-166, 198).

B. EVERS' HOSPITALIZATION AND COMMUNICATION OF MEDICAL CONDITION

7. On July 12, 2018, Evers was working at the Office and felt dizzy, slurring his words and had a headache. His wife picked him up from the Office and brought him to a hospital where he was admitted. The next day Evers underwent a spinal tap procedure which resulted in spinal fluid leaking out. On July 14, 2018, he had emergency back surgery. He was discharged from the hospital on July 22, 2018. During his hospitalization, Evers performed work for NSF utilizing his laptop. (Evers I at 83-86, 88; Exhibit 31).
8. Based on the following, I find that Evers provided Dubois with the status of Evers' medical condition during and after his hospitalization.
    a. On July 12, 2018, Evers texted Dubois, "I will not be able to be in work tomorrow. The hospital admitted me…." On July 13, 2018, Evers texted Dubois, "just wanted to give you an FYI. I'm still at [the hospital] and it seems th[eir] keeping me till Saturday…." On July 14, 2018, Evers texted Dubois, "give me a call tomorrow if you can. Just so I can let you know what's going on, I'm still in the hospital." (Exhibit 29).
    b. On July 15, 2018, Evers emailed Dubois, "I have been trying to reach out to you to give you an update on what's going on. They ended up doing a spinal tap on me … and it did not go well and since then I had to have emergency surgery on my back because I could not feel my left leg nor could I move it. I had back surgery last night…. I am still on bed rest but I can move my leg a little bit. I am still in the hospital and will be here for probably another 3-4 days. With that said I will not be in the office this week but I will answer emails and phone calls and do what I can on my end to keep the communication going with everyone. I will keep you updated if anything changes…." (Exhibit 9) (the "July 15 Email").

c. On July 19, 2018, Evers texted Dubois, "thank you for returning my call sorry I missed you. Give me a call whenever your free so I can give you an update…." (Exhibit 29). On July 23, 2018, Evers texted Dubois, "Please call me when your free." (Exhibit 29). On July 23, 2018, Evers notified Dubois that he had been discharged from the hospital. (Evers I at 212).

d. On July 24, 2018, Dubois emailed Evers, "wanted to see what your status was. I'd like to get us together in person [at] some point this week if possible." (Exhibit 14).

e. On July 24, 2018, Evers replied by email to Dubois, "[t]omorrow I am unavailable because I have Physical Therapy and Occupational Therapy … and Thursday is also another busy day with the visiting nurse…. I can get together Friday [July 27] mid morning or early afternoon and we can meet somewhere. It is really difficult for me to walk and to do stairs. I also can not drive yet but I can have [my wife] bring me somewhere to meet with you…." (Exhibit 14) (the "July 24 Email").[4]

f. On July 30, 2018, Dubois emailed Evers, "just checking in on you and your health. Any word on when you think you would be able to return? Can I have you pass along the attached to your physician so that we can get doctor documentation into the file…." (Exhibit 15).

g. On July 30, 2018, Evers replied by email to Dubois, "I am not sure when I will be able to come back to the office because the office is not handicap accessible. I am unable to walk on my own or walk up many stairs at a time and I still can not drive, which makes it impossible to get into the office as of now…. I am fully capable of working from home like I have been doing until I am cleared to go back to the office. I am hoping it won't be too much longer but unfortunately I can not give you an exact time frame. My

[4] The in-person meeting that Dubois was seeking to schedule with Evers never occurred. (Evers I at 111).

neurosurgeon is on vacation this week but I can provide you with a Doctors note as soon as possible." (Exhibit 15) (the "July 30 Email").[5]

9. Dubois believed that Evers' job could be done remotely and that Evers had been working remotely since July 13, 2018. Evers working remotely "wasn't an issue" for Dubois. Dubois never demanded that Evers return to work at the Office. Dubois did not consider Evers' communications in July 2018 as a request(s) to work remotely (Dubois II at 137, 182).[6] Dubois and Evers did not discuss working remotely, (Evers I at 108-109), which I infer was the result of Dubois not thinking that Evers was asking to work remotely.

10. As of August 1, 2018, Evers needed assistance with walking and using the bathroom and continued to have severe pain in his back and legs. As of April 2019, Evers was "mobile", "had some problems here and there" but was "able to drive myself and walk." (Evers I at 125-126, 128, 263).

C. EVERS' WORK PERFORMANCE

Team meetings

11. During Evers' employment with NSF, there was a weekly team meeting during which Eisner discussed new franchisees and real estate, Grippi discussed operations, another employee

[5] In assessing Dubois' credibility, I have considered the inconsistencies between (1) Dubois' deposition testimony and a position statement that he affirmed, and (2) his testimony at the hearing, regarding Evers' communications to Dubois in July 2018 regarding Evers' health. At the hearing, Dubois agreed that when Evers was in the hospital, he told Dubois that he had back surgery and could not walk. Dubois acknowledged that he may have answered differently to that question at his deposition. Next, at his deposition, Dubois answered "no" when asked, "[Evers] never told you verbally or in writing that he couldn't walk, he couldn't use stairs, that he had had an issue with his back. You had no knowledge of that," but at hearing, Dubois admitted that the July 15 Email communicated in detail such information. (Dubois II at 172, 175, 177, 179-181). A portion of a position statement affirmed by Dubois read, NSF "admits that Mr. Dubois e-mailed complainant on July 30th" but "does not have a record of complainant responding." At the hearing, Dubois admitted that the July 30 Email was Evers' response. (Dubois II at 195).

