COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PAUL PIERCE,
Complainants

v. Docket No. 05 BEM 02613

ANDERSON INSULATION and
ROBERT ANDERSON,
Respondents

Appearances: David Stillman, Esq., for Complainant
Robert Greene, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 25, 2005, Paul T. Pierce ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that he was subjected to discrimination by Respondent on the basis of handicap.

The MCAD issued a probable cause finding and on September 30, 2009, certified the case for public hearing on the questions of whether Complainant is a handicapped person who was subject to discrimination when terminated by Respondent Company.

A public hearing was conducted on May 24 and 25, 2010. The parties introduced 36 joint exhibits into evidence and Respondents introduced one additional exhibit marked as Respondents' Exhibit 1. The following individuals testified at the public hearing: Complainant, Patricia Pierce, Jeremy Pierce, Paul Pierce, Jr., Anton Trigler, and Robert Anderson.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

I. FINDINGS OF FACT

1. Complainant Paul T. Pierce worked as an "Icynene Technician" on a spray foam insulation crew for Respondent Anderson Insulation Company from June 16, 1997 to April 30, 2005. Complainant was an employee-at-will who did not have a written employment contract. According to the Company's Employee Manual, compensation reviews are usually given with yearly performance reviews. Joint Exhibit 36, pp. 21 & 22.
2. Respondent Anderson Insulation Company is an employer within the meaning of M.G.L. c. 151B, sec. 1(5). As of the date of public hearing, it employed between 75 to 100 people.
3. Respondent Robert Anderson is Company Treasurer. He did not supervise Complainant directly but knew him from processing insurance claims and handing out pay checks. Respondent Robert Anderson negotiates the purchase of supplies from vendors, negotiates insurance from insurance carriers, processes Workers' Compensation claims, processes claims for unemployment benefits, and books jobs for the Company.
4. Anton Trigler was the supervisor of the spray foam insulation division of the Company from 1985 until 2008. Transcript II at 232. Trigler had authority over

the day-to-day operations of the spray foam insulation division, including the hiring and firing of employees, the issuing of work orders, the assigning of workers to jobs, the promoting of workers to crew chief, and the determination of compensation rates. Transcript II at 235-239. Trigler was Complainant's immediate supervisor. Transcript I at 124. Trigler could not recall a single instance of Robert Anderson ever terminating an employee. Transcript I at 239.

5. Truck crews in the spray foam insulation division of Respondent Company consist of one crew chief and one or two additional workers. Typically, crew members arrive around 5:30 a.m. each morning at the operations center of the Company in Abington, MA. Trigler would assign workers to crews/trucks and issue work orders to the crews.
6. Crew chiefs are generally responsible for driving a truck to and from work sites, spraying foam insulation, and overseeing the work of the crew. According to Trigler, in "99.9%" of situations, the crew chief is the "sprayer" on the truck. Transcript II at 241.
7. Crew members on a spray foam truck load the truck with supplies, travel to the job site in the truck, unload the truck, carry supplies into the site, prepare windows and fireplaces in rooms scheduled to be insulated, assist the crew chief as he sprays foam, clean up the job site, reload the truck, and return to the Abington facility.
8. Complainant was never a crew chief. He testified that he didn't know why he was not a crew chief, that he was never offered the position, and that if he had been asked, he would have accepted it (Transcript I at 144; II at 383), but he also

testified that he "couldn't" be a crew chief because he was "allergic" to the Icynene spray foam insofar as it caused him migraine headaches and that he was "content" as a crew member. Transcript I at 42, 144. I do not credit Complainant's testimony about not being offered a crew chief position.

9. Trigler testified that Complainant didn't want to be a crew chief because he didn't want the responsibility and that it would have been possible for Complainant to function as a crew chief without spraying foam insulation. Transcript II at 295.

10. At the commencement of Complainant's employment, he earned $10.00 per hour with benefits including a health insurance plan to which the Company contributed 50% and a profit-sharing plan. Transcript I at 82. In 1999, his pay increased to $12.00 per hour; in 2000, his pay increased to $14.00 per hour; and in 2002, his pay increased to $16.00 per hour. According to Complainant, he only received pay increases when he asked for them.

11. Complainant sustained work-related injuries which resulted in Workers' Compensation claims in early 2000 and in March of 2002. Transcript II at 368. The March of 2002 injury resulted from somebody tossing an industrial stapler to Complainant which went into his arm. Transcript I at 178. Complainant returned to work in April of 2002 on a light-duty basis. Joint Exhibit 20.

