COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and EDWIN RIVERA,
Complainants

Docket No.13 SEM 02846

v.

TOP-NOTCH ABATEMENT, LLC and
RUSSELL ORCUTT,
Respondents

Appearances: Kathryn Crouss and Meaghan Murphy, Esqs. for Complainant
Keith Minoff, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 7, 2013, Complainant Edwin Rivera filed a charge of discrimination based on handicap and retaliation against Respondents Top-Notch Abatement, LLC and Russell Orcutt, individually. Complainant alleges that he suffered injuries on the job, was not permitted to file for workers' compensation, was denied time off as an "accommodation" for his injuries, and was terminated from his job in violation of M.G.L. 151B, Section 4 (1).

A probable cause finding was issued and a public hearing was held on May 31 and June 28, 2019. The following individuals testified at the hearing: Complainant Edwin Rivera, Jodi Orcutt, Respondent Russell Orcutt, and Randy Smith. The parties presented the following exhibits: Joint Exhibits 1-9, 16, 18, 19, 21, 22, 24-25, and 27-29 (some exhibits were proffered and excluded).

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Edwin Rivera ("Complainant") resides in Springfield, MA. During his employment with Respondent Top-Notch Abatement, LLC, he lived in Westfield MA. Transcript I at 37. He is a licensed asbestos abatement worker. Transcript I at 42.
2. Respondent Top-Notch Abatement, LLC ("Top-Notch") is an asbestos removal and mold remediation company with a principal place of business in Palmer, MA. The company has in excess of ten (10) employees.
3. Respondent Russell Orcutt founded Top-Notch Abatement in 1996 and is the sole owner of the company. From the start of the company until approximately 2016, his former wife Jodi Orcutt was the office and human resource manager. Transcript I at 199-200. In those roles, Ms. Orcutt was responsible for processing new hires, submitting payroll, and filing workers' compensation claims. Transcript I at 204-207.
4. On April 29, 2013, Complainant was hired by Respondent Top-Notch Abatement. Transcript I at 43. At the time of his hire, Complainant received and signed a form entitled "Personal Responsibilities for Workers and Supervisors of TNALLC (Top Notch Abatement LLC) Employees." The document states in relevant part that employees, "*MUST*" call out sick before the start of their shifts and, if possible, the night before and that for absences of more than three consecutive days due to illness, employees must bring in a doctor's note prior to returning to work. When an employee has a doctor's appointment, funeral or any necessary day off, the rules state

that, "you *must notify* the office with the date as soon as possible." Exhibit 1F, p. 32; Transcript I at 136.

5. Complainant began performing asbestos abatement work for Respondents in mid-May 2013. He testified that he did not work a regular schedule. Transcript I at 48-49. According to Complainant, he commuted to work on public transportation, but he also acknowledged that Russell Orcutt or Top-Notch employees including Orcutt's son, would sometimes give him a ride to the work. Transcript I at 50, 147.
6. Complainant worked for Top-Notch Abatement until terminated approximately eleven weeks after he was hired. Complainant worked, on average, 24 hours per week. Joint Exhibit 2. According to the credible testimony of Jodi and Russell Orcutt, Complainant did not work full-time because he was unavailable, couldn't be reached, or couldn't get a ride to the job. Transcript I at 223, II at 31, 75-76. According to Russell and Jodi Orcutt, Top-Notch Abatement had full-time work available for Complainant and expected him to work full-time. Transcript I at 221-222; II at 45-46, 58; II at 69, 75.
7. Top-Notch employees were expected to inquire daily about their work schedules for the following day. Transcript II at 48, 59. Complainant testified that if he was not on a job site, he would call the Top-Notch office after 2:00 p.m. in order to get his work schedule for the next day, but if he was on a job site, he would find out from the site supervisor whether and where he was working the following day. Transcript I at 48.
8. Complainant had three different rates of pay: 1) a driving rate of $9.00 per hour; 2) an asbestos abatement rate of $14.00 per hour; and 3) a "prevailing wage" rate (applicable to public works projects) of $44.34 per hour. Transcript I at 45-46.

9. On June 3, 2013, Respondent Russell Orcutt received a report from a customer that Complainant was swearing on his phone at the customer's property. Transcript I at 55. The swearing stemmed from an argument that Complainant was having with his brother who was also an employee of Top-Notch. Transcript I at 51. Orcutt issued Complainant a written warning for using bad language. Joint Exhibit 1-C. Complainant signed the warning and apologized for his actions. Id.