Another portion of the position statement read, "Complainant never provided the company with specific information either verbally or in writing about complainant's medical condition, likelihood of recovery or timeline for recovery." (Dubois II at 173-175). Based on the findings in paragraph 8, this answer was inaccurate.

[6] When asked, "[d]id you view the communications [from Evers] indicating he had to work from home or work from his hospital as him requesting the ability to work remotely?", Dubois credibly answered, "I didn't. It just seemed like he was doing it, and that wasn't an issue. That wasn't the issue with Sean." (Dubois II at 182).

discussed marketing, and Evers discussed real estate and construction. (Dubois II at 33-35; Grippi III at 171-173; Evers I at 77; Eisner III at 106-107). Regarding Evers' presentations during the team meetings, questions about time frames and project schedules "seemed to keep coming up every week." During more than one team meeting, Dubois discussed with Evers the need to adhere to the schedule of projects. (Grippi III at 173-175). I credit Eisner's testimony, that at team meeting(s), Dubois was critical of Evers' work performance even though Eisner was unable to provide at how many team meetings this critique took place, their dates or what Dubois said on the matter. (Eisner III at 108-110, 128-129). I do not credit Evers' testimony that Dubois never criticized his performance at a team meeting. (Evers I at 171).

Equipment installation

12. R&R Steam ("R&R") was the company that installed dry-cleaning equipment at the project sites for NSF. For the project in Germantown, Tennessee, Evers was the person at NSF responsible for ensuring that the utilities were installed at the site before R&R arrived to install the equipment. Evers instructed R&R to proceed with the installation of equipment at the Germantown site, but when R&R arrived at the site in April 2018, the site was not ready because no gas was available. R&R had to make a return trip to the site to complete the equipment installation and charged NSF for the additional costs. (Grippi III at 161-162, 176-178, 180, 221; Dubois II at 47, 51; Evers I at 172, 177; Exhibit 34). Grippi discussed the incident with Evers and emphasized the importance of ensuring that a site was ready for equipment installation to take place on its scheduled day. (Grippi III at 180-181). Dubois discussed the incident with Evers. I do not credit Evers' testimony that Dubois did not criticize his performance as to that incident, (Dubois II at 48-49; Evers I at 179), or his testimony that Grippi never questioned Evers' performance before his hospitalization. (Evers I at 171-172).
13. Franchisee Shashi Modha's ("Modha") project included a site in Little Elm, Texas. (Eisner III at 112-113). After Evers said that the Little Elm site was ready for equipment installation, R&R

arrived at that site in late June 2018 to install the equipment, but that site was not ready for equipment installation because gas was not available. R&R made a return trip to that site to complete the equipment installation and charged NSF for the additional costs. Dubois discussed that incident with Evers. Given Dubois' mindset at the time - it "didn't seem conceivable [] that we were finding over and over that what we were being told wasn't accurate" - I infer that Dubois critiqued Evers' performance regarding the Little Elm installation issue. I do not credit Evers' testimony that Dubois did not criticize his performance as to that incident. (Grippi III at 182-183, 211-212; Dubois II at 53-55, 203; Evers I at 178, 194-196; Exhibit 34).

14. The Germantown incident in April 2018 caused Dubois to question whether Evers was telling him the truth. By the time of the Little Elm installation incident in June 2018, it appeared to Dubois that Evers was repeatedly telling NSF things that were not accurate. (Dubois II at 43, 53-54, 138-139, 211). Based on paragraphs 12-13, I do not credit Evers' testimony that Dubois never criticized Evers' performance before his hospitalization or that Evers did not receive negative feedback regarding his performance prior to his hospitalization. (Evers I at 81-82, 170).

Little Elm Wall

15. A fire marshal determined that another coat of blueboard (which I infer was a fire retardant) was needed on a wall on the building at the Little Elm site which would cost approximately $10,000. (Grippi III at 184-185). Dubois asked Evers to ask the landlord to pay the cost out of the tenant improvement allowance for construction ("allowance"). (Evers I at 231; Dubois II at 57, 60).[7]

16. On July 26, 2018, Dubois emailed Evers regarding, among other things, "the extra wall that we needed to build" at the Little Elm site. In his reply email, Evers wrote that Eisner "was taking care of [the wall issue] months ago" and "[e]very time I ask [Eisner] he said he was handling it." (Exhibit 21). I do not credit these statements by Evers in his email as they conflict with Eisner's

[7] An allowance is money that a landlord contributes towards the cost of construction of a site into a Lapels dry-cleaning business. The allowance reduces the construction costs for franchisees and is negotiated as part of the letter of intent and is included in the lease. To accurately project the cost of construction for a franchisee, it is necessary to know if there is an allowance. (Evers I at 182-183, 185, 205, 235; Dubois II at 18; Grippi III at 195).

credible testimony that such statements were false, and that as of that time, Eisner had never had a discussion with Evers regarding the wall and had no role regarding it. (Eisner III at 114-115).