12. On the afternoon of November 26, 2002, Complainant suffered another work-related injury when he was driving one of Respondent's trucks back to the Abington facility. His truck was struck by a car which went through a stop sign. Complainant jammed the brake and clutch of the truck in an attempt to avoid the collision. In doing so, Complainant suffered a hip contusion which exacerbated a

condition in his right hip. Complainant's right hip had been operated on at age fifteen and subsequently in 1987. Transcript I at 122. The day after the accident, Complainant went to the emergency room of Jordan Hospital in Plymouth, MA. When told there might be an extended wait, Complainant left the hospital with any examination or treatment. A few weeks after the accident, Complainant saw his orthopedic surgeon, Dr. Siliski, who had treated Complainant for previous problems with his hip. Complainant began physical therapy but stopped after a few sessions because he felt the therapy was aggravating the injury. Complainant's wife, Patricia Pierce, testified that after the accident, Complainant developed a limp and could no longer climb ladders, carry heavy items, or take long walks. Transcript I at 209.

13. Respondent Company filed an injury report with the Massachusetts Division of Industrial Accidents on December 10, 2002. Complainant was out of work from November 26, 2002 until July 5, 2003. He received benefits through the Division of Industrial Accidents, i.e., Workers' Compensation benefits.

14. At the request of the insurance company that provided Workers' Compensation benefits, Complainant was examined by Dr. Pick, an Independent Medical Examiner who reviewed Complainant's medical records and history and prepared a report dated June 9, 2003 which concluded that Complainant was able to return to work and "engage in his date of injury work activities." Joint Exhibit 6. Dr. Pick stated in his report that Complainant sustained a possible hip sprain which may have temporarily aggravated pre-existing arthritis but which did not permanently or materially aggravate his condition. Id. Based on the report,

Complainant's Workers' Compensation benefits were discontinued. Joint Exhibit 7.

15. On July 5, 2003, Complainant returned to work in a light-duty capacity, with a note from Dr. Siliski stating that Complainant could perform "limited duty, may use a cane as needed, no ladders, no heaving lifting/carrying." Transcript I at 56; Joint Exhibit 9. The note acknowledged that Complainant reported that "employer will take him back and accommodate restrictions." The note did not include an end date for the restrictions. Complainant did not use a cane while working and stopped using a cane altogether in or around October of 2003.
16. After Complainant returned to work, he resumed working as a crew member. Complainant testified that he performed his job with "no difficulties or problems," could climb four-foot ladders, carry equipment if it wasn't too heavy, and climb stairs, but he could no longer climb 6 or 10 foot ladders or lift pipe staging platforms for the installation of insulation. Transcript I at 49, 50, 54, 150-152. Complainant could operate hand-held foam guns to fill cracks around windows, could cover windows and fireplaces with poly-plastic, and could carry handheld tools and other objects. Transcript I at 64.
17. A February 5, 2004 office note by Dr. Siliski states that as of that date, Complainant was still working on a light-duty basis, walking with a mild limp, having moderate pain in his right hip, and requiring a "restricted work situation" on a permanent basis. Joint Exhibit 12; Transcript I at 60.

18. Complainant asked for assistance from fellow crew members if he considered his assignment to be too strenuous. According to Complainant, most crew members would carry staging or climb high ladders for him. Transcript I at 63.
19. Complainant's sons, Jeremy Pierce and Paul Pierce Jr., worked for the Respondent Company between 2003 and 2006. Jeremy Pierce testified that after the accident, his father couldn't climb ladders above the second rung, could not use "stilts" at work, and could not carry items weighing over twenty pounds. Transcript I at 97, 107. Paul Pierce Jr., testified that his father could not climb ladders or lift heavy items after his accident but that none of the crew chiefs had any problem with the limitations that his father had in regard to climbing ladders or lifting. Transcript I at 111, 118.
20. On December 8, 2003, Complainant received a pay raise to $17.00 per hour. Transcript I at 126-127. In 2004, Complainant earned $48,402.70, consisting of regular pay and overtime. Transcript I at 81.
21. In January of 2005, Complainant sought a pay raise from Trigler. Trigler testified that he declined to increase Complainant's pay because Complainant earned more per hour than any other crew member who was not a crew chief except for John Ainslie who had been with the Company for approximately thirty years. Transcript II at 290. Of the Company's seven crew chiefs, one earned the same hourly rate as Complainant, three earned $18.00 per hour, two earned $20.00 per hour and one, with eleven years greater seniority than Complainant, earned $24.00. Respondents' Exhibit 1; Transcript II at 251. According to Trigler,

raising Complainant's hourly rate would have resulted in having to increase the pay of other employees who were crew chiefs. Transcript II at 294.