10. According to Jodi Orcutt's credible testimony, Complainant missed work without calling in on June 17 and 18, 2013. Transcript II at 25-26.

11. Beginning in late June 2013 and continuing for several weeks through mid-July 2013, Complainant worked primarily on a Top-Notch job known as "Ames Privilege," located in Chicopee.[1] Transcript II at 67. The assignment was a prevailing wage job which involved the removal of flooring material containing asbestos from a large factory building that was being converted into apartments and offices. The asbestos abatement project was shut down for safety issues between late May and July 15, 2013, but during that time, Top Notch employees continued to seal up the basement, monitor the site, and perform other work which kept them busy. Transcript II at 31, 75, 155-158.

12. On Tuesday, July 16, 2013, at approximately 10:45 a.m. while Complainant was removing a layer of flooring at the Ames Privilege job, he fell through a hole in the flooring up to his armpits. Transcript I at 58. His brother helped him up. Transcript I at 58, 60. Complainant testified that after he was helped out of the hole, he went to

[1] Most of Complainant's work between June 23, 2013 and June 16, 2012 involved the Ames Privilege job, but there were four days during the period when he worked on other assignments. Joint Exhibit 2, pp. 40-43.

take a step but his left knee gave out. Transcript I at 58, 61, 64. He said that he also hurt his left hip and left ribs. Transcript I at 61.

13. Complainant testified in a contradictory fashion about whether he was able to continue working that day. He asserted on direct examination that he was not able to continue working because he couldn't breathe and couldn't put weight on his knee, but he asserted on cross-examination that he returned to work for the rest of the shift. Transcript I at 61-63, 112. Complainant testified that he asked his supervisor Randy Smith if he could go to the hospital. Transcript I at 62, 66, 114-115. According to Complainant, Mr. Smith spoke to Russell Orcutt over the phone, and Mr. Orcutt said that Complainant should not return to work if he went to the hospital. Transcript I at 66-67. Complainant testified that he remained on the job even though he was unable to perform heavy duties such as hauling bags of debris. Transcript I at 69-70. I credit that Complainant fell through a hole in the floor and experienced pain, but I do not credit that Complainant was discouraged from going to the hospital or that he was unable to perform his regular duties after he fell through the hole in the floor. Russell Orcutt testified credibly that if Complainant had informed Top-Notch that he needed medical attention and/or to miss work because of his injury, the Company would have submitted a workers' compensation claim and granted the request. Transcript II at 89.

14. Former Top Notch employee Randy Smith testified that he worked for Top Notch Abatement in 2013. He left Top Notch approximately six years ago and has had no contact with the Orcutts since then. Transcript I at 183. Mr. Smith was Complainant's site supervisor on the Ames Privilege job. Transcript I at 164, 166.

He filled out an injury report and went over its contents with Complainant who read and signed it. Joint Exhibit 1; Transcript I at 65. Mr. Smith reported Complainant's accident to Respondent Russell Orcutt by telephone from the job site. Transcript I at 173. Mr. Smith testified that he did not see Complainant fall through the hole on July 16, 2013, but saw him immediately thereafter. Transcript I at 168-169. According to Mr. Smith, whom I found to be credible, Complainant limped around "a little bit" and appeared to be sore in the hip, rib, and knee areas after he was helped out of the hole, but declined to go to the hospital when Mr. Smith asked him if he wanted to go and went back to work after taking a twenty to twenty-five minute break. Transcript at 169-170, 172-173, 194. Mr. Smith's assertion that Complainant declined to go to the hospital is consistent with a 2013 statement that Mr. Smith gave to Top Notch's insurance carrier, AIM Mutual. Transcript II at 187; Impeachment Exhibit A.

15. Russell Orcutt testified that he asked if Complainant needed medical assistance or needed to go to the hospital and was informed by Mr. Smith that Complainant wasn't looking for medical attention right away and wanted to stay at work. Transcript II at 73-74. Mr. Orcutt credibly denied that he told Complainant that if he went to the hospital, he should not come back to his job. Transcript II at 73, 77.

16. Complainant earned a prevailing rate on the Ames Privilege job of over $40.00 an hour. Transcript II at 74. Prior to starting work on the Ames Privilege job, Complainant earned less than half the prevailing rate.

17. Complainant continued to work the rest of the day on Tuesday, July 16, 2013. According to Mr. Smith, Complainant appeared to be getting better as the day wore on. Transcript I at 174-175.

