COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and CHRISTOPHER JENSON, Complainants	)	
v.	)	DOCKET NO. 19-NEM-00584
ROCKDALE CARE & REHABILITATION CENTER Respondent	)	

Appearances: Gigi Tierney, Esq. for Complainants

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On March 1, 2019, Complainant, Christopher Jenson filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD" or "Commission") charging his former employer, Respondent Rockdale Care & Rehabilitation Center, with age and disability discrimination. On February 7, 2023, the Investigating Commissioner certified the case to public hearing. On April 5, 2023, I issued an Amended Certification Order certifying two issues for public hearing.[1] On May 15, 2023, I conducted a public hearing ("hearing"). At the commencement of the hearing, Mr. Jenson stated that he was withdrawing the age discrimination claim, and counsel for Mr. Jenson formally withdrew the certified claim of age discrimination. I then stated on the record that the sole issue certified to public hearing was: Did Respondent Rockdale Care & Rehabilitation Center discriminate against Mr. Jenson on the basis of his "handicap" in violation of M.G.L. c. 151B, § 4(16) when it terminated his employment? Respondent did not appear at the hearing and a default against it was entered on the record at the

[1] The two issues in the Amended Certification Order were:

1. Did Respondent Rockdale Care & Rehabilitation Center discriminate against Complainant, Christopher Jenson, on the basis of his "handicap" in violation of Massachusetts General Laws c. 151B, § 4(16) when it terminated his employment.
2. Did Respondent Rockdale Care & Rehabilitation Center discriminate against Christopher Jenson on the basis of his age in violation of Massachusetts General Laws c. 151B, § 4(1B) when it terminated his employment.

hearing. A default hearing was held pursuant to 804 CMR § 1.12 (10) (2020). [2] One witness, Mr. Jenson, testified, and four (4) exhibits were entered into evidence. On June 22, 2023, counsel for Mr. Jenson filed a post-hearing brief. To date, no post-hearing brief has been received from Rockdale Care & Rehabilitation Center. Unless stated otherwise, where testimony is cited, I find the testimony credible and reliable, and where an exhibit is cited, I find it reliable to the extent it is cited. Having reviewed the record of the proceedings, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT[3]

BACKGROUND

1. In 1999, Christopher Jenson ("Mr. Jenson") received an associate's degree in nursing while working in the Massachusetts National Guard. *18:00 – 20:00* Mr. Jenson has held a Massachusetts Licensed Practical Nurse ("LPN") license from 2011 to the time of hearing. *18:00 – 20:00;* Exhibit 2.
2. In 2013 and 2014, Mr. Jenson worked as an LPN for Somerset Ridge Nursing Home ("Somerset Ridge") reporting to Tracy Farias ("Ms. Farias"), who was then the Director of Nursing at Somerset Ridge. *53:00 – 55:00* After working at Somerset Ridge, Mr. Jenson went on active military duty. When Mr. Jenson returned from active duty in the military, Ms. Farias, who was then the Director of Nursing at Respondent Rockdale Care & Rehabilitation Center ("Rockdale Care") hired Mr. Jenson to work as an LPN at Rockdale Care. *53:00 – 55:00* There was no evidence as to the quality of Mr. Jenson's work as an LPN at Somerset Ridge. However, I infer from the fact that Ms. Farias hired Mr. Jenson to work as an LPN at Rockdale Care after supervising his work at Somerset Ridge, that Mr. Jenson's work performance as an LPN at Somerset Ridge was satisfactory.
3. From approximately May 15, 2016, to November 3, 2018, Mr. Jenson was employed by Rockdale Care, then located at 1123 Rockdale Avenue, New Bedford, Massachusetts. *7:30-*

[2] On May 17, 2023, the Commission issued a Notice of Entry of Default Against Respondent. Among other things, the notice stated that a default had been entered on the record against Respondent for failure to appear at the hearing and that Respondent had ten calendar days from its receipt to petition the Commission to remove the entry of default and reopen the case for good cause shown. 804 CMR 1.12 § 10(d) (2020). The Commission has not received any such petition.

[3] The official record of the hearing is an audio recording, which is cited herein by hour, minute and second (example: *1:07:30* represents 1 hour, seven minutes and thirty seconds).

9:00 From 2016 to 2018, Rockdale Care was a skilled nursing facility that served patients in the New Bedford area. Rockdale Care had a Transitional Care Unit, and units focusing on dementia and drug rehabilitation. During Mr. Jenson's employment, Rockdale Care had approximately 86 to 93 patients, many of whom received Medicare. *29:40-30:50*

4. Throughout his employment at Rockdale Care, Mr. Jenson worked as an LPN and reported to Ms. Farias. *25:00 – 26:00; 33:00 – 34:00* As an LPN at Rockdale Care, Mr. Jenson was responsible for caring for between 47 and 65 patients, keeping notes, tracking drug orders, calibrating the diabetes glucometer machines, and logging information in the logbook. *26:00 – 29:00* Mr. Jenson also had some responsibility for the security of the building and for supervising the Certified Nursing Assistants ("CNAs"). *26:00 – 29:00*
5. At the beginning of his employment at Rockdale Care, Mr. Jenson had a good professional relationship with Ms. Farias. *33:00-34:00* For example, Ms. Farias expressed appreciation for Mr. Jenson's work when he did chest compressions on patients. *34:00*
6. Early in his employment at Rockdale Care, Ms. Farias issued Mr. Jenson a written "first warning" (first warning) for failing to give a patient a medication. *1:21:00 – 1:22:00* Mr. Jenson did not receive any other written discipline during his employment at Rockdale Care. I make this finding despite documentary evidence submitted as Exhibit 3, which contains the words "recent suspension" because, I do not find that Mr. Jenson was threatened with, or received, a suspension during his employment at Rockdale Care based on my findings in paragraph No. 22 below.
7. During his employment as an LPN at Rockdale Care, Ms. Farias did not inform Mr. Jenson that she had concerns about Mr. Jenson's performance, other than the following: (1) the first warning; (2) Ms. Farias and Mr. Jenson's conversations about his "calling out," and (3) Ms. Farias' response to Mr. Jenson on one occasion when he contacted her to tell her he was running late: "You've got to drag it back" which Mr. Jenson took to mean that he needed to arrive at work on time. *37:21*
8. During his employment at Rockdale Care, Mr. Jenson did not receive a written performance evaluation. *1:20:00 – 1:22:00*

MIGRAINES

9. On July 14, 2004, Mr. Jenson was diagnosed with Post-Concussive Syndrome, which results in migraines and mildly blurred vision. Throughout his employment at Rockdale Care, Mr.