22. Complainant testified that rather than deny him a raise outright, Trigler said he would get back to him. According to Complainant, he continued to ask Trigler for a raise on a weekly basis for almost two months. Transcript II at 384-385.

23. Trigler testified that after he refused to increase Complainant's pay in January of 2005, Complainant would ignore him and walk away whenever Trigler attempted to speak with him. According to Trigler, other employees reported that Complainant was a "miserable and unhappy person" at work, not a "team player," and they did not like having him on their trucks. Transcript II at 247, 259, 261, 262, 279-280. Trigler described Complainant as a very good employee prior to being refused a raise in January of 2005 but not a good employee after that time. Transcript II at 303. Trigler did not impose any discipline on Complainant and hoped that with time, Complainant would "lose his attitude" about not receiving a pay raise and become a "team player" again. Transcript II at 246, 271-272, 284-285, 304. During the period in which Complainant refused to communicate, Trigler dealt with Complainant through his crew chief. Transcript II at 302, 306.

24. Complainant acknowledged that he was "a little upset" with Trigler during the beginning of 2005, but denied that he refused to speak to Trigler or that he was disrespectful. Transcript I at 128-130. I do not credit this testimony.

25. Complainant testified he made an appointment to speak to Robert Anderson on March 30, 2005, because he always had a good rapport with him and wanted to ask him for a raise. Transcript I at 137. Complainant testified that during their

meeting, he used the expression "all around monkey pays peanuts" in reference to his job. Transcript I at 139-140. Anderson interpreted this expression to mean "if you paid peanuts, you get monkeys." Transcript II at 337-338.

26. According to Robert Anderson, Complainant appeared at his door on March 30, 2005 without an appointment, asked for a pay raise, and said he was going to look for another job if he did not get one. Transcript II at 346. Anderson testified that he asked Complainant what his earning history was, what his health contribution was, what he did as a crew member, and why he was not a crew chief. Transcript II at 337-339. Anderson took notes at the meeting. Joint Exhibit 14. His notes listed Complainant's starting rate of pay, his rate of pay after ten years on the job, his health insurance contribution on an hourly basis, the "monkey" statement, and a reference to Complainant fixing equipment. Anderson recorded three items under the topic "Downfall": 1) Gave up spraying – headaches 2) Problem w Ladders – 3) Like/Lite work & co.[1] Joint Exhibit 14.

27. Between March 30, 2005 and April 7, 2005, Anderson spoke to Trigler about Complainant's hourly rate. Transcript II at 342. According to Anderson, Trigler said Complainant's pay was "fine" and that Complainant "doesn't even talk to me." Based on that information, Anderson proposed terminating Complainant and Trigler agreed. Transcript II at 343. Anderson testified that he and Trigler never discussed any matters relating to Complainant's physical condition. Transcript Ii at 343.

[1] In my judgment, the entry appears to be "Lite" work but the transcript records Anderson as testifying that Complainant said he "did like work." Transcript II at 339.

28. After speaking with Trigler, Anderson made additional entries dated 4-7-05 and 4-30-05 on the same page on which he recorded his March 30, 2005 conversation with Complainant. Joint Exhibit 14. Anderson's entry dated 4-7-05 states that Complainant's pay is "correct in overall hierarchy." His entries on both 4-7-05 and 4-30-05 reference a decision to "let [Complainant] go." Id.
29. According to Complainant, he arrived to work at some point in early April of 2005 and learned that he was not scheduled to be on any truck that day. He subsequently saw Trigler who sent him to Robert Anderson's office where he was told that he was terminated. Transcript I at 76; Transcript II at 344-345.
30. Company records list Complainant as terminated effective 4/30/05. Respondent's Exhibit 1.
31. Complainant testified that he had three or four phone conversations with Anderson after the termination but did not receive a satisfactory explanation about why he was let go. Complainant requested his personnel file. The file did not contain any reprimands but did contain Robert Anderson's notes from the March 30, 2005 meeting.
32. According to Complainant, there was a "severe drug problem" at the Company involving three or four individuals. Transcript I, p. 81. Complainant sent the Company a "To Whom It May Concern" letter dated May 27, 2005, in which he asserted that his crew chief/nephew James Reynolds, Jr., as well as Anthony Trigler's son and another employee were "profoundly into Oxycontin and Cocaine." Joint Exhibit 15. Complainant wrote that in the months prior to his dismissal, he had discussed the drug situation with Trigler and with James

Reynolds Sr., his brother-in-law/Company foreman, and, on the morning of his discharge, with Robert Anderson. Id. According to Complainant's letter, Anderson refused to reconsider Complainant's dismissal for the following reasons: too many of his family members were employed in the spray foam division, he was a "bi-product" of the "[drug] situation," his "attitude" and "not performing [his] job." Id. Complainant claims in his May 27, 2005 letter that he was dismissed for advising Anderson of the drug problem within the company. Transcript I at 174.