17. Evers testified that Eisner was involved with the wall issue "because he started the project before I came on" and further testified that the project was "put in my lap mid-construction", and the wall issue "dropped in my lap." (Evers I at 80-81, 234, 237-239). I credit Evers' testimony that construction had started on the Little Elm site before he worked at NSF, but I do not credit his testimony regarding Eisner's involvement with the wall issue as that conflicts with Eisner's credible testimony described in paragraph 16. Further, I find Evers' characterizations - "put in my lap" and "dropped in my lap" - as reflecting an unwillingness to accept responsibility.

18. It seemed to Dubois that Evers was blaming Eisner in his email for the wall issue even though it was Evers' responsibility. Dubois then asked Eisner to resolve the issue. Eisner called the broker and then the landlord who promptly agreed to reimburse the franchisee for the cost of the additional work on the wall. (Eisner III at 117-118; Dubois II at 64-66).

19. On July 27, 2018, Dubois emailed[8] Evers, writing that Eisner "had spoken to the real estate rep who told him we needed to talk to the Landlord. [Modha] claims that you have been telling him you're leaving messages [with the landlord] and not getting a call back. Landlord claims no one has called on this and agreed this morning to reimburse the 10K for the wall.[9] [Modha] is really upset about the communication with him and frustrated because he feels like no action was ever taken on this until today and then once it was [by Eisner,] got remedied pretty quickly and easily." (Exhibit 21). Evers emailed Dubois and Grippi, "I understand but [Grippi] and I had many calls in with the [landlord] about the wall and he kept telling us … there nothing they could do…." Grippi then emailed, "[j]ust want to get this right as you [Evers] have my name all over this email. I only spoke to the [general contractor and Modha] about the wall and suggested to [Modha] to have his

[8] All emails referenced in this paragraph were sent on July 27, 2018. (Exhibit 21).

[9] I do not credit Evers' testimony that he was "calling everyone" to resolve the wall issue. (Evers I at 233, 239).

lawyer call the landlord…." (Exhibit 21). Grippi credibly testified that he did not speak to the landlord about the wall. (Grippi III at 188-91). I do not credit Evers' statement in his email that he and Grippi had "many calls in" with the landlord in light of Grippi's email and credible testimony to the contrary. (Exhibit 21). To Dubois, it felt that after blaming Eisner, Evers was now blaming Grippi for the wall issue. (Dubois II at 66-67).

Letter of Intent for Skye Canyon[10]

20. Mena Boktor ("Boktor") signed an agreement with NSF involving two sites near Las Vegas - Skye Canyon and Durango Post. This was the only project at NSF that Evers was involved in from its beginning. Eisner and Evers worked on the letters of intent for these sites. (Eisner III at 103-104, 119, 140; Evers I at 182, 222; Dubois II at 106-08).

21. On July 27, 2018, Dubois emailed Evers that Boktor was seeking a copy of the letter of intent for Skye Canyon. (Exhibit 23). Instead of sending the full letter of intent, Evers sent the signed signature page only. Dubois emailed Evers that the signature page by itself was "useless info to anyone. You can't have a signature only page on a [letter of intent] that has been going back and forth…." (Exhibit 25).

Loss of Boktor project

22. Neeta Baley ("Baley") assisted franchisees like Boktor in obtaining lending from a bank. (Dubois II at 117-118; Evers I at 79). On July 31, 2018, Baley asked Dubois about the timing of the opening of the Skye Canyon and Durango Post sites.[11] Dubois then asked Evers regarding the status of Boktor's review of the leases for those sites. Evers replied that he had talked to Boktor that day and was helping Boktor with questions that Boktor and Bayley had. Dubois inquired as to the questions, noted Boktor was "hanging on every word right now" and expressed to Evers

[10] It is not clear from the record whether it is "Sky Canyon" or "Skye Canyon." That distinction is immaterial.

[11] All correspondence referenced in this paragraph was by email sent on July 31, 2018. (Exhibit 26).

that Dubois and Eisner would be the "front person" communicating with Boktor, Baley and Boktor's attorney because Dubois was concerned that "we [could] lose [Boktor] during this process." Evers replied that Boktor had asked for a "ball park figure" for construction costs and that Evers had provided a "range between $85-100 a sq ft for each location." Evers asked Dubois how his communicating with Boktor was a "risk." Dubois replied that Evers should copy Eisner on the emails and emphasized that he wanted to be "100% certain" that Boktor understood the components of the estimate including landlord contributions. Evers again asked how his involvement was a "risk." Dubois answered that he did not believe that the estimate that Evers provided to Boktor would work and could "potentially scare [Boktor] off" and reiterated that Eisner and Dubois would be in charge to avoid "something quick that costs us a significant sale here." (Exhibit 26).