18. Complainant worked the remainder of the week, July 17, 18, and 19, 2013. Transcript I at 115-116. Complainant performed his job without restrictions and did not request any accommodations. Transcript II at 11, 87, 133, 144. I do not credit Complainant's assertion that he asked to take off work on Wednesday, July 17, 2013 in order to go to the hospital but was told by Russell Orcutt that he was "really needed" at work. Transcript I at 68. I credit that Complainant may have experienced pain and swelling in his knee as a result of his accident, but I don't credit that he was unable to perform "heavy duty" job functions or that he continued to work because Mr. Orcutt forced him to do so. Instead, I believe that Complainant continued to work because he was receiving a wage of over $40 an hour for the job and did not want to lose income. Transcript I at 72.

19. On Saturday, July 20, 2013, Complainant went to Noble Hospital in Westfield because he still had pain and swelling in his knee. Transcript at 71; Joint Exhibit 3. He was given crutches and a knee immobilizer for a possible sprain/strain of his left knee, was instructed to rest and to ice and elevate his leg, and was told to follow up with an orthopedist. Transcript I at 71, 75, 116; Joint Exhibit 3. Complainant did not receive a doctor's note that medically excused him from work or imposed restrictions on his ability to work. Transcript I at 116-118. He did not see an orthopedist as instructed. Id.

20. Complainant testified that he called Mr. Orcutt from the hospital to say that his knee was swollen but not broken. Transcript I at 73-74. According to Complainant, Mr. Orcutt was concerned about whether he reported to hospital personnel that the injury was work-related. Transcript I at 73. I do not credit this testimony.

21. Jodi Orcutt testified that it was her practice to submit a workers' compensation form to AIM Mutual for employees seeking medical attention or missing work due to work-related injuries. Transcript II at 5-6. She testified that she did not submit a workers' compensation report of Complainant's injury on July 16, 2013 because Complainant did not leave work due to his injury and because she was not aware that he sought medical attention. Id.

22. Russell Orcott testified that he was not concerned that workers' compensation rates for Top Notch might go up if a claim were filed for Complainant because the company was already in a high risk pool. Transcript II at 94, 107-108, 138. Mr. Orcott credibly denied that he ever discouraged Complainant from reporting that his injury was work-related. Transcript II at 78.

23. Complainant testified that on Monday, July 22, 2013, he went to work at the Ames Privilege site even though he was still in pain because he needed the money. Transcript I at 76-77. Complainant informed Mr. Smith that he had been to the hospital over the weekend. Transcript I at 119. Mr. Smith drafted a "Field Injury Report" which states that Complainant related that "he went to hospital on his own time and doctor released him with no restrictions and was able to return to work." Transcript I at 119-120; Exhibit 27. Complainant did not sign the report but testified that what Mr. Smith wrote was accurate. Transcript I at 120.

24. During Monday and Tuesday July 22-23, 2013, Complainant worked on the Ames Privilege job without any restrictions. Transcript I at 120.

25. Complainant arranged to miss work on Wednesday, July 24, 2013 in order to attend Springfield District Court in regard to a restraining order being sought against him

and on the afternoon of Thursday, July 25, 2013 in order to attend Housing Court in regard to an eviction proceeding against him. Transcript I at 79-85, 150; II at 24-25. Complainant testified that he sought to take off both days in their entirety. Transcript I at 77. I do not credit that Complainant arranged to take off both the morning and afternoon on July 25th.

26. Following the first court date on Wednesday, July 24, 2013, Complainant was in an altercation outside Springfield District Court. Transcript I at 80. He went to the hospital after the altercation and was diagnosed with a broken nose. Transcript I at 81-82; Exhibit 6.

27. Complainant did not report to work on the morning of Thursday, July 25, 2013 and did not call in ahead of time to say he would be absent. Transcript II at 25, 78. As a result of his broken nose, Complainant could not wear a respirator and mask over his nose which asbestos abatement workers are required to wear in order to perform their work. Transcript I at 84, 125; II at 127-129.

28. Complainant did not report to work on Friday, July 26, 2013 and did not call in ahead of time to say that he would be absent. Transcript II at 25, 79-80. Complainant maintains that he was not scheduled to work on Friday, July 26, 2013. Transcript I at 85, 123, 129. I do not credit this testimony because it was contradicted by Russell Orcutt and by Complainant's own charge of discrimination wherein he states that Friday, July 26, 2013 was the next day he was scheduled to work.