33. The following employees were terminated following Complainant's discharge: Shawn Glauben on 5/27/05; Andreas Trigler on 7/15/05; James Reynolds, Jr. on 9/30/05; and James Reynolds, Sr. on 12/06. Respondent's Exhibit 1. Robert Anderson testified that some of the people identified by Complainant were terminated because of drug problems.

34. During his last year working for Respondent (between January 1, 2005 and April 28, 2005), Complainant earned $16,544.21. Complainant did not receive a profit-sharing payment in 2005 because he was not employed for the requisite number of hours that year. Complainant received $12,144.00 in unemployment compensation in 2005, following his termination.

35. In October of 2005, approximately twenty-four weeks after his termination, Complainant commenced working for Tech-Etch of Plymouth, MA as a machine operator. He earned $4,407.28 in 2005, $24,524.27 in 2006, and $21,844.57 in 2007. Transcript I at 84-85. In 2008, Complainant began working for RA Energy of Nantucket, MA, as an installer of insulation. He performed the same job and

had the same restrictions that he had with the Respondent Company following his 2005 accident. He earned $15,195 at RA Energy in 2008. Complainant receives $30.00 per hour, works 45 hours per week, and earns approximately $1,350.00 per week. Complainant's job in Nantucket does not have benefits and requires that he be away from his wife during weekdays from Monday night or Tuesday morning until Friday night each week.

36. Complainant testified that between being terminated by Respondent and hired at RA Energy, he had financial problems which forced him to borrow money from his parents. He described the experience of borrowing money from his parents as "devastating" because they were elderly and on a limited income. Transcript I at 88. He described losing his job as taking away his self-esteem and causing him to lose sleep and over 40 pounds of weight. Complainant asserts that he was "almost in divorce court a couple of times" as a result of his employment problems. Complainant estimates that his sleep, weight, and marital problems lasted approximately three years. Transcript I at 90.
37. Complainant's son Paul Pierce Jr. testified that his father was miserable and depressed after he was terminated, wanted to be left alone, and slept a lot. Transcript I at 114.
38. Complainant's wife testified that Complainant was very upset when he was terminated. Transcript I at 213. According to Patricia Pierce, the termination "kind of put a little space between us … I just couldn't get through to him. … He just shut down. Transcript I at 214. She estimates that Complainant was distant

for almost a year. Id. She described her husband as losing a lot of weight, sleeping all the time," and not eating. Transcript I at 215.

III. CONCLUSIONS OF LAW

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

While the question is a close one, Complainant qualifies as a handicapped and/or presumed handicapped individual. Complainant has presented credible evidence of chronic hip pain which limits his ability to engage in the major life activities of walking, climbing, and carrying. Complainant's wife, Patricia Pierce, testified credibly that after his November 26, 2002 car accident, Complainant developed a limp and could no longer climb ladders, carry heavy items, or take long walks. Complainant's orthopedic surgeon confirmed that six months after the accident, Complainant was still walking with a mild limp, having moderate pain in his right hip, and needed to be in a "restricted work situation." Complainant's physical limitations in regard to walking, climbing and carrying are sufficient to render him a disabled individual under Chapter 151B. See Shedlock v. Department of Correction, 442 Mass. 844, 849-852 (2004) (jury could

conclude that inmate who used a cane to walk and experienced chronic pain was disabled with respect to the major life activity of walking); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (recognizing as major life activities such basic abilities as walking, seeing, and hearing).

The MCAD has traditionally interpreted the term "handicap" broadly in order to effectuate the protections of Chapter 151B. See G. L. ch. 151B, sec. 9 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof…"); Dahill v. Police Department of Boston, 434 Mass. 233, 240 (2001) (declining to accept federal limitations on disability status resulting from the correction of impairments by medication or devices). This liberal interpretation of Chapter 151B is consistent with Congress's 2008 amendments to the ADA. 29 CFR 1630 (Fed. Reg. 9/23/09, Vol. 74, No. 183). Pursuant to the 2008 amendments, "the definition of disability … shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA [which does not require] an impairment [to] render an employee completely incapable of performing major life activities." Bragdon v. Abbott, 524 U.S. 624, 641 (1998).