23. Dubois was concerned that the cost projections that Evers had provided to Boktor would "scare him." (Dubois II at 130). The square foot cost projections that Evers provided to Boktor were higher than franchisees typically paid. (Grippi III at 192-194). Evers disclosed the cost projections to Boktor without first discussing them with Dubois or Grippi. (Evers I at 202-204; Dubois II at 129).

24. On August 1, 2018, Baley emailed Dubois that Boktor was not proceeding with the project because of the "start up cost" which Boktor had described to her as a "buildout cost per sq ft of $95" for each location. Baley emailed Dubois that she thought that Boktor was receiving $45 per square foot on one site and $40 per square foot on the other site for landlord reimbursement. (Exhibit 27). To Dubois, it appeared the $95 number was "biting us here … and caused angst and panic" for Boktor. Dubois understood Baley's reference to $45 and $40 per square foot to reflect the respective allowance that Boktor was receiving from the landlord, but that the allowance was not included in the cost projections that Evers had provided to Boktor. (Dubois II at 133-134).

25. Failing to include the allowance inflated the projected cost of construction for the Boktor project. (Grippi III at 196). Evers admitted that he did not include the allowance in the cost projections

that he had provided to Boktor. I do not credit Evers' testimony that he did not provide the allowance because the allowance had not been established. (Evers I at 204-205).

26. On August 1, 2018, Dubois forwarded Baley's email to Evers writing, "See below[,] I feel like you were not hearing what I was trying to tell you and maybe this puts it in better perspective. We could have gotten this build out done on budget as we have done here for years[,] but instead may have completely lost the sale because of [Boktor] getting this info and not getting the full information on it." (Exhibit 27). The missing information was the allowance. (Dubois II at 134-135).

27. Boktor did not sign the lease for Durango Post or Skye Canyon. (Dubois II at 135-136; Eisner III at 137). Boktor's withdrawal from the project caused NSF to be deprived of payment from Boktor for an equipment package in addition to not receiving ten years of royalty and ten years of fees for marketing. (Dubois II at 136-137).

Franchisees complaints

28. Before July 12, 2018, Dubois verbally told Evers that some franchisees thought he "was non-communicative" and had conveyed that he was not responding to emails or returning telephone calls. (Dubois II at 52).

29. On July 31, 2018, Dubois emailed Evers, "[o]ur Franchise Owners are not happy[.] Sean, Chris, Lan, [Modha], Niral are all voicing concerns about the communication and lack of follow up on real estate and construction. I need to get a handle on when you are able to be back in the office so we can look at how to better this process with [franchisees] before I put you as the first line with them." (Exhibit 18).

Critique of Evers' performance by Eisner and Grippi

30. During Evers' employment with NSF, Eisner continued to be involved with the real estate process because he was not confident that Evers understood the real estate process and did not believe that Evers was reaching out to realtors and identifying properties for Lapel dry-cleaning sites. (Eisner III at 105-106, 133-134). Throughout Evers' employment, Eisner believed that Evers

needed continued training and supervision on real estate issues. (Eisner III at 146-147). Eisner never criticized Evers' performance to his face but did criticize Evers' performance to Dubois when Dubois asked him about that before July 2018. (Eisner III at 111-112).

31. Grippi believed that Evers had communication and performance issues related to construction. The communication issue regarded "follow-up, miscommunication, things of that nature." I credit that testimony even though Grippi did not reference the equipment installation issues at Germantown or Little Elm at his deposition. (Grippi III at 206, 209-215).

Reason for Dubois not documenting Evers' performance issues

32. There is no written warning or discipline in Evers' personnel file at NSF. (Exhibit 28). Dubois did not document Evers' performance issues. I credit Dubois' explanation for the lack of documentation. "[W]e were a very small group that was talking in real time all day. To me, it would have felt very awkward to have a written reprimand to somebody that had been with you for four weeks and, you know, walk eight feet across the hall and hand that to that person. I[t] felt to me like the better management style was to talk to him directly about it and see if it was something that you could work through." (Dubois II at 54). For that reason, although I credit Evers' testimony that he did not receive any "write-ups or written counsel from" NSF before July 12, 2018, (Evers I at 81), I do not infer from the lack of documentation that his job performance prior to his hospitalization was satisfactory.

33. There were more NSF emails about Evers after he went into the hospital than before his hospitalization because before, Dubois, Eisner, Grippi and Evers frequently communicated in person rather than through email. (Dubois II at 209; Grippi III at 175).

D. DUBOIS FIRES EVERS

34. Based on the findings in paragraphs 12-13 and my credibility assessment of Dubois, I credit Dubois' testimony that "somewhere at the end of June" 2018, he was "100 percent certain" that Evers was not the right person for the job and had decided that he was going to fire Evers.