29. Russell Orcutt testified credibly that at some point on Thursday, July 25, 2013 or Friday, July 26, 2013, Complainant contacted him about having been in a fight and being sore but did not explain the extent of his injuries, did not mention his broken

nose, and did not say that he would be absent from work on Thursday, Friday, or the following Monday. Transcript II at 78-81, 87, 121-122, 125. Mr. Orcutt credibly denied that Complainant asked for any accommodation for his injury. Transcript II at 87, 131.

30. Complainant did not appear for work on Monday, July 29, 2013. Transcript II at 80. He testified that he called the office at 6:30 a.m. on the morning of Monday, July 29, 2013, left a message on Top-Notch's office answering machine saying that he would not be into work that day because he had a broken nose, and that he received a call-back from Russell Orcutt around 8:30 or 9:00 a.m. that morning. Transcript I at 89-90, 133, 135. Complainant testified that during the call, he explained the situation to Mr. Orcutt, and Mr. Orcutt told him to bring in "all the paperwork" pertaining to his knee, nose, and light duty. Transcript I at 89-90. I do not credit Complainant's testimony about contacting Respondents to report his broken nose on Monday, July 29, 2013 at 6:30 a.m. because it was credibly rebutted by Russell and Jodi Orcutt. Transcript II at 23, 81, 87.

31. Complainant was again absent from work on Tuesday, July 30, 2019. Transcript II at 81-82. He states that he did not call in this absence because he had already informed the office on the previous day about his situation. Transcript I at 128-129.

32. According to Jodi and Russell Orcutt, Complainant did not report that he had broken his nose until the afternoon of Tuesday, July 30, 2013 when Complainant called to say that he would be dropping off paperwork on the following day that documented his injuries. Transcript II at 21-24, 82, 87, 123-124. I credit their testimony over Complainant's.

33. Jodi and Russell Orcutt discussed terminating Complainant failing to report absences from Thursday July 25 through Monday July 29, 2013, swearing over the phone in front of a customer, arguing with his brother at work, being unreliable, and not having transportation to and from work. Transcript II at 27-28, 83. They decided to terminate Complainant when they did not hear from him on Monday, July 29, 2013, but delayed telling him while only women were present in the office. Transcript II at 28-29.

34. Complainant came into the Top-Notch office on Wednesday, July 31, 2013 with medical documentation of his hospital visit which he gave to Jodi Orcutt. Transcript I at 92-94; II at 17. Complainant had not been to work since July 23, 2013. Transcript I at 138. The paperwork did not include a doctor's note stating when Complainant would be able to resume work. Transcript I at 138-139. According to Complainant, he failed to bring such documentation because he hadn't yet seen a doctor. Transcript I at 139.

35. Ms. Orcutt testified that she didn't file a workers' compensation report at that time (or earlier) based on her mistaken belief that she was not required to file a claim if an employee did not miss any work. Transcript I at 211, 229; II at 6, 47, 60.

36. Complainant did not hear from Russell Orcutt on Wednesday, July 31, 2013 or on Thursday, August 1, 2013. Transcript I at 94-95.

37. On Friday, August 2, 2013, Complainant called Top-Notch because a paycheck had not been deposited in his bank account. Transcript I at 95. At that time, Russell Orcutt told him that he was terminated. Transcript I at 97.

38. Following his termination, Complainant's attorney contacted Respondent's insurance carrier, AIM Mutual, in regard to the injury which Complainant sustained at work on July 16, 2013. Transcript I at 140-141. The insurance carrier advised Jodi Orcutt to file a workers' compensation claim which she did on August 26, 2013. Transcript I at 101, 143; II at 7; Exhibit 29.

39. The workers' compensation claim was initially denied but ultimately granted in or around February 2014, retroactive to January 1, 2014. Transcript I at 141-144; II at 15; Exhibit 16. Complainant ultimately received $29,609 in workers' compensation benefits. Transcript I at 144; Exhibit 16. Complainant also received unemployment benefits for between two to four months after he was terminated. Transcript I at 150-151.

40. Complainant received medical treatment for his knee following his termination which consisted of physical therapy and surgery. Transcript I at 102.

41. According to Jodi Orcutt's credible testimony, if an employee came in with a doctor's note asking for light duty, the employee would be given light duty. Transcript I at 215. Top-Notch had, in the past, made accommodations available for employees with disabilities when they asked for time off, light duty, or other types of accommodation. Transcript II at 9-11.