Complainant not only merits disabled status on the basis of his physical limitations, he is entitled to a rebuttable presumption of qualified handicapped status under G.L.c.152, section 75B (1) as a recipient of disability payments. See Gilman v. C&S Wholesale Grocers, Inc., 170 F.Supp.2d 77, 84 (D. Mass. 2001) (individuals suffering work-related injuries deemed qualified handicapped persons under chapter 151B for as long as their status under Workers' Compensation law influences their treatment by others); Patel v. Everett Industries, 18 MDLR 26,28 (1996) (complainant

who sustained injury for which she received Workers' Compensation is presumed to be handicapped pursuant to c. 152, sec. 75B); Joubert v. United Parcel Service, Inc., 22 MDLR 253 (2000) (Workers' Compensation settlement entitles Complainant to presumption of qualified handicap status under chapter 152). Although Complainant ceased to receive Workers' Compensation payments in June of 2003, a record of his having done so on three prior occasions constituted an indelible part of his employment history when he was terminated in 2005. Thus, Complainant's history of applying for and receiving Workers' Compensation benefits contributes to a presumption of handicap status.

Notwithstanding the record and the reality of a physical disability, Complainant was able to perform the essential functions of his job when he returned to work in June of 2003. Along with other crew members on Respondent's spray foam trucks, Complainant participated in loading and unloading of supplies, monitoring equipment, preparing windows and fireplaces in rooms scheduled to be insulated, cleaning up at the job site, and inspecting jobs at completion. Complainant was able to climb small ladders, climb some stairs, and carry equipment that wasn't too heavy. Following his November 26, 2002 car accident and a seven-month recuperation, Complainant was able to perform his essential duties in a satisfactory manner from July of 2003 until his termination some seventeen months later. His supervisor described him as a "very good employee" and granted Complainant a raise in December of 2003. Based on his performance and his supervisor's evaluation, Complainant is entitled to consideration as a qualified handicapped employee who performed the essential functions of a crew member position between June of 2003 to April of 2005.

The fact that Complainant was confined to light duty during this period does not detract from his qualified handicapped status. Management, crew chiefs, and fellow crew members all acquiesced to the arrangement whereby Complainant avoided carrying heavy objects, climbing high ladders, and using "stilts" to reach high spaces. There is no credible evidence that anyone objected to Complainant's light-duty role.

As a result of the aforesaid factors, when Complainant sought a raise in January of 2005, he did so as a long-term employee with no disciplinary record who had not received an increase in his hourly rate since December of 2003 despite the fact that the Company's Employee Manual provides for yearly salary reviews**.** These circumstances give rise to an inference of discrimination, which, along with Complainant's qualified handicapped status, establish a prima facie case of handicap discrimination. Complainant, moreover, was fired for having a bad attitude, but he was never warned that his job was in jeopardy for behaving in a hostile manner. Respondents also assert that Complainant was denied a raise in January of 2005 because the Company did not want to elevate his hourly rate above that of the Company's crew chiefs, but that concern could have been addressed by granting Complainant a small raise in keeping with the Company's salary structure.

Once a prima facie case is established, the burden of proof shifts to Respondents to articulate a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible evidence. See Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441-442 (1995). If the Respondents succeed in offering such a reason, the burden then shifts back to the Complainant at stage three to persuade the fact

finder by a preponderance of evidence that the articulated justification is a pretext for discrimination. See Blare, 419 Mass. at 444-445.

According to Respondents, their reasons for terminating Complainant relate to his attitude, not his work ethic. In support of this rationale, Anton Trigler testified credibly that after he denied Complainant a pay hike in January of 2005, Complainant ignored him, walked away whenever he attempted to speak, behaved in a "miserable" and "unhappy" manner at work, and was not a "team player." According to Trigler, other employees did not want to have Complainant on their trucks. Complainant acknowledged that he was "a little upset" with Trigler during the beginning of 2005, although he denied that he refused to speak to Trigler or that he was disrespectful. Prior to suggesting termination, Trigler had hoped that with time, Complainant would "lose his attitude" about not receiving a pay raise and become a team player again, but such an improvement was not forthcoming.