(Dubois II at 138-139, 211). The following actions by Dubois in July 2018 initially may appear inconsistent with his decision at the end of June 2018 to fire Evers: Dubois solicited input on July 20 from Grippi regarding Evers' performance;[12] NSF did not issue a job posting for Evers' replacement until July 27; (Dubois II at 186-187; Exhibit 2); Dubois did not restrict Evers from communicating with franchisees until July 31; and Dubois asked Evers in late July 2018 regarding the timing of his return to work at the Office and for medical documentation. However, these actions in July 2018 are not inconsistent with Dubois' decision at the end of June 2018 to fire Evers but merely are the result of circumstances that caused Dubois to delay implementation of that decision for weeks. Dubois intended to fire Evers by July 13, 2018, but did not because of Evers' hospitalization on July 12, 2018. Dubois "didn't want to [fire Evers] over the phone or in an e-mail…. You know, I felt like [Evers] was a good guy that, you know, wasn't the right fit for us, but, you know, didn't want to have ill will with him and wanted to have a conversation direct face-to-face with him." (Dubois II at 138-139). Dubois intended to fire Evers at the in-person meeting that Dubois sought to schedule in his email of July 24, 2018, (Dubois II at 183), but that meeting did not take place. Dubois fired Evers during a telephone call on August 1, 2018, (Evers I at 123-124), because franchisee feedback of his performance was becoming "worse" and the Boktor matter became "untenable. Like, we can't have this guy in this seat for another minute. And even if I can't get in front of him face-to-face, I've got to let him go right now." (Dubois II at 140).

[12] On July 20, 2018, Dubois asked Grippi whether Evers was a "good fit" for his position. Grippi told Dubois that he did not believe that Evers was able to handle the construction aspect of his job based on his past performance. At no point before that conversation did Grippi believe that Dubois was going to fire Evers. When asked if had knowledge at the time of that conversation that Dubois had decided to fire Evers, Grippi answered, "not that I was aware of." Grippi testified inconsistently regarding whether after the conversation he formed a belief that Dubois intended to fire Evers. (Grippi III at 197-198, 200, 203, 205). I do not place any weight on Grippi's thoughts regarding what Dubois might have been thinking at a particular time.

35. Dubois fired Evers because he believed Evers "wasn't picking up the real estate part of the job", "mischaracterized his skill set on construction, and he was giving us bad information." (Dubois II at 168).

II. LEGAL ANALYSIS

A. FAILURE TO PROVIDE A REASONABLE ACCOMMODATION CLAIM

It is an unlawful practice for an employer to "dismiss from employment … or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made … would impose an undue hardship to the employer's business. M.G.L. c. 151B, § 4(16). To establish liability on his failure to provide a reasonable accommodation claim, Evers must prove that: (1) he was a qualified disabled person; (2) he requested an accommodation;[13] and (3) NSF refused to provide it. Alba v. Raytheon Co., 441 Mass. 836, 843, n. 9 (2004).[14]

1. Evers was a qualified disabled person

A disabled person includes a person who has a physical or mental impairment that substantially limits one or more major life activities. M.G.L. c. 151B, § 1(17). Whether an impairment substantially limits a major life activity does not demand extensive analysis. Massasoit Industrial Corp. v. Massachusetts Comm'n Against Discrimination, 91 Mass. App. Ct. 208, 213, n. 6 (2017). The spinal tap and emergency surgery left Evers with significant mobility issues which required physical and occupational therapy.

---

[13] There "may be situations in which a request by the employee is unnecessary. These result from circumstances such as a condition that makes it obvious that accommodation is required, or a condition that renders the employee incapable of making a request." Leach v. Comm'r of Massachusetts Rehab. Comm'n, 63 Mass. App. Ct. 563, 567 (2005).

[14] In describing the proof for a failure to accommodate claim, the Court in Alba also referenced the harm resulting from the denial of the request. Alba, 441 Mass. at 843, n. 9. Harm is part of the remedy aspect of the claim, as opposed to an element establishing liability. As reflected above, the statutory basis for the claim, M.G.L. c. 151B, § 4(16) does not reference harm. This is not surprising because Section 4(16) is part of c. 151B, § 4 which describes various unlawful practices but does not address the remedy for such.

Evers needed assistance with using the bathroom and walking. Caring for oneself and walking are each recognized as a major life activity. M.G.L. c. 151B, § 1(20). Evers had a physical impairment that substantially limited his ability to walk and care for himself; he thus was disabled.[15] Evers was a qualified disabled person because he was a person with a disability capable of performing the essential functions of his job with or without a reasonable accommodation. M.G.L. c. 151B, § 1(16).

2. Evers made two requests for a reasonable accommodation

A reasonable accommodation is "any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a [disabled] individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment." MCAD Guidelines, Employment Discrimination on the Basis of Handicap, § II (C). A request for a reasonable accommodation need not be stated in a formulaic manner or use the words "reasonable accommodation." Ferris and Massachusetts Comm'n Against Discrimination v. City of Lawrence, 42 MDLR 15, 21 (2020). The employee must only "make the employer aware that the employee is entitled to and needs accommodation" because of a disability. Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 632, 649, n. 21 (2004).[16] I conclude that the July 24 and the July 30 Emails from Evers were requests for a reasonable accommodation.

