**** Please note that this Investigative Report has been amended to remove portions that addressed allegations regarding which the Human Rights Commissioners found there were no reasonable grounds to believe there was a violation of Vermont law or in which the Human Rights Commissioners deferred making a final determination. ****

INVESTIGATIVE REPORT
HRC Case No.:E09-0006
EEOC Case No. 16K-2009-00068

CHARGING PARTY: "Mr. Cedar"

RESPONDENT: Vermont Agency of Transportation

CHARGE: employment/ disability

SUMMARY OF CHARGE: In his Charge of Discrimination of November 12, 2008 and his Amended Charge of Discrimination of July 14, 2009, Mr. Cedar states he is an individual with disabilities and alleges the Vermont Agency of Transportation, failed to provide him with reasonable accommodations for his disabilities and terminated him from employment because of his disabilities.

SUMMARY OF RESPONSE: In its response of August 19, 2009, the Vermont Agency of Transportation denied that it failed to provide him with properly requested reasonable accommodations for his disabilities or terminated him from employment because of his disabilities.

PRELIMINARY RECOMMENDATIONS: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Agency of Transportation illegally discriminated against Mr. Cedar because of his disability in violation of 9 VSA §4502 by its failure to provide him with reasonable accommodations and by terminating Mr. Cedar's employment.

INTERVIEWS

= Thomas Ball, 10/28/09
= Penny Brown, 11/16/09
= Mr. Cedar, 9/9/09, 10/28/09, 11/3/09, 1/20/10
= Sherward Farnsworth, 10/6/09
= Jonathan Goddard, 3/23/10
= Michael Hedges, 1/19/10
= Dr. Francis Kalibat, 5/28/10
= Matthew Langham, 1/19/10
= Marty Raymond, 2/1/10
= Wayne Symonds, 10/28/09
= Ted Tedesco, 2/16/10, 2/23/10
= Richard Tetreault, 10/6/09

DOCUMENTS

= Mr. Cedar's medical records and written statements of medical care providers, 4/26/96 - 4/10/10
= Mr. Cedar's AOT personnel file, including e-mails and letters to, from and regarding Mr. Cedar, performance evaluations, AOT forms completed by or about Mr. Cedar, 8/01 - 5/08
= ER physician's report, 12/21/07
= Initial Charge of Discrimination, 11/12/08
= AOT response to initial Charge of Discrimination, 12/15/08
= Letters from Mr. Cedar to HRC, 3/4/09, 6/10/09, 9/28/09, 12/12/09
= E-mails from Mr. Cedar to HRC, 5/5/09 (x2), 5/6/09 (x2), 10/28/09, 10/29/09 (x2), 11/2/09, 11/6/09 (x2), 11/13/09 (x2), 11/18/09 (x2), 12/12/09 (x3), 12/28/09 (x4), 12/30/09, 12/31/09, 1/10/10, 1/11/10, 1/15/10 (x2), 1/16/10 (x2)
= Memo from Mr. Farnsworth to Atty. Vincent, 11/9/09
= Amended Charge of Discrimination, 7/14/09
= AOT response to Amended Charge of Discrimination, 8/19/09
= E-mail from Tim Shea to HRC, 1/11/10

CASE ELEMENTS

FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

The Charging Party must show by a preponderance of the evidence:
(1) Charging party was a person with one or more disabilities pursuant to Vermont's Fair Employment Practices Act (FEPA);
(2) Respondent employer is covered by FEPA and had notice of the charging party's disability(ies);
(3) With reasonable accommodation, the charging party could have performed the essential functions of his job; and
(4) Respondent employer failed to make such accommodations.

Adapted from Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 183-184 (2d Cir. 2006)

DISCRIMINATORY TERMINATION

The Charging Party must show by a preponderance of the evidence:
(1) Respondent employer is subject to FEPA;
(2) Charging party was disabled within the meaning of the FEPA;
(3) Charging party was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and
(4) Charging party was discharged from his job under circumstances giving rise to an inference of discrimination.

Adapted from Kennedy v Dept. of Public Safety, 168 Vt 601 (1998) (mem. dec.)

I. FACTS

A. UNDISPUTED FACTS

The facts detailed in paragraphs 1 - 4 below, are not disputed by the parties.

1. "Mr. Cedar" is a pseudonym for the charging party.

2. Prior to working for the Vermont Agency of Transportation (AOT),

Mr. Cedar worked as a civil engineer with the Massachusetts Department of Transportation.