Respondents' employment records confirm that when Complainant sought a raise at the beginning of 2005, he earned more than any other non-crew chief with the exception of one employee who had been with the Company for approximately thirty years. At the time, Complainant earned $17.00 per hour whereas the lowest-paid crew chief earned $18.00 per hour. Thus, granting a pay raise to Complainant would have boosted his hourly rate into the range of crew chief pay, motivating the crew chiefs, in turn, to seek raises. According to Anderson and Trigler, they decided to terminate Complainant in order to forestall such a situation and to put an end to the antagonism caused by Complainant's negative attitude. These reasons, supported by evidence in the record, are sufficient to satisfy Respondents' burden at stage two.

At stage three, Complainant has the burden of establishing that Respondents' reasons for firing him were not the real reasons but, rather, a pretext for discrimination. Complainant may carry this burden of persuasion with circumstantial evidence that the proffered reasons are pretextual and that Respondents are covering up a discriminatory motive which is the determinative cause of the adverse employment decision. See Lipchitz v. Raytheon Co., 434 Mass 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, a finding of discrimination is not mandatory in the absence of discriminatory intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 117-118 (2000).

Complainant has failed to sustain his burden of establishing that Respondents' reasons for firing him were a pretext for discrimination. The most compelling evidence in support of Complainant's claim of pretext is that Respondent Robert Anderson, while interviewing Complainant on March 30, 2005, took notes which included three items under the topic of "Downfall." Two of the items refer to tasks which Complainant could not perform -- spraying and climbing ladders -- and a third refers to either "like" or "lite" work. Complainant interprets these notes as linking his physical limitations to his loss of employment.

Respondent, on the other hand, asserts that the "downfall" entries refer to the reasons why Complainant did not seek promotion to the position of crew chief. I conclude that Respondents' interpretation is the more reasonable one and interpret the "downfall" entries as attempting to explain why Complainant was not being paid as a supervisor. It is logical that Robert Anderson would have focused on this issue because of his legitimate concern that granting Complainant a raise would cause the crew chiefs

to seek increases as well. The "downfall" notes are consistent with Complainant's testimony that he rejected a crew chief position because the spray foam used by crew chiefs gave him migraine headaches and because he was "content" with his non-supervisory position. Accordingly, I conclude that Anderson's notes explain why Complainant was not functioning in a supervisory job rather than reveal Anderson's intention to discharge Complainant for his physical limitations.

Respondent's lack of discriminatory animus about Complainant's physical condition is supported by the fact that Complainant had been back at work on light-duty basis for approximately seventeen months by the time he sought a raise in January of 2005. There is no evidence that during the intervening seventeen months that management or Complainant's co-workers had a problem with his physical limitations. In fact, the Company gave Complainant a raise in December of 2003, some six months after he returned to work on a light-duty basis. Trigler testified credibly that Complainant was a very good employee until he developed an attitude problem in January of 2005. Complainant's poor attitude was manifest by his refusing to speak to Trigler after being denied a raise.

In contrast to persuasive evidence of non-discriminatory reasons for discharge, the evidence in support of discrimination is unconvincing. Complainant was less credible in asserting that he made weekly requests for more money during the first few months of 2005 than was Trigler in asserting that he immediately denied Complainant a raise which caused Complainant to stop speaking to him. Complainant was also lacking in credibility when he testified that he didn't know why he was not a crew chief, that he was never offered a crew chief position, and that he would have accepted a crew chief position if it

had been offered to him. These claims are wholly at odds with his testimony that he couldn't be a crew chief because he was "allergic" to the Icynene spray foam and that he was "content" with his position.

Also damaging to Complainant's case is the letter he drafted just weeks after his discharge in which he hypothesized about why he was not permitted to return to work. In that letter, Complainant omitted any mention of discrimination as a possible reason for Respondents' refusal to re-employ him. Complainant's analysis included: too many family members employed in the spray foam division, being a "bi-product" of the drug situation at work, his "attitude" and "not performing [his] job." Had Complainant believed that his physical limitations were the real cause of his separation from work, it stands to reason that he would have included this reason in his letter. The omission of any reference to his handicap or to his light-duty status as a possible motive for Respondents' actions indicates that Complainant did not believe that his physical limitations played a role in his termination.

Based on the foregoing I conclude that Complainant has failed to sustain his burden of establishing that Respondents' reasons for firing him were not the real reasons for termination but, rather, a pretext for discrimination.

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 23rd day of August, 2010.

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Betty E. Waxman, Hearing Officer