The July 24 Email was Evers' response to Dubois' suggestion that they meet in-person. In that email, Evers noted that he was undergoing physical and occupational therapy and that it "is really difficult for me to walk and to do stairs. I also can not drive yet but I can have [my wife] bring me somewhere to meet with [Dubois]." Especially when read against the backdrop of the July 15 Email which described Evers' disability,[17] the July 24 Email conveyed to Dubois that climbing stairs was a problem for Evers because

[15] Even though Evers' condition was not permanent and improved over time, that does not preclude a determination of disability. Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 16–17 (1998).

[16] Although the quoted language in Ocean Spray Cranberries, Inc. "could be seen as indicating that, under M.G.L. c. 151B, a[n] [] accommodation request must definitively establish that [one] is 'entitled to' an accommodation to suffice", that construction is not necessary. Moore v. Indus. Demolition LLC, 138 F.4th 17, 34, n. 18 (1st Cir. 2025).

[17] Communications can be collectively analyzed in assessing whether a request for accommodation was made. Ocean Spray Cranberries, Inc., 441 Mass. at 649–50.

of his disability.[18] Because Evers would need to climb stairs to work at the Office, the July 24 Email essentially expressed his need for an accommodation - work at a location other than at the Office - because of a disability, thus qualifying as a request for a reasonable accommodation.

The July 30 Email focused upon Evers' inability to work at the Office - as opposed to working at home - because of a disability. Evers wrote that he was "not sure when I will be able to come back to the office because the office is not handicap accessible. I am unable to walk on my own or walk up many stairs at a time and I still can not drive, which makes it impossible to get into the office as of now…. I am fully capable of working from home like I have been doing until I am cleared to go back to the office." The July 30 Email expressed Evers' need for an accommodation - work at home - because of a disability and qualified as a request for accommodation.

3. NSF did **not** deny Evers' requests for a reasonable accommodation

Although Dubois did not consider Evers' communications in July 2018 as a request to work remotely, he effectively gave Evers what he was seeking - work remotely (at home) as opposed to working at the Office. From Evers' communications, Dubois knew that Evers had been working remotely (first from the hospital and then from his home). Dubois never demanded that Evers return to work at the Office or took any action to indicate that he objected to Evers working remotely. Dubois did not have a problem with Evers working remotely and believed that Evers' job could be performed remotely. Dubois' acceptance of Evers' working remotely is reflected in the following testimony. In response to being asked, "[d]id you view the communications [from Evers] indicating he had to work from home or work from his hospital as him requesting the ability to work remotely?", Dubois answered, "I didn't. It just seemed like he was doing it, and that wasn't an issue. That wasn't the issue with Sean." While Dubois never expressly told Evers that he could work remotely, under these circumstances, Dubois' actions cannot reasonably be

[18] In the July 15 Email, Evers described his medical situation and stated his intent for the next work week - "I will not be in the office this week but I will answer emails and phone calls." That email read as a statement of intent as opposed to a statement of need and could not be reasonably be construed as a request for a reasonable accommodation. Nevertheless, it provided NSF with knowledge of Evers' disability.

considered a denial by NSF of Evers' requests to work remotely.[19] Having failed to prove an essential element of liability, Evers' failure to provide a reasonable accommodation claim is dismissed.

B. DISPARATE TREATMENT DISABILITY CLAIM

To prove his disability-based disparate treatment claim, Evers must prove membership in a protected class, that he was subjected to an adverse employment action, that NSF bore disability-based discriminatory animus, and that such animus was the reason for the adverse action (causation). Adams v. Schneider Elec. USA, 492 Mass. 271, 280 (2023).[20] [21] Evers established the first two elements. He was a disabled person who was subjected to an adverse employment action - termination of his employment. However, for the following reasons, I conclude that Evers has not sustained his burden of proving that NSF had disability-based discriminatory animus, or that the termination of his employment was caused by such animus.

First, the record does not contain a remark that could reasonably be construed as animus towards disability in general, or towards Evers' disability. Second, there is no comparative evidence. There is no evidence that NSF allowed a non-disabled person who was unsatisfactorily performing their job responsibilities to remain employed at NSF. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997) ("The most probative means of establishing that the plaintiff's termination was a pretext for [disability] discrimination is to demonstrate that similarly situated [non-disabled] employees were treated differently.")

[19] Based on the same circumstances, I do not find that NSF failed to engage in the interaction process.

[20] Where, as here, the employer claims that the adverse employment action was motivated by legitimate, non-discriminatory reasons such as poor job performance, the disability-based disparate treatment claim is analyzed as a proverbial "pretext" case. In such a case, the elements are comparable to disparate treatment claims alleging discrimination of other protected characteristics. Gannon v. City of Boston, 476 Mass. 786, 793-794 (2017).

[21] Following a recent trend of Commission hearing decisions, I do not apply the burden-shifting paradigm set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to the disparate treatment and retaliation claims. See Adams, 492 Mass. at 281, n. 5 (2023) ("McDonnell Douglas test is not used at trial.")