Jenson experienced mildly blurred vision and between three and four migraines a month.[4] *47:00 - 49:50*

10. Mr. Jenson's migraines generally lasted between five and twelve hours and impaired his judgment and ability to think. On a scale of 1-10, the pain level of Mr. Jenson's migraines was between a 6 and 7. During migraines, Mr. Jenson generally stayed home and slept, and avoided driving because he felt it was unsafe. When Mr. Jenson had heavy migraines, he experienced debilitating pain. Mr. Jenson treated his migraines with rest and over-the-counter medication. External events, including loud noises, bright lights, and a lack of sleep, triggered Mr. Jenson's migraines. *49:00 – 51:00* Working more than 40 hours per week, including double shifts, and not getting adequate sleep, would trigger more frequent migraines. *49:00 – 53:00, 1:17:00-1:19:00*
11. On the Rockdale Care job application, Mr. Jenson identified himself as "disabled." *39:00 – 41:00* When Ms. Farias hired Mr. Jenson at Rockdale Care, Mr. Jenson told Ms. Farias that he was a disabled veteran, and that he had Post-Concussive Syndrome, migraines, tinnitus and hearing loss. *51:00 – 53:00* Mr. Jenson provided Ms. Farias with a copy of his veteran identification card, which identified him as a disabled veteran. *39:00 – 41:00* Ms. Farias asked Mr. Jenson if he could work the 11 p.m. to 7 a.m. shift, and Mr. Jenson said, "Absolutely." *52:00 – 53:00*

WORK SCHEDULE AND "CALL OUTS" AT ROCKDALE CARE

12. When Mr. Jenson started working at Rockdale Care, he worked the night shift from 11 p.m. to 7 a.m. Over time, Mr. Jenson's schedule "morphed" to include more work hours. He frequently volunteered and worked double shifts where he would work the evening shift from 3 p.m. to 11 p.m. prior to, and in addition to, his regularly scheduled night shift from 11 p.m. to 7 a.m. Mr. Jenson also worked "all the holidays [he] could."[5] *25:00 – 26:00*

[4] Throughout the hearing, Mr. Jenson alternatively referred to his migraines as "migraines" and "headaches."

[5] The time records offered at hearing reflect only three periods of time during his employment at Rockdale Care and the number of hours for which he was paid during such periods. Exhibit 4. These time records are not a complete record of the number of hours Mr. Jenson worked during his employment at Rockdale Care.

13. During Mr. Jenson's employment at Rockdale Care, Ms. Farias responded positively and was "very happy" when Mr. Jenson worked double shifts. When Mr. Jenson worked double shifts, Ms. Farias did not have to call "agency people" in and knew that the shifts were covered. *37:00- 38:00*
14. Rockdale Care permitted staff to report 15 minutes before their scheduled shift. *1:05:00-1:07:00* For example, when Mr. Jenson worked the evening shift from 3 p.m. to 11 p.m., he would arrive at 2:45 p.m. This would allow Mr. Jenson and the 7 a.m. to 3 p.m. day shift nurse to "do report" before the day shift nurse left the shift at 3 p.m. *1:05:00-1:07:00* Taking or doing report entailed doing "rounds" together, documenting scheduled medications, and reviewing the patients' health-related data. *26:00 – 29:40*
15. On a recurring basis, Mr. Jenson's double shifts lasted longer than 16 consecutive hours because the day shift nurse arrived late. *1:05:00 - 1:08:00* When the day shift nurse arrived late -- at times, as late as 7:45 a.m. -- Mr. Jenson was required to work past the time that the night shift ended, in order to do "report" with the incoming day shift nurse. On occasion, Mr. Jenson would "walk[] out of the door, hurting." *1:13:00 – 1:16:00*[6] If Mr. Jenson was then scheduled to work at 3 p.m. that day, Mr. Jenson would have to return to work within less than eight (8) hours. On some of these occasions Mr. Jenson called in to explain that he needed some sleep and intended not to report that day for his scheduled shift, or, alternatively, to report late for the evening shift. *38:00 - :39:00; 1:01:00 – 1:06:00; 1:07:00 – 1:10:00; 1:12:00 – 1:13:00* When this occurred, and Mr. Jenson informed Ms. Farias that he would be coming in late for the evening shift because he needed to get "[his] 8 hours of sleep," Ms. Farias would "get grumpy about that." *37:30 – 39:30; 1:07:00 – 1:08:00*
16. Mr. Jenson and Ms. Farias discussed these "call outs" and the circumstances under which Mr. Jenson was calling out. 1:03:00 – 1:05:00 Ms. Farias asked Mr. Jenson why he "called out" and Mr. Jenson explained to Ms. Farias that the day shift nurse came in late, that he needed sleep, and was unable to work his next shift because he was experiencing symptoms. *1:03:00 – 1:05:00; 1:13:00 – 1:16:00* For example, Mr. Jenson told Ms. Farias: "I have a headache --it's really catching up to me and I need a day off." *1:03:00 – 1:05:00; 1:13:00 – 1:16:00*

[6] Other than this reference to "walking out of the door, hurting", there was no evidence that Mr. Jenson had a migraine while working a shift at Rockdale Care.