III CONCLUSIONS OF LAW

Disability Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of an

impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1(17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2. In order to be qualified, a handicapped individual must be able to perform the essential functions of a job with or without a reasonable accommodation. A reasonable accommodation is one that does not impose "undue hardship" on an employer. See MCAD Handicap Guidelines at pp. 6-8.

Absent direct evidence of discrimination, a *prima facie* case of handicap discrimination may be established through the three-stage method adopted in Wheelock College v. MCAD, 371 Mass. 130 (1976). Applying the Wheelock College paradigm to a claim of handicap discrimination, a complainant must show that: 1) she/he is a member of a protected class; 2) she/he performed his work at an acceptable level; 3) she/he suffered adverse employment action(s); and 4) the adverse employment action occurred in circumstances that give rise to an inference of handicap discrimination. See Gannon v. City of Boston, 476 Mass. 786, 793 (2017) (where parties dispute reason for adverse employment action, case is analyzed in accordance with McDonnell Douglas framework); Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 45 (2005); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts).

Complainant maintains that an inference of handicap discrimination may be drawn from his performance as a competent employee who nonetheless was terminated on the heels of a work-related injury for which he sought medical treatment and received workers' compensation and a non-work-related injury for which he had to take time off

from work in order to recuperate. This sequence of events is sufficient to satisfy a prima facie case of handicap discrimination. The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as "not onerous." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995).

Once a prima facie case of handicap discrimination is established, the burden of production shifts to Respondents to articulate and produce some credible evidence to support a legitimate, nondiscriminatory reason for its treatment of Complainant. See Gannon v. City of Boston, 476 Mass. 786, 794 (2017) (once a prima facie case is established, employer bears burden of showing with credible evidence that real reason for adverse action is not employee's handicap); Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 50 (2005) *quoting* Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 138 (1976). Respondents do so with credible evidence proving that Complainant never sought time off from work or requested a modification of his job responsibilities.

Regarding the accident at work on July 16, 2013, Complainant, no doubt, experienced pain in his knee, left hip, and ribs as a result of the accident at work, but there is no credible evidence that he was unable or unwilling to perform his regular duties following the accident or that he was discouraged from going to the hospital by Mr. Orcutt. According to Mr. Smith, whom I found to be credible, Complainant limped around "a little bit" but declined to go to the hospital and went back to his duties after taking a twenty to twenty-five minute break. Complainant worked the remainder of the week, July 17, 18, and 19, 2013. I conclude that he did so, not because Mr. Orcutt forced

him to continue working, but because he was receiving a prevailing wage of over $40 per hour for the job and did not want to lose income.

Although Complainant finally went to Noble Hospital on the weekend following his Tuesday accident, he failed to obtain a doctor's note medically excusing him from work or restricting his ability to work in any way. These circumstances indicate that Complainant's workplace injury did not rise to the level of a disability. See Hallgren v. Integrated Fin. Corp., 42 Mass. App. Ct. 686, 688-689 (1997) (no disability where plaintiff recovered from knee injury with a month and was not regarded as being disabled).

The receipt of workers' compensation benefits months after the incident also fails to support a claim of disability discrimination. To be sure, in some situations the receipt of such a benefit establishes a record of impairment and/or presumed qualified handicap status. Pursuant to G.L. c. 152, section 75B, an "employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable . . . with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B." See Bleau v. Molta Florist Supply, 35 MDLR 33 (2013) (work-related injury for which employee received workers' compensation establishes a rebuttable presumption of handicap status); Jouabert v. United Parcel Service, Inc., 22 MDLR 253 (2000) (workers' compensation settlement entitled employee to qualified handicapped status under chapter 152); Patel v. Everett Industries, 18 MDLR 26, 28 (1996) (employee may be presumed handicapped pursuant to G.L. c. 152, section 75B by virtue of receiving workers' compensation benefits).

Notwithstanding such presumption, the receipt of workers' compensation benefits in this case does not compel a finding that Complainant was treated adversely based on a disability because Ms. Orcutt testified credibly that she didn't file a workers' compensation report at the time of Complainant's injury based on her good faith, albeit mistaken, belief that she was not required to do so if an employee did not miss work and did not report medical intervention. Complainant continued to work, did not inform Respondents that he sought medical treatment for his injury, and did not seek any accommodations. Under such circumstances, an inference of adverse treatment based on disability cannot be drawn despite the grant of workers' compensation.