Third, the temporal proximity between Evers' disclosure of his disability to Dubois and the subsequent termination of Evers' employment, does not evidence the requisite animus or causation under the circumstances. Although Evers was fired less than three weeks after Dubois learned of Evers' disability in the July 15 Email, Dubois had already made the decision to fire Evers before his hospitalization. At the end of June 2018, Dubois was "100 percent certain" that Evers was not the right person for the job and had decided that he was going to fire Evers. Dubois wanted to fire Evers in person. But for Evers' hospitalization, he would have been fired by July 13, 2018. Subsequently, Dubois sought an in-person meeting in which Dubois would fire Evers, but that meeting never took place. Dubois ultimately fired Evers on August 1, 2018, when franchisee feedback of his performance became "worse" and the Boktor matter became "untenable."

Fourth, the record contains ample evidence of Evers' unsatisfactory job performance. Despite receiving on-the-job training from Eisner and Grippi, Evers' brief employment at NSF was marred with job performance deficiencies. During Evers' presentations at team meetings, questions about time frames and project schedules "seemed to keep coming up every week." At one or more team meetings, Dubois critiqued Evers' job performance.

Eisner remained involved with the real estate process throughout Evers' employment at NSF because Eisner was not confident that Evers understood the real estate process and did not believe that Evers was contacting realtors and identifying potential dry-cleaning sites. When Dubois asked Eisner before July 2018 about Evers' performance, Eisner criticized Evers' performance. Grippi believed that Evers had communication and performance issues related to construction, and when asked by Dubois on July 20, 2018, whether Evers was a "good fit" for his position, he told Dubois that based on Evers' past performance, Grippi did not believe that Evers could handle the construction aspect of his job.

Before Evers' hospitalization, Dubois told Evers that some of the franchisees thought he "was non-communicative" and had conveyed that Evers was not responding to emails or returning telephone calls.

Similarly, on July 31, 2018, Dubois emailed Evers that five franchisees "are all voicing concerns about the communication and lack of follow up on real estate and construction."

Evers instructed R&R to go to the Germantown site to install the equipment, but when R&R arrived, that site was not ready for equipment installation, because there was no gas. Subsequently, when Evers said that the Little Elm site was ready for equipment installation, R&R arrived at that site, but that site was not ready for equipment installation because the gas was not available. Remarkably, Evers committed the same mistake despite Grippi and Dubois having previously addressed the Germantown installation error with him. To Dubois, it was "[in]conceivable [] that we were finding over and over that what we were being told wasn't accurate."

After failing to obtain an allowance for franchisee Modha to cover additional wall costs at the Little Elm site, Evers wrongfully blamed Eisner for the failure, inaccurately implicated Grippi in the failure and caused franchisee Modha to be "really upset." When asked to provide a copy of the letter of intent for the Skye Canyon site to franchisee Boktor, Evers only sent a signature page which was "useless info to anyone." Evers provided Boktor with an estimate of construction costs for the Skye Canyon and Durango Post sites that failed to include the allowance for each site, which significantly inflated the projected costs, causing Boktor to refuse to sign the leases and depriving NSF of substantial revenue.

Although there were no documents reflecting a written warning or discipline of Evers, that was not indicative of satisfactory job performance. NSF was "a very small group." To Dubois, it would have been "very awkward to have a written reprimand to somebody that had been with you for four weeks and, you know, walk eight feet across the hall and hand that to [Evers]." Dubois believed that "the better management style was to talk to [Evers] directly about" his performance issues.[22] Dubois believed that

[22] The increase in documentation (emails) regarding Evers after he was admitted to the hospital is not remarkable, because before the hospitalization, Dubois, Eisner, Grippi and Evers frequently communicated in person rather than through email.

Evers "wasn't picking up the real estate part of the job", "mischaracterized his skill set on construction [when hired], and he was giving us bad information."

Simply put, the termination of Evers' employment was caused by Evers' consistently poor job performance and was not related to any disability animus. As Evers has failed to prove discriminatory animus and causation, the disparate treatment disability-based claim must be dismissed.

C. "RETALIATION" CLAIM UNDER M.G.L. c. 151B, § 4(4)

It is unlawful for "any person, employer … to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." M.G.L. c. 151B, § 4(4).[23] On July 24 and July 30, 2018, Evers engaged in protected conduct by requesting a reasonable accommodation.[24] On August 1, 2018, he suffered an adverse employment action when NSF terminated his employment.[25] However, Evers failed to prove that he was fired in response to his request(s) for accommodation. Evers' work performance was sufficiently poor that Dubois had decided at the end of June 2018 that he was

[23] Massachusetts case law as to the elements of a M.G.L. c. 151B, § 4(4) claim is not uniform.