17. At times, Ms. Farias was understanding of Mr. Jenson's need for a day off, and at other times, she expressed her annoyance by saying so in a text to Mr. Jenson, or expressing it through the inflection in her voice. *1:15:00 – 1:20:00*
18. Mr. Jenson talked with Ms. Farias about the day shift nurses arriving late, and the effect that it had on him as the LPN coming off a double shift. Ms. Farias acknowledged this and spoke with the day shift nurses about arriving on time to take report. Despite this, the day shift nurses continued to come in late. *1:07:00 – 1:08:00*
19. In addition to the above, Ms. Farias expressed annoyance at Mr. Jenson when he "called out" and Ms. Farias was unable to get coverage for him. *1:03:00 – 1:05:00* Ms. Farias was "exceptionally annoyed" if Ms. Farias had to cover the shift herself. *1:03:00 – 1:05:00* Ms. Farias expressed her irritation at Mr. Jenson by texting him and saying, "Oh, Jesus Christ, Chris." *1:03:00 – 1:05:00* Throughout his employment at Rockdale Care, Mr. Jenson received approximately six (6) of these texts from Ms. Farias, expressing her irritation about his call outs. *1:12:00 – 1:13:00*
20. Mr. Jenson "called out" approximately two times a month. *1:10:00*
21. Mr. Jenson wanted "to work within his own limitations", and when he began to get fatigued, he would reduce the number of double shifts he worked. *1:10:00 - 1:13:00* When Mr. Jenson began to reduce the number of double shifts, Ms. Farias expressed frustration toward him about this. *1:27:00 – 1:32:00* Ms. Farias expressed to Mr. Jenson that she was upset that he was unwilling to continue to volunteer for double shifts. *1:54:0 – 1:56:00*
22. While I credit Mr. Jenson's testimony that Ms. Farias expressed frustration toward Mr. Jenson and was upset when he began to reduce the number of double shifts he worked, I do not credit Mr. Jenson's testimony that Ms. Farias threatened him with a suspension for cutting back on the number of hours he was working. During questioning on the topic of a suspension, or threatened suspension, Mr. Jenson was vague and demonstrated a notable lack of specific recall. *1:21:00 – 1:31:00* Mr. Jenson initially testified that he did not recall being threatened with any discipline. He subsequently testified that it had been a long time since the events at issue. When asked if he had a specific recollection of Ms. Farias threatening him with suspension, he testified: "I think she snapped at me in her office once, but, you know, that was about it." *1:28:00 – 1:29:00* Further, as set forth below, I do not find reliable Exhibit 3 which references a "recent suspension." Based on my observations of Mr.

Jenson's testimony as to this issue and the evidence as a whole, I find that Mr. Jenson was not threatened with, and did not receive a suspension, for cutting back on the number of hours he worked.

NOVEMBER 2018 PATIENT FALL

23. On November 2 or 3, 2018, a Rockdale Care patient fell and Mr. Jenson found the patient on the floor. *1:48:00 – 1:49:00; 1:35:00* Mr. Jenson instructed a CNA not to move the patient, and to sit with the patient. Mr. Jenson slid a pillow under the patient's head, put a blanket on the patient, and called 911. *1:35:00 – 1:36:00*
24. The procedure employed when a Rockdale Care patient fell depended upon on whether the patient fall was witnessed. If the fall was witnessed, the LPN would put the patient back in bed, take the patient's vital signs and fill out a fall packet. *1:36:00 – 1:38:00* When a patient fall was not witnessed, the Rockdale Care protocol was for the LPN to send the patient out to receive medical care. *1:36:00 – 1:38:00* In this latter scenario, there was "a tremendous amount of documentation" that would need to be completed by Ms. Farias, Ms. Farias' secretary or the day nurse. *1:36:00 – 1:38:00; 2:00:00 – 2:06:00*
25. When the patient fell on November 2 or 3, 2018, Mr. Jenson determined that this was an unwitnessed patient fall and sent the patient out for medical care at a hospital. *1:34:00 – 1:36:00* Mr. Jenson completed an event form on the computer. *1:48:00 – 1:51:00*
26. Mr. Jenson perceived Ms. Farias to be furious at him because Mr. Jenson's decision to send the patient to a hospital meant that Ms. Farias would have to complete additional paperwork. *1:34:00 - 1:36:00*

TERMINATION

27. On November 3, 2018, Mr. Jenson was called into a meeting in the office of Mr. Nickerson, the Administrator at Rockdale Care. *1:37:00 – 1:38:00* Ms. Farias was present and sat there quietly. Mr. Nickerson told Mr. Jenson that he had a "track record" of "calling out" a lot and that Rockdale Care no longer needed him. *1:37:00 – 1:38:00* Mr. Jenson asked if the termination was because of the patient fall, and Mr. Nickerson responded in the negative, stating "you did everything correct." *1:42:00 – 1:43:00*
28. In light of the close supervisory relationship that Ms. Farias had with Mr. Jenson, the history of her conflict with him over his schedule, and the stated verbal reason for the termination –

"call outs," I infer from the evidence that Mr. Nickerson relied on the recommendation of Ms. Farias in terminating Mr. Jenson's employment.

2018 WRITTEN WARNING

29. Months after Rockdale Care terminated Mr. Jenson's employment, Mr. Jenson saw a document at his attorney's office entitled "Written Warning" dated November 3, 2018. Exhibit 3 ("2018 Written Warning"). *1:47:00 – 1:49:00* The 2018 Written Warning identifies Mr. Jenson, states the "Date of deficiency" as 11/3/18, and describes the "Details of incident" as "[f]ailure to complete event report, failure to write note on severity of fall and fracture." *1:48:00 – 1:49:00*; Exhibit 3. The 2018 Written Warning states under "Plan for improvement: Termination. Multiple examples of poor job performance." Exhibit 3. The remainder of the line under plan for improvement is illegible, except that it contains the words "recent suspension." Exhibit 3; *1:44:00 – 1:48:00*

30. The 2018 Written Warning has three signature lines other than the employee's: one labeled "Supervisor's Signature"; the second labeled "2nd Level Management" and the third labeled "3rd Level Management/HR Department." Exhibit 3. Only the Supervisor's Signature line is signed. Exhibit 3. Mr. Jenson was unable to identify the signature under the Supervisor's Signature. *1:44:00 – 1:48:00*

31. At the end of the 2018 Written Warning, it states:

> I have read and understand the nature of this deficiency and understand that if it persists, further disciplinary action up to and including termination of my employment, may occur. I also understand that the imposition of disciplinary action, up to and including termination, is not preconditioned upon receipt of verbal and written notice of unacceptable conduct. Exhibit 3.