3. Mr. Cedar was employed by the AOT in Montpelier as a civil engineer starting in August 2001.

4. In May 2008, Mr. Cedar was terminated from his position with AOT.

B. INITIAL STATEMENTS OF MR. CEDAR

Mr. Cedar stated as follows:

5. Mr. Cedar is an individual with both physical and mental disabilities. His physical disabilities include traumatic brain injury, mobility difficulties, and injuries to and chronic pain in his head, back and neck. All of these physical disabilities resulted from being struck by a truck in 1995. Mr. Cedar's mental disabilities, which he has had since before the 1995 accident, include bipolar disorder, moderate to severe depression, mood disorder, cognitive limitations and alcohol dependency.[1]

6. Mr. Cedar's first four years at AOT were spent working within the Planning and Transportation unit of AOT's Planning, Outreach and

[1] According to Vermont's Supreme Court, alcoholism is a disability protected by Vermont's Fair Employment Practices Act. Kennedy v. Dept. of Public Safety, 168 Vt. 601, 602 (1998) (mem.dec.). However, "adverse employment actions taken for misconduct are not discriminatory even though the employee was an alcoholic and the misconduct was related to the misuse of alcohol." Id.

Community Affairs Division. In that unit, Mr. Cedar served as the state scenic byways coordinator and the public lands and forest highways coordinator. Mr. Cedar reports that his work for AOT during that period went well. His supervisor, Matthew Langham, provided Mr. Cedar with both positive reinforcement and flexibility.

7. In mid-2005, AOT transferred Mr. Cedar to the Structures unit within AOT's Program Development Division. In the Structures unit, Sherward Farnsworth served as Mr. Cedar's immediate supervisor.

8. Mr. Cedar found that Mr. Farnsworth had a supervisory style that was much different than his previous supervisor. In particular, Mr. Cedar found Mr. Farnsworth to be inflexible and did not provide positive reinforcement. Over time, Mr. Cedar found that Mr. Farnsworth increasingly sought to "micro-manage" Mr. Cedar's schedule and his work for the Structures unit. Mr. Farnsworth was also increasingly critical of Mr. Cedar's work. Mr. Cedar found that Mr. Farnsworth's supervisory style caused him extreme stress which impeded his ability to attend to his work.

C. MR. CEDAR'S FIRST FOUR YEARS AT AOT

9. Mr. Cedar's first two performance evaluation reports (Feb. 25, 2002 and Feb. 12, 2003), written by supervisor Matthew Langham, rate

Mr. Cedar's performance as "excellent." Mr. Langham's third performance evaluation report (March 4, 2004) rates Mr. Cedar's performance as "satisfactory" and describes Mr. Cedar as a "genuine asset" to his team and a "pleasure to work with!" (Exclamation point in original.)

10. During his interview with this investigation, Mr. Langham stated that during most of Mr. Cedar's tenure in his unit, Mr. Cedar's work was excellent and he had good rapport with his co-workers. Mr. Cedar communicated well both orally and in writing. Toward the end of Mr. Cedar's work in Mr. Langham's unit, Mr. Cedar's work "deteriorated" to a degree, and for this reason Mr. Cedar's evaluation rating changed from "excellent" to "satisfactory." Mr. Langham speculated that alcohol abuse was at least one cause of that deterioration. In support of that speculation, Mr. Langham stated that toward the end of their working relationship he received a few voice mail messages from Mr. Cedar that had been left very late at night in which Mr. Cedar slurred his words as he stated he felt ill and would not be at work the next morning.

11. Shortly after Mr. Langham wrote Mr. Cedar's March 2004 ("satisfactory") performance evaluation report, additional performance problems arose. In April 2004, Mr. Langham wrote Mr. Cedar an office memo entitled "Performance Concerns" focusing on unfinished tasks. In

June 2004, Mr. Langham orally reprimanded Mr. Cedar for an unexcused absence. In August 2004, Mr. Langham gave Mr. Cedar a formal reprimand for showing up at work apparently under the influence of alcohol. In December 2004, Mr. Langham informed Mr. Cedar in writing that he might be disciplined for unexcused absences.

12. In 2005 there was a reduction in force throughout AOT during which several positions, including Mr. Cedar's, were eliminated.

13. In July 2005, after Mr. Cedar had been moved to the Structures unit, his new division director imposed a written reprimand on Mr. Cedar for unexcused absences that had occurred during his time under Mr. Langham's supervision.