> Commonwealth's law only required: (1) proof that he engaged in protected conduct; (2) proof that he suffered some adverse action; and (3) proof that some causal connection existed between the protected conduct and the adverse action. See Mole v. Univ. of Massachusetts, 442 Mass. 582, 814 N.E.2d 329, 338–39 (2004); see also Tate v. Dep't of Mental Health, 419 Mass. 356, 645 N.E.2d 1159, 1165 (1995) (describing an M.G.L. c. 151B retaliation claim's elements slightly differently, requiring proof that the plaintiff had a reasonable and good faith belief the defendant was engaged in wrongful discrimination, proof that the plaintiff acted reasonably in response to his belief [plus causal adverse action].

See Moore, 138 F.4th at 32. Further, "[i]t is not entirely clear whether, in order to establish protected conduct under M.G.L. c. 151B, an individual claiming retaliation based on an accommodation request must also show in addition: (1) that he reasonably and in good faith believed he was actually entitled to an accommodation; or (2) that he reasonably opposed his employer's denial of the accommodation request [Citation omitted]." Moore, 138 F.4th at 33, n. 17. Adhering to the language of M.G.L. c. 151B, § 4(4), viewed liberally as demanded by c. 151B, § 9, I conclude that for the purpose of a c. 151B, § 4(4) claim based on a request for a reasonable accommodation, the request for accommodation is sufficient to prove the protected conduct element of the claim.

[24] Sullivan and the Massachusetts Comm'n Against Discrimination v. Middlesex Sheriff's Office, 42 MDLR 144, 152 (2020) ("Complainant's protected activity, beginning with her quest for a reasonable accommodation in 2007")

[25] By statute, the termination of employment is an adverse action. M.G.L. c. 151B, § 4(4) (unlawful for employer to "discharge" employee for engaging in protected conduct). See also Moore, 138 F.4th at 36.

going to fire Evers. Evers' hospitalization and Dubois' inability to have an in-person meeting with Evers were the reasons that the decision to fire was not implemented until August 1, 2018. Indeed, Evers' first request for a reasonable accommodation (the July 24 Email) was a response to an email by Dubois seeking to schedule an in-person meeting in which he planned to fire Evers. Given the lack of causation, the M.G.L. c. 151B, § 4(4) claim is dismissed.

D. COERCION, INTIMIDATION, THREATS AND INTERFERENCE CLAIM UNDER M.G.L. c. 151B, § 4(4A)

Employment free from disability discrimination and retaliation are rights granted by M.G.L. c. 151B. Among other things, c. 151B, § 4(4A) makes it unlawful for a person to interfere with another's exercise or enjoyment of a c. 151B right. Prohibited interference may be established by demonstrating action taken in deliberate disregard of a person's right under c. 151B, because that allows the inference that there was an intent to interfere with the exercise or enjoyment of that right. See Woodason v. Town of Norton School Comm., Splaine and Stanovich, 25 MDLR 62, 64 (2003).[26] In light of Evers' failure to prove disability-based discrimination and retaliation, see Section II (A-C), the record does not support finding the requisite deliberate disregard. The claim under c. 151B, § 4(4A) is dismissed.[27]

E. SUCCESSORS IN INTEREST CLAIMS

The claims against Clean Franchise Brands, LLC, Next Step Franchising LLC, and Clean Franchise Brands, Inc. are based on a theory of successor in interest. Those respondents could only be held liable if

[26] NSF/Dubois' contention in their post-hearing brief that actual malice is required to demonstrate the requisite "interference" under M.G.L. c. 151B, § 4(4A) is incorrect. They rely upon two cases not addressing Chapter 151B. See King v. Driscoll, 418 Mass. 576, 587 (1994) (discussion of malice related to a claim of intentional interference with contractual relations) and Blackstone v. Cashman, 448 Mass. 255, 255 (2007) (issue was "whether the defendant was entitled to an 'actual malice' instruction when the plaintiff's claim of intentional interference with advantageous economic relations was submitted to the jury").

[27] The record is devoid of any evidence that NSF/Dubois threatened, intimidated or coerced Evers in the exercise or enjoyment of a right under M.G.L. c. 151B.

NSF was held liable. Because all claims against NSF have been dismissed, I dismiss the claims against those three other Respondents.[28]

III. ORDER

As detailed above, all claims are dismissed. I hereby **dismiss this case in its entirety**.

IV. NOTICE OF APPEAL

This Decision represents the final order of the Hearing Officer. Any party aggrieved by this order may appeal this Decision to the Full Commission. To do so, a party must file a Notice of Appeal within ten (10) days of receipt of this Decision and must file a Petition for Review within thirty (30) days of receipt of this Decision. 804 CMR 1.23(1). If a party files a Petition for Review, each of the other parties may intervene in the appeal. To do so, such party must file a Notice of Intervention within ten (10) days of receipt of the Petition for Review and must file a brief in reply to the Petition for Review within thirty (30) days of receipt of the Petition for Review. 804 CMR 1.23(2). All such filings shall be made with the Clerk of the Commission in the Boston office, with a copy served on all other parties.

So ordered this 6th day of November, 2025

Jason B. Barshak

Jason Barshak
Hearing Officer

[28] This decision does not address whether those three Respondents would have been liable in the event NSF was held liable.