32. Mr. Jenson did not see the 2018 Written Warning on November 3, 2018. Mr. Jenson did not recall verbally refusing to sign the 2018 Written Warning on November 3, 2018. *1:44:00 – 1:48:00* Instead, Mr. Jenson first saw the 2018 Written Warning months after Rockdale Care terminated him, when his attorney obtained a copy of the 2018 Written Warning. *1:44:00 – 1:48:00* At the bottom of the 2018 Written Warning, under "Employee's Signature", there are handwritten words -- "Refused to sign" – and a date at the Employee's Signature line "11/3/2018." Exhibit 3. I draw the inference that Mr. Jenson did not write "refused to sign" at the bottom of the 2018 Written Warning based on Mr. Jenson's credible testimony that he did not see the 2018 Written Warning until months after his employment was terminated.

EMPLOYMENT AFTER ROCKDALE CARE

33. One (1) week after Rockdale Care terminated Mr. Jenson, Mr. Jenson updated his resume and posted it on line. *2:08:00 – 2:09:00*

34. Three (3) weeks after the termination, Mr. Jenson obtained employment at Athena Health Care Group ("Athena"). *2:09:00 – 2:10:00*

35. Mr. Jenson's wages at Rockdale Care varied, and were substantially enhanced by working overtime. I credit Mr. Jenson's testimony that his average weekly wage at Rockdale Care was $2,200. *2:33:00 – 2:34:00*; Exhibit 4.

36. The position at Athena paid a higher hourly rate than the one Mr. Jenson received at Rockdale Care. *2:23:00 – 2:25:00* Mr. Jenson worked approximately the same number of hours at Athena that he worked at Rockdale Care. *2:09:00 – 2:10:00*

EMOTIONAL DISTRESS

37. When he was informed of the termination, Mr. Jenson felt angry, hurt, upset and "a little distraught." *2:05:00 – 2:09:00*

38. Mr. Jenson spent a week feeling "a little depressed" and sleeping a lot. After one week, Mr. Jenson began to make efforts to find another job. *2:07:00 – 2:09:00*

39. I do not credit Mr. Jenson's description of his emotional state as being "eviscerated" by the termination from Rockdale Care. *2:07:00 – 2:08:00* I base this conclusion on my observations of Mr. Jenson while testifying to his distress, the fact that Mr. Jenson described himself as *"a little* depressed" and "*a little* distraught," and that he had prompt success in obtaining alternative, more remunerative employment within three (3) weeks.

III. CONCLUSIONS OF LAW[7]

Mr. Jenson alleges that Rockdale Care discriminated against him on the basis of his disability[8] by terminating his employment in violation of M.G.L. c. 151B, § 4(16). Section 4(16)

[7] Rockdale Care is an employer within the meaning of M.G.L. c. 151B, § 1(5). The evidence reflects that Rockdale Care had three shifts (day, evening and night); with a nurse on each shift; with CNAs; a Director of Nursing; and that Mr. Jenson was paid as an employee. Based on this evidence, I reasonably infer that Rockdale Care had six (6) or more employees during Mr. Jenson's employment.

[8] In 1983, when Chapter 151B was amended to include the prohibition against disability discrimination, the term "handicap" was used in the statute. Since its enactment, the term "handicap" has fallen into disfavor. Therefore, where possible, the term "disabled" and "disability" will be used in place of "handicapped" and "handicap" in this decision.

states that it is an unlawful practice for an employer to "dismiss from employment … 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 … would impose an undue hardship to the employer's business." M.G.L. c. 151B, § 4 (16). Mr. Jenson asserts that Ms. Farias knew that he was disabled by migraines, and that this affected his ability to work extended double shifts. He further alleges that Ms. Farias developed an antipathy toward him because of the effect that his disability had on his ability to work extended double shifts, and due to his consequent unwillingness to work as many double shifts because of the adverse effect on his disability. Mr. Jenson further alleges that Ms. Farias' bias regarding Mr. Jenson's disability was a determinative factor in the decision to terminate his employment. Mr. Jenson asserts that neither his general work performance, nor the increased paperwork that his response to the patient fall may have initiated, caused his termination.[9]

Where a disparate treatment disability discrimination case involves an adverse employment action, the Massachusetts Supreme Judicial Court has described two categories of disability discrimination "which differ according to the explanation given for the adverse employment action by the employer." Gannon v. City of Boston, 476 Mass. 786, 793 (2017). In the first category, the employer admits that the adverse action was taken because of the employee's disability, but contends that "the employee was not capable of performing the essential functions of the job even with reasonable accommodation, and therefore is not a qualified handicapped person." Id. at 794-795. This category of disability discrimination is not applicable to this case as it was not argued, nor was any evidence to support such a theory, presented. [10] Rather, the facts in this case, implicate the category of disability discrimination described as a "pretext case." Id.

[9] Section 4(16)'s coverage includes claims for alleged failure to provide a reasonable accommodation. M.G.L. c. 151B, § 4 (16). Mr. Jenson did not proceed on a theory that Rockdale Care failed to provide him with a reasonable accommodation or engage in an interactive dialogue to identify an accommodation, and presented no evidence that he requested an accommodation, or that Rockdale Care was aware of a need for an accommodation.