D. NOTICE OF DISABILITY

14. Mr. Cedar asserts that his AOT supervisors were aware that he was an individual with disabilities.

15. In his interview with this investigation, Mr. Cedar's first AOT supervisor, Mr. Langham, stated that he recalled Mr. Cedar reporting a back problem and requesting a new desk chair – a request granted by Mr. Langham. Mr. Langham stated that the only other accommodation that he recalled Mr. Cedar requesting during Mr. Langham's time as his supervisor

was that of intermittent leave pursuant to Vermont's Parental and Family Leave Act.[2] Mr. Langham also recalled that, toward the end of his supervision of the charging party, Mr. Cedar participated in residential treatment for alcohol dependence at the Brattleboro Retreat and Maple Leaf Farm. Mr. Langham stated he learned of Mr. Cedar's treatment from Mr. Cedar's requests for medical leave.

16. The documentary record corroborates Mr. Langham's recollection. It includes a request to AOT for medical leave so Mr. Cedar could receive residential treatment for alcohol abuse at Brattleboro Retreat and Maple Leaf Farm during the autumn of 2004.

17. AOT provided this investigation with a letter dated October 6, 2004 that it had received from Jane Worley, APRNCS (Advanced Practice Registered Nurse Clinical Specialist) of Brattleboro Retreat. The letter stated that the Brattleboro Retreat had diagnosed Mr. Cedar with the following:

> alcohol dependence
> cognitive disorder, not otherwise specified
> major depression, recurrent severe without psychosis
> nicotine dependence

18. Penny Brown is a Human Resources Specialist in AOT's Human Resources unit. Ms. Brown recalls receiving the October 6, 2004 letter

[2] The documentary record indicates that Mr. Cedar requested intermittent leave in autumn 2004, not as

from Brattleboro Retreat. Ms. Brown is the employee in the AOT Human Resources unit who receives and reviews requests for unpaid medical leave and supporting medical documents from the units in which Mr. Cedar worked. Ms. Brown is also the person within AOT who provides AOT employees with information on how to request reasonable accommodations for disabilities.

19. On June 9, 2005, AOT received a fax from Maple Leaf Farm stating that Mr. Cedar had begun treatment on June 2 and his discharge was planned to occur on June 15, 2005.

20. Sherward Farnsworth became Mr. Cedar's immediate supervisor in mid-June 2005. Mr. Cedar asserts that, shortly after his transfer to Mr. Farnsworth's unit, he orally informed Mr. Farnsworth of his 1995 accident and resulting physical disabilities. Mr. Cedar asserts further that, beginning in autumn 2005, he sought to inform Mr. Farnsworth of his mental disabilities by repeatedly asking Mr. Farnsworth to meet with him to discuss "personal issues." Mr. Cedar states that Mr. Farnsworth declined each such request.

21. Mr. Farnsworth denied declining any requests by Mr. Cedar to speak stating, "I would not blow him off." Mr. Farnsworth stated that Mr.

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an accommodation for disability but rather to attend to his elderly mother who he said was in ill health.

Cedar never stated to him that he was a person with disabilities. Mr. Farnsworth added that at some point in time, Mr. Cedar provided him with a document, the content of which Mr. Farnsworth did not recall, but that may have described Mr. Cedar's claims of disability.

22. Asked by this investigation when he first learned that Mr. Cedar claimed to be an individual with disabilities, Mr. Farnsworth stated that shortly after Mr. Cedar began working in his unit, Mr. Farnsworth learned from a source, a source he was not able to recall, that Mr. Cedar was alcoholic; Mr. Farnsworth stated he considers alcoholism to be a disability. Mr. Farnsworth stated to this investigation that alcoholism was Mr. Cedar's only disability of which he was aware.

23. Mr. Farnsworth stated that his supervisory protocol required employees under his supervision to submit to him requests for unpaid medical leave and supporting documentation from medical providers. Mr. Farnsworth would review such paperwork and then promptly submit it to Penny Brown of AOT's Human Resources unit. Ms. Brown stated that, in most instances, she and Mr. Farnsworth would have been the only AOT staff members who would have reviewed Mr. Cedar's requests for medical leave and supporting documentation; AOT Personnel Administrator Ted Tedesco would have been the only other AOT staff member who might

have reviewed Mr. Cedar's medical paperwork, and then only in instances regarding a request for schedule change. Because of this protocol, Mr. Farnsworth and Ms. Brown received the following medical documentation:

> June 2005 – stating that Mr. Cedar was receiving counseling from an office that, on its letterhead, described itself as offering "substance abuse and mental health counseling services."

> April 2007 -- the same information again on the same letterhead

> October 2007 – from the same counselor, albeit on different letterhead, stating, in part, that Mr. Cedar was receiving psychiatric care.