Complainant's second injury arising out of a non-work-related altercation also fails to support a prima facie case of handicap discrimination. It is undeniable that the broken nose which Complainant sustained during a fight would have made it difficult, if not impossible, to wear a respirator at work. Thus, a broken nose arguably created a disability. However, no adverse action was taken against Complainant as a result of this alleged disability. After sustaining his broken nose, Complainant simply stopped reporting to work, failed to call in his absences between Thursday July 25, 2013 and Tuesday, July 30, 2013, and did not inform the company of his condition until the afternoon of Tuesday, July 30, 2013 when he communicated that he would drop off paperwork about his injury on the following day.

Complainant's failure to report his absences in a timely fashion violated the requirement he agreed to at hire that employees "*MUST*" call out sick before the start of their shifts and, if possible, the night before and that for absences of more than three consecutive days due to illness, employees must bring in a doctor's note prior to

returning to work." Credible evidence establishes that Complainant did not follow these instructions. The Orcutts tolerated Complainant's deficiencies for a period of time, but after he failed to report his absences beginning on Thursday July 25, 2013, they made a job-related, non-discriminatory decision to terminate him.

The credible evidence in the record paints a picture of an unreliable employee who could not be counted on to come into work as needed or to call in his absences as required. Over an eleven-week period, Complainant failed to appear for work on the following occasions without providing advance notice of his absences: June 17, June 18, July 25, July 26, July 29, and July 30, 2013. These absences, together with the other reasons proffered by the Orcutts for terminating Complainant are non-pretextual and convincing. As such, they are sufficient to defeat a claim of handicap discrimination. See Gannon, 476 Mass. at 794; Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass. 437, 444-446 (1995) (satisfying stage two requirement causes burden of persuasion to shift back to Complainant at stage three to demonstrate by a preponderance of evidence that Respondents' reasons are pretextual).

Complainant next maintains that he sought an accommodation in the form of days off from work for the dual injuries he experienced in July 2013 and that the request was unreasonably denied by Respondents. To state a case of discrimination based on a failure to accommodate, Complainant must prove that he was a qualified handicapped person capable of performing the essential functions of his job, that he requested a reasonable accommodation and that he was prevented from performing his job because his employer failed to reasonably accommodate the limitations associated with his handicap. See Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Hall v. Laidlaw

Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000).

Complainant fails to satisfy the above criteria because Ms. Orcutt testified persuasively that she granted light duty to employees with doctors' notes requesting accommodations. She provided credible testimony that Top-Notch has provided accommodations to employees with disabilities when they asked for time off, for light duty or for other types of accommodations. Unlike such employees, Complainant did not seek such assistance for either his knee/hip injury or for his broken nose. I credit Mr. Smith's testimony that Complainant did not seek time off from work after hurting his knee. I likewise credit Mr. Orcutt's testimony that Complainant did not mention his broken nose after the altercation which caused it, did not tell Mr. Orcutt that he would be absent from work from Thursday through Tuesday, July 25-30, 2013, and did not ask for any accommodations. Accordingly, Complainant has failed to make out a prima facie case of handicap discrimination based on a failure to accommodate.

Retaliation

Retaliation is defined by Chapter 151B, sec. 4 (4) as punishing an individual's opposition to practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, Complainant must establish a prima facie case of retaliation by demonstrating that: (1) he/she engaged in a

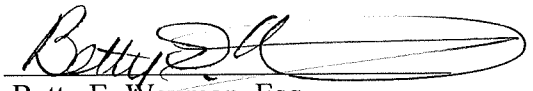
protected activity; (2) Respondent was aware of the protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Complainant maintains that he engaged in protected activity by asking for time off from work as an accommodation for his injuries. Such a request, had it been made, might have established protected activity. See Wright v. Compusa, Inc., 352 F.3d 472 (1st Cir. 2003) (requesting an accommodation is protected activity for purposes of claiming retaliation). However, Complainant did not request time off as an accommodation for his injuries, he did not inform his supervisor that he wanted to go to the hospital, and Russell Orcutt did not tell Complainant that he was prohibited from returning to work if he went to the hospital. Accordingly, Complainant has failed to make out a prima facie case of retaliation.

IV. ORDER

The case is hereby dismissed. 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 of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 17th day of December, 2019



Betty E. Waxman, Esq.,
Hearing Officer