[10]There was no evidence that Mr. Jenson was incapable of performing the essential duties of the job as a result of the physical or mental limitations arising from the disability. On the contrary, Mr. Jenson introduced evidence that he was capable of performing the essential duties of the job.

at 793-795. To prevail in such a case, Mr. Jenson must show that: (1) he is a member of a protected class; (2) he was subject to an adverse employment action (harm); (3) the employer bore "discriminatory animus"; and (4) that animus was the reason for the action (causation). Adams v. Schneider Electric USA, 492 Mass. 271 (2023), citing Bulwer v. Mount Auburn Hosp., 473 Mass. 672 (2016), quoting Lipchitz v. Raytheon Co., 434 Mass. 493 (2001).[11]

A. MEMBER OF A PROTECTED CLASS

To be a member of a protected class in the context of a disability case, Mr. Jenson must show that he is a qualified person with a disability, i.e. a "qualified handicapped person." MCAD Guidelines: Employment Discrimination on the Basis of Handicap ("MCAD Disability Guidelines"), § II.B. A person has a "handicap" if (s)he has a physical or mental impairment which substantially limits one or more major life activities. M.G.L. c. 151B, § 1 (17). M.G.L. c. 151B, § 1(20)'s non-exhaustive list of major life activities includes "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The MCAD Disability Guidelines provide additional examples of major life activities including sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others. Disability Guidelines, II.A.5. A "qualified handicapped person" is a "handicapped person" who is capable of performing the essential functions of a particular job with or without a reasonable accommodation. M.G.L. c. 151B, § 1(16).

Mr. Jenson is a "handicapped person." Throughout the time-period that Mr. Jenson was employed at Rockdale Care, Mr. Jenson experienced disabling migraines. When he experienced migraines, Mr. Jenson was unable to engage in normal daily activities, did not feel he could drive safely, and instead, stayed home and slept. During his employment at Rockdale Care, Mr. Jenson

[11] I have not utilized the McDonnell Douglas burden-shifting construct, as this case is before me as the ultimate fact-finder, rather than before the court or a tribunal on a motion for summary judgment. Adams v. Schneider Electric, 492 Mass. 271, 281 n. 5 (2023) (the McDonnell Douglas framework is **not used at trial**) (emphasis added). The McDonnell Douglas framework is "a method of organizing evidence" "in the context of summary judgment." Id. at 281; Lipchitz v. Raytheon Co., 434 Mass. 493, 508 (2001). At the time of public hearing or trial, the focus should be on the ultimate issues of harm, discriminatory animus and causation. Adams at 281, n. 5; Lipchitz at 508 (McDonnell Douglas analytical framework was established in the context of summary judgment, and the focus of the jury should be on the ultimate issues of harm, discriminatory animus and causation). Cases decided under M.G.L. c. 151B assessing whether legitimate and non-discriminatory reasons motivated an employer to act, or whether such reasons are pretextual, have bearing on the ultimate issues of harm, animus and causation. For this reason, the use of the analysis in this case should not impact judicial review of past MCAD cases that have employed the McDonnell Douglas framework to organize the evidence.

experienced between three and four migraines a month, along with mildly blurred vision. While working at Rockdale Care, the migraines would last between five and twelve hours, and at times, result in "debilitating" pain that substantially impaired Mr. Jenson's judgment and his ability to think. He described the pain he experienced from a migraine at a level between 6 or 7 on a scale of 1 – 10. In addition, I infer from the testimony as to the frequency and length of the migraines, and that when Mr. Jenson had a migraine, he "stayed home and slept", that the migraines affected Mr. Jenson's ability to concentrate and interact with others. Mr. Jenson's migraines substantially impaired several major life activities including thinking, concentrating and interacting with others.[12] Based on this record, I conclude that, at all relevant times, Mr. Jenson had a physical impairment which substantially impaired one or more major life activities, and therefore met the statutory definition of "handicapped person."

Mr. Jenson is a "qualified handicapped person" as he was "capable of performing the essential functions" of the LPN position at Rockdale Care. M.G.L. c. 151B, § 1(16) In some circumstances, an employee who "calls out" frequently may not be qualified to perform the essential functions of the job. This is not that case. As an LPN at Rockdale Care, Mr. Jenson was responsible for caring for between 47 and 65 patients, keeping notes, tracking drug orders, calibrating the diabetes glucometer machines, and logging information in the logbook with some responsibility for the security of the building and for supervising CNAs. With the exception of

[12] In appropriate circumstances, migraines constitute a physical impairment which substantially impairs one or more major life activities. Coughlin v. 750 Woburn Street Operating Co., LLC, 2019 WL 2912763 (D. Mass. 7/8/2019) (granting a motion to amend, holding that it could be reasonably inferred that repeated migraines would likely qualify as an impairment that substantially limits one or more major life activities); Burns v. Neilsen , 506 F.Supp.3d 448 (W.D. Texas 2020) (drawing all inferences in favor of the verdict, the record provides a sufficient basis for a reasonable jury to find that employee's migraines substantially affected one or more major life activities, and therefore, was a disability); Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Indiana, 1995) (evidence that employee suffered from headaches which occurred 3-4 times per week, resulting in an inability to drive a car, eat, drink, get out of bed, or stand when suffering from headache, precluded summary judgment as to whether she was "disabled" within meaning of ADA); Carlson v. InaCom Corp., 885 F.Supp. 1314 (D. Neb. 1995) (finding that the employee established her migraine headaches constitute a physiological disorder which affects both neurological and vascular systems, and that employee established that she is substantially limited in major life activities such as caring for her infant son, driving a car or concentrating on work); Dutton v. Johnson County Board of County Commissioners, 859 F. Supp. 498 (D. Kan. 1994) (holding that employee's migraine headaches constitute a physiological disorder which affects his neurological and cardiovascular systems, and denying employer's motion for summary judgment on the grounds that there was sufficient evidence showing that the headaches substantially impaired one or more major life activities, i.e. headaches were severe and debilitating, rendered employee unable to drive or carry on "most normal, everyday tasks that an unimpaired individual is able to do" and limited his ability to work)