> August 2007 – from a Licensed Alcohol and Drug Counselor stating that Mr. Cedar reported episodes of "extreme" depression "rendering him unable to perform routine activities."

> October 2007 – from a substance abuse counselor stating that Mr. Cedar was receiving "inpatient psychiatric care" at the Windham Center (Bellows Falls). The documentation included diagnostic paperwork that apparently triggered Mr. Cedar's admission to Windham Center, including diagnoses of depression NOS, acute anxiety and alcohol dependence at risk of relapse.

> April 2008 – from another counselor whose letterhead advertised his services as "psychotherapy and substance abuse counseling." The documentation was apparently accompanied by a form that listed Mr. Cedar's diagnoses as major depression disorder, recurrent, without psychotic features, alcohol dependence and post-traumatic stress disorder.

E. REQUESTS FOR REASONABLE ACCOMMODATION

24. AOT imposed a disciplinary suspension on Mr. Cedar during May 2007. Upon Mr. Cedar's return to work, the Structures unit Program

Manager, Michael Hedges, sent him a May 30, 2007 e-mail identifying four work problem areas he asked Mr. Cedar to address. The problem areas identified by Mr. Hedges were 1) unapproved and unexcused absences, 2) untimely submission of time reports, 3) erratic work start and end times, and 4) taking extended or extra breaks.

25. In response to that e-mail, Mr. Cedar sent a May 31, 2007 e-mail to Mr. Hedges, simultaneously sending copies of his e-mail to Penny Brown, Sherward Farnsworth, and Ted Tedesco. Mr. Cedar's May 31, 2007 e-mail included the following statements. (Typographical errors reported below as in original.):

> I apologize and I feel bad about having problems in the course of my employment assignment with the State of Vermont. I will and do take ownership of any of the attributes that you indicate are problem areas and I will work dilligently to correct these situations with the solutions you have pointed out to me ... Being that I just returned yesterday from a 30 day suspension of which I took full responsibility for my actions of concern of which I paid a hefty price for my mistakes in full. I am very concerned with improving my performance so as to avoid any and all situational mistakes that require such extreme and serious punishment as I have paid.
>
> ... I ... need to take resposibility in disclosing for myself the fact that I as an individual have certain limitations or frailties that would and are considered dissabilities. Being that medical and functional dissabilities issues are very private confidential and unfortunately embarrasing or have the affect to cause individuals inferiority complexes for plain and simple medical limitations often beyond or extremely challenging for an individual to acknowledge, manage, treat and basically learn to live and adapt too.
>
> Please let me know of how I can best communicate these frailties that are directly linked to some or all of the problems to

varying degrees, so that a complete disclosure and understanding can be utilized to best capture my best attributes and assetts in my employment assignments with the State of Vermont.

... I wish to recommend that in developing my full potential as an employee, an understanding of frailties or dissabilities that are not blatantly visually obvious and are of a more concealed nature. I believe this managerial and human understanding should be implemented in managing and supervising my assetts and unfortunately some liabilities that so diligently we/I are trying to correct. This is an area that I have had considerable experience in during my career and situations such as mine require specific management skills that not all employers supervisors or managers possess and consequently the employer struggles in trying to manage and accommodate people with protected frailties and life debilitating defects of which they struggle to live with and function with in society.

I believe disclosure of these dissabilities would help in understanding, managing and supervising myself so that I can be of best service to the State of Vermont as a civil servant. It certainly would provide a platform for understanding what exactly I have to live with and accommodate due to this medical situation. In no way shape or form am I stating that my potential to be a beneficial employee assett to any employer is in any way diminished my capacity to be a high achiever of goals and an overall strong performer given the proper setting. I have had to identify and request reasonable accommodations to get me to this level of professional development and accomplishment thus far in the field of civil engineering and project management.

I also feel compelled to point out that since my arrival in program development the feedback has strictly emphasized my problem areas of which I acknowledge and own and will work dilligently to implement. In my quest and overall goal of being of best service to the State of Vermont could I respectively request that my attributes and assetts be identified so that I further provide and improve my service to the State of Vermont. I cannot recall one positive attribute being pointed out at any time.

26. During interviews with this investigation, Mr. Hedges, Ms. Brown,

and Mr. Farnsworth each recalled receiving Mr. Cedar's e-mail of May 31, 2007. Mr. Hedges, Ms. Brown, Mr. Farnsworth, and Mr. Tedesco were unsure whether any AOT personnel responded to the e-mail, although Mr. Tedesco noted that such a response would have been the responsibility of Ms. Brown. Mr. Hedges recalled that he asked Mr. Tedesco about Mr. Cedar's e-mail; Mr. Tedesco responded that AOT's Human Resources unit would respond to Mr. Cedar.