receiving a "first warning" early in his employment for failure to provide medication, the record is devoid of instances of Mr. Jenson failing to perform these duties. Moreover, there is no evidence that Mr. Jenson's migraines precluded him from performing the essential functions of the job. As for the issue of "calling out", there is no evidence that Mr. Jenson had issues with his attendance, or "calling out" when he worked the 11p.m. – 7 a.m. shift that he was hired to do and that Ms. Farias had asked if Mr. Jenson could do at the time he disclosed his disability to Ms. Farias. Rather, it was when Mr. Jenson tried to assume additional duties that went beyond the principal objectives of his LPN position by working double shifts - and often, extended double shifts - that he needed to call out. The evidence does not reflect an LPN who failed to meet the principal objectives of the job. MCAD Disability Guidelines, II.B ("essential functions" of the job are those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job). A nurse who works 16 or more consecutive hours, is scheduled to return to work in less than 8 hours, and "calls out" does not fail to perform essential functions of the job. Such a determination would be inconsistent with Massachusetts law, and public policy. M.G.L. c. 111, § 226(f) ("[a] nurse shall not be allowed to exceed 16 consecutive hours worked in a 24 hour period. In the event a nurse works 16 consecutive hours, that nurse must be given at least 8 consecutive hours of off-duty time immediately after the worked overtime.") If Mr. Jenson's "calling out" prevented him from performing the principal objectives of the job, one would expect that Rockdale Care would have issued written disciplinary action. It did not. Nor did Rockdale Care otherwise take disciplinary action against Mr. Jenson during his employment relative to "call-outs." On the record before me, Mr. Jenson was qualified to perform the essential functions of the LPN position at Rockdale Care, and is a member of a protected class under M.G.L. c. 151B.

B. ADVERSE ACTION

When Rockdale Care terminated his employment, Mr. Jenson suffered harm and was subject to an adverse employment action. Yee v. Massachusetts State Police, 481 Mass. 290, 296-298 (2019).

C. DISCRIMINATORY ANIMUS

The record contains ample evidence of discriminatory animus by Ms. Farias towards Mr. Jenson's disability.

First, Ms. Farias displayed increasing resentment toward Mr. Jenson in the communications they had regarding Mr. Jenson's migraines and the effect the migraines had on his ability to work extended double shifts, and return to work a shift within less than eight (8) hours. Ms. Farias knew that Mr. Jenson suffered from migraines, and that working long hours without sufficient breaks between shifts had an adverse effect on Mr. Jenson's migraines. At the time he was hired, Mr. Jenson told Ms. Farias that he had Post-Concussive Disorder, resulting in frequent migraines. While Mr. Jenson wanted to work double shifts at Rockdale Care, and volunteered to do so, there were times when this was medically untenable. When Mr. Jenson worked double shifts and the day nurse arrived late, Mr. Jenson worked more than 16 consecutive hours. As noted, Massachusetts law prohibits nurses from working more than 16 consecutive hours and states that after 16 consecutive hours of work, a nurse is entitled to 8 consecutive hours of off-duty time. M.G.L. c. 111, § 226(f). Despite this, there were times that Mr. Jenson worked more than 16 consecutive hours and there were times that Mr. Jenson would return to work without 8 consecutive hours of off-duty time after he had worked at least 16 consecutive hours. On some of these occasions, and as a result of his migraines, Mr. Jenson "called out" or informed Ms. Farias that he would be arriving later than his scheduled start time. When Ms. Farias and Mr. Jenson discussed Mr. Jenson's call outs, Mr. Jenson explained that the day shift nurse came in late, that he needed sleep, and that he was unable to work his next shift because he was experiencing symptoms related to his migraines. Ms. Farias knew that Mr. Jenson had recurring migraines, that he was working more than 16 consecutive hours, that he sometimes was scheduled to return to work within less than eight (8) hours, and that working long hours without sufficient breaks between shifts, triggered Mr. Jenson's migraines. She was also aware that Mr. Jenson's inability to keep to the schedule was the result of the confluence of his extended double shifts and the symptoms of his disability.[13] In short, she knew or should have known that Mr. Jenson was working exceptionally long and legally impermissible hours and that Mr. Jenson's disability

[13] An employee who calls out frequently may not be qualified to perform the essential functions of the job. Likewise, an employer may be justified in terminating an employee with a disability if the employee is unable to meet the employer's uniformly applied standards of performance even with the provision of a reasonable accommodation. Miceli v. JetBlue Airways Corp., 914 F.3d 73 (1st Cir. 2019) (uniform application of a facially neutral policy that proscribes unexcused absences is a legitimate, nondiscriminatory reason for termination that is distinct from the employee's disability). However, Mr. Jenson was qualified to perform the essential functions of the LPN position and did satisfy Rockdale Care's standards of performance.

made this untenable. Despite this knowledge, Ms. Farias expressed antipathy toward Mr. Jenson for calling out. On this record, Ms. Farias' response to Mr. Jenson reflected bias toward Mr. Jenson because of the medical limitations posed by his disability.

Second, the hostility that Ms. Farias expressed toward Mr. Jenson when he volunteered for fewer double shifts – action that she was aware that Mr. Jenson took because of the effect that working double, extended shifts had on his disability – further supports a finding of discriminatory animus. Mr. Jenson and Ms. Farias discussed the impact that the day nurse's late arrival had on Mr. Jenson when he worked double shifts. Ms. Farias spoke with the day nurses, but the issue of their tardiness was not resolved. As a result, Mr. Jenson continued to work more than 16 consecutive hours. When Mr. Jenson began to cut back on double shifts, Ms. Farias expressed her frustration with him for doing so. Mr. Jenson's intention was "to work within his own limitations" and not to have a need to call out. When fatigue set in, which could trigger his migraines, however, Mr. Jenson needed to reduce the number of double shifts he worked for medical reasons. Ms. Farias' response to Mr. Jenson's efforts to work within his own limitations was one of frustration and animosity, and supports the conclusion that Ms. Farias bore animus towards Mr. Jenson due to his disability.

Third, under the circumstances of this case, the reason that Mr. Nickerson gave for the termination – "call outs" – supports a finding of discriminatory animus. Mr. Jenson worked double, extended shifts in contravention of state law and put his employer on notice that this was not possible due to the limitations of his disability. Subsequently, Rockdale Care terminated Mr. Jenson for "calling out." Ms. Farias knew that the symptomatic manifestation of Mr. Jenson's migraines was an inability to work well beyond a normal work week, and resulted in "call outs." Her hostility to the "call outs" that Mr. Jenson took in order to manage his disability, her subsequent participation in the termination decision and the reason Mr. Nickerson provided for the termination, evidences that the termination was based on the physical limitations resulting from his disability.[14]

[14]A termination that results from conduct that is itself the result of a disability is not automatically the same as a termination because of the disability. See Kelly v. Cort Furniture, 717 F. Supp. 2d 120 (D. Mass. 2010) (the fact-finder must still weigh the evidence to determine whether the disability, rather than the conduct, motivated the termination in whole or in part); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 37-38 (1st Cir. 2000). In Ward, an employee with severe arthritis, which caused pain and stiffness in the mornings, maintained he was tardy due to his arthritis and informed his employer that the reason for his tardiness was stiffness and pain in the mornings. Id. at 31. The district court held that even

Fourth, Rockdale Care's decision to provide a 2018 Written Warning months after the termination, which states accusatory and false reasons for the termination, permits the inference that the termination decision was fueled by discriminatory animus. Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001) ("[I]n an indirect evidence case, we permit the fact finder to infer discriminatory animus (and causation) from proof that the employer offered a false reason for the adverse employment decision.") (parenthesis in text). The 2018 Written Warning states that Mr. Jenson: (a) failed to complete an event report, (b) failed to write a note on a serious fall and fracture, and (c) had "[m]ultiple examples of poor job performance .. [illegible] .. recent suspension." If the 2018 Written Warning's allegations were true, that could support non-discriminatory reasons for terminating employment. Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 116 (2000) However, the credible evidence demonstrates the falsity of these contentions. Contrary to these allegations, Mr. Jenson credibly testified that he completed an event report, properly documented the fall and sent the patient out for further medical care consistent with Rockdale Care's protocols. Rockdale Care did not issue a suspension to Mr. Jenson, nor did Mr. Jenson engage in poor job performance. Rather, Mr. Jenson was a committed LPN, who worked as much as he could within the limitations of his disability and who competently performed the essential functions of his position. The reasons set forth in the 2018 Written Warning, provided to Mr. Jenson's attorney months after Rockdale Care terminated Mr. Jenson's employment, are false and the issuance of this document further supports the conclusion that Rockdale Care acted with discriminatory animus when it terminated Mr. Jenson's employment.

Fifth, the false reasons for termination contained in the 2018 Written Warning are different than the reason for termination verbally told to Mr. Jenson by Mr. Nickerson during the termination meeting.[15]

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if the employee "was fired 'because of' his tardiness, it does not follow that he was fired 'because of the arthritis.'" Id. at 38.The First Circuit reversed, holding that "there is arguably a conduct connection in Ward's case – the tardiness flows directly from the arthritis – and therefore a finding against him on this element was improper." Id.

[15]An employer's "shifting explanations" for an adverse employment action can support a finding of discrimination. Fife v. Metlife Group, Inc., 411 F.Supp.3d 149, 159 (D. Mass. 2019); Moran & MCAD v. David's Gym & Gonsalves, 30 MDLR 1 (2008) (shifting contradictory positions provide circumstantial evidence that the respondents' reasons are not the real reasons for terminating the complainant and that respondents are covering up a discriminatory motive which is the determinative cause of the adverse

Finally, given the close supervisory relationship that Ms. Farias had with Mr. Jenson, the history of her conflict with him over his schedule, and the stated verbal reason for the termination – "call outs," I conclude that she strongly influenced, and set the termination decision into motion. As noted, I infer from the evidence that Mr. Nickerson, the person who communicated the reason for the termination to Mr. Jenson, relied on the recommendation of Ms. Farias. As such, Ms. Farias' motives are "treated as the motives for the decision." Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 688 (2016) (employer may not insulate its decision by interposing an intermediate level of persons in the hierarchy of decision). I find that Ms. Farias bore bias toward Mr. Jenson because of his disability and strongly influenced the termination decision.

Based on the record, I conclude that Rockdale Care acted with discriminatory animus when it terminated Mr. Jenson.

D. ROCKDALE CARE'S DISCRIMINATORY ANIMUS WAS THE DETERMINATIVE CAUSE OF THE TERMINATION

In addition to proving discriminatory animus, Mr. Jenson must prove that the discriminatory animus was the determinative cause of the termination decision. Lipchitz v. Raytheon Co., 434 Mass. at 504–07. Discriminatory animus is the determinative cause if it was the active efficient cause in bringing about the action. Discriminatory animus must have contributed significantly to the termination such that it was a material and important ingredient in causing it to happen. Id. Relying on my analysis from Section III(C) and the following paragraphs in this Section III(D), I find that Ms. Farias' bias toward Mr. Jenson because of his migraines, and their inherent physical limitations, was a material and important ingredient leading to the decision to terminate his employment and thus was the determinative cause of the termination.

I find that the 2018 Written Warning is an after-the-fact attempt by Rockdale Care to cover up the real reason for Mr. Jenson's termination – Ms. Farias' animus towards Mr. Jenson's disability, and the attendant physical limitations that it presented. In addition to containing false reasons for the termination, as detailed in Section III(C), the 2018 Written Warning reflects numerous irregularities supporting the conclusion that the reason the 2018 Written Warning was

employment decision).

issued was to cover up for Rockdale Care's discriminatory animus.[16]

First, the 2018 Written Warning was not shown to Mr. Jenson at the time of the November 3, 2018 termination meeting, and yet states that Mr. Jenson refused to sign it on November 3, 2018. It is apparent that an unidentified individual wrote "refused to sign" on the form, without showing it to Mr. Jenson, and dated it as if Mr. Jenson himself refused to sign. Secondly, during that meeting, Mr. Jenson was not told that his performance was lacking in any way, or did not meet Rockdale Care's expectations, with respect to the patient fall. Instead, Mr. Nickerson told Mr. Jenson that he "did everything correct" with relation to the patient fall. Third, Mr. Jenson was not told of the allegations contained within the 2018 Written Warning at the time of termination. Fourth, the 2018 Written Warning is not signed by 2nd Level Management, or 3rd Level Management/HR Department, which would be reasonably expected in the context of a termination. Fifth, the 2018 Written Warning nonsensically indicates that if the nature of "this deficiency" persists, "further disciplinary action up to and including termination" may occur. The 2018 Written Warning was not a termination form, inaccurately states that Mr. Jenson refused to sign it, was not signed by management or human resources, and was produced to Mr. Jenson's attorney months after the termination. These facts all support the conclusion that Rockdale Care issued the 2018 Written Warning to cover up for its discriminatory reason for termination.

Mr. Jenson is not required to disprove every reason suggested in the evidence for the adverse decision. Chief Just. for Admin. & Mgmt. of Trial Ct. v. Massachusetts Comm'n Against Discrimination, 439 Mass. 729, 735–36 (2003); Lipchitz, 434 Mass. at 504–07. Nevertheless, I address the following. The termination occurred the day of, or the day after, Mr. Jenson sent a patient out for further medical care. At first glance, the timing of Mr. Jenson's termination, coupled with Mr. Jenson's testimony that Ms. Farias was "furious" at him for sending a patient out for medical care because this judgment call would result in paperwork, could support a potential non-discriminatory reason for the termination decision.[17] I reject the notion, however,

[16] Bulwer v. Mount Auburn Hospital, 473 Mass. 672 (2016) citing 1 A. Larson, Employment Discrimination § 8.04, at 8–81 to 8–82 (rev. ed. 2015) ("pretext can be shown by demonstrating ... irregularities in ... the procedures for discharge").

[17] On this record, the essence of this potential reason is Ms. Farias' peevishness about extra work, not a failure on the part of Mr. Jenson to properly care for the patient or having engaged in some other professional misconduct related to the fall. Mr. Jenson's unrebutted testimony was that he took the proper

that Ms. Farias' agitation regarding additional paperwork was the determinative cause for the decision to terminate. First, Ms. Farias was not solely responsible for additional paperwork generated by Mr. Jenson's decision to send the patient out for medical care. Ms. Farias could have tasked the day nurse or her secretary with completing the paperwork, contradicting the notion that additional paperwork would infuriate Ms. Farias to the extent that she would seek Mr. Jenson's termination. Secondly, I have credited Mr. Jenson's testimony that, at the time of the termination, Mr. Jenson asked if the termination was because of the patient fall incident and Mr. Nickerson said "no" and "you did everything correct." If the reason for the termination was the paperwork that flowed from Mr. Jenson's judgment call, Mr. Nickerson would not have told Mr. Jenson that the termination had no relationship to the patient fall and that he handled the fall correctly. Based on these findings, I conclude that Ms. Farias' frustration with Mr. Jenson because of paperwork was not the determinative reason for his termination.

E. ROCKDALE CARE VIOLATED M.G.L. c. 151B, § 4(16)

Because Mr. Jenson has proven the requisite elements of his claim of disparate treatment - protected status, harm, discriminatory animus and causation, I conclude that Rockdale Care terminated him from his employment in violation of M.G.L. c. 151B, § 4(16).

IV. REMEDIES

A. Lost Wages/Back Pay

Upon a finding that Rockdale Care committed an unlawful act prohibited by Section 4 of M.G.L. c. 151B, the Commission is authorized to award damages to make Mr. Jenson whole. M.G.L. c. 151B, § 5. For three (3) weeks after the termination, Mr. Jenson was unemployed before he was able to secure and commence a position where his wages were higher than those received at Rockdale Care. His average weekly wages at Rockdale Care were $2,200 and therefore, Mr. Jenson's lost wages are $6,600.

B. Damages for Emotional Distress

In addition to back pay, the Commission is authorized to award damages for emotional distress resulting from Rockdale Care's discriminatory termination. Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass 549 (2004). Awards for emotional

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steps to care for the patient; followed Rockdale Care's protocol, which was to send a patient out for further medical care in the event of an unwitnessed patient fall; and filled out the proper event forms and related paperwork.

distress "should be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time [Mr. Jenson] has suffered and reasonably expects to suffer; and (4) whether [Mr. Jenson] has attempted to mitigate the harm...." Id. Mr. Jenson must show a sufficient causal connection between Rockdale Care's unlawful act and his emotional distress. Id.

Upon being told that he was terminated from Rockdale Care, Mr. Jenson was angry, upset, with hurt feelings, "a little distraught" and "a little depressed." I infer from the fact that Mr. Jenson frequently volunteered to work double shifts, particularly at the beginning of his employment, and worked "all the holidays he could", that the termination was particularly hurtful to Mr. Jenson. Mr. Jenson described sleeping a lot for one week, before he initiated efforts to locate alternative employment. There was no evidence, however, that Mr. Jenson continued to feel distraught or depressed after he found alternative employment three weeks after his termination from Rockdale. Based on these facts, I conclude that Mr. Jenson is entitled to damages for emotional distress resulting from employment discrimination in the amount of $10,000.

V. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Rockdale Care is ordered:

1) To cease and desist from any and all acts of discrimination based on disability.

2) To pay to Complainant, Christopher Jenson, the sum of $6,600 in back pay with interest thereon at the rate of 12% per annum from the date the complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

3) To pay to Complainant, Christopher Jenson, the sum of $10,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

VI. 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 10 days of receipt of this decision and file a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020). If a party files a Petition for Review, the other

party has the right to file a Notice of Intervention within ten days of receipt of the Petition for Review and shall file a brief in reply to the Petition for Review within 30 days of receipt of the Petition for Review. All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party. 804 CMR 1.23 (2020).

VII. PETITION FOR ATTORNEY'S FEES AND COSTS

Any petition for attorney's fees and costs for Complainants' Counsel shall be submitted to the Clerk of the Commission within 15 days of receipt of this decision. Pursuant to 804 CMR 1.12 (19) (2020), such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. Respondent may file a written opposition within 15 days of receipt of said petition.

So ordered this 20th day of September, 2023.

Simone Liebman

Simone R. Liebman
Hearing Officer