27. A week later, Mr. Cedar sent a June 7, 2007 e-mail to Sherward Farnsworth, simultaneously sending copies of his e-mail to Penny Brown, Michael Hedges, Wayne Symonds, Ted Tedesco and Tom Trahant (chief of AOT's Human Resources unit). That e-mail included the following statements. (Typos reported below as in original.):

> I have repeatedly requested ADA dissability, confidential coordination, in regards to my ADA and FMLA[3] rights and the issues and services of coordination I have requested on my behalf have not been responded too and have been ignored. I have brought up several rights related issues intended to beeter the workplace and workforce with the only result of bringing these issues up has seemingly been retaliatory actions directed toward me in response to my perceived helpfull suggestions for the work environment in which I work.
>
> I say this in complete confidence since these are medically sensitive protected information rights pertaining to my health and the negative affects of which I am suffering due to my circumstances and treatment in the workplace.

[3] The federal Family and Medical Leave Act that provides for unpaid medical leave.

28. During interviews with this investigation, Mr. Hedges, Ms. Brown, Mr. Farnsworth, and Mr. Symonds each recalled receiving Mr. Cedar's e-mail of June 7, 2007. Mr. Hedges, Mr. Farnsworth, Mr. Symonds, and Mr. Tedesco were unsure whether any AOT personnel responded to the e-mail. Mr. Symonds stated that, to his knowledge, this e-mail did not trigger any consideration among Mr. Cedar's supervisors to change the personnel supervising Mr. Cedar or their supervisory methods. Ms. Brown stated that on June 8, 2007 she responded by both mailing and hand delivering to Mr. Cedar a State of Vermont form for requesting a reasonable accommodation along with a copy of the State's reasonable accommodation policy (i.e., State of Vermont Policy and Procedures Manual section 3.2).[4]

29. After another week, Mr. Cedar sent a June 14, 2007 e-mail to Sherward Farnsworth, simultaneously sending copies of his e-mail to Penny Brown, Michael Hedges, Wayne Symonds, and Ted Tedesco. The beginning of that e-mail requested flexibility in taking break time and in doing stretching exercises during work hours. In a latter part of the e-mail, Mr. Cedar made the following statements. (Typos reported below as in original.):

> It appears that the medically substantiated accommodations is

[4] Ms. Brown stated to this investigation that she had first provided Mr. Cedar with a request for reasonable accommodation form in December 2004, although she did not recall what triggered her then providing the form. She did not receive a completed form from Mr. Cedar at that time.

the states current process for dealing with situations such as mine by funneling the requests to the accomodations board for the workplace compliance at or above ADA rehabilitation requirements.

Correct me if I am wrong in this assumption.

Is there someone assigned that I can speak to on this type of issue, such as typical accomdations requests? Basically whom is the accomodations request coordinator?

30. During an interview with this investigation, Mr. Farnsworth stated that he recalled receiving Mr. Cedar's e-mail of June 14, 2007; he did not respond because he expected Ms. Brown to do so. Ms. Brown stated that on June 16, 2007, she mailed Mr. Cedar a State of Vermont form for requesting a reasonable accommodation. On that date she also hand delivered the form to Mr. Cedar along with a copy of the State's reasonable accommodation policy (i.e., State of Vermont Policy and Procedures Manual section 3.2).

31. On June 14, 2007, Mr. Cedar attended a meeting with Penny Brown, Sherward Farnsworth, Wayne Symonds and Ted Tedesco. Topics of discussion at that meeting included Mr. Cedar's requests for break times and for an ergonomic assessment of his workstation. Penny Brown's notes of that meeting state, in part, "If I do not get ADA paperwork I will send e-mail. Need to send e-mail stating no ADA request and state he has not request [sic] so we will lay this to bed."

32. Ms. Brown spoke with Mr. Cedar about the state's form for

requesting a reasonable accommodation and the state's reasonable accommodation policy. She is not certain when she spoke with Mr. Cedar about the form, but she believes it would likely have been in early June 2007, shortly after having provided him with the form.

On the occasion she met with Mr. Cedar, Ms. Brown described to him the process for requesting a reasonable accommodation, starting with completing the form. She informed Mr. Cedar of the definition of disability and showed Mr. Cedar the questions on the form that he needed to answer, including that portion of the form which required a statement saying how the individual believed his disabilities affected his ability to care for himself. She also informed Mr. Cedar that he needed to specify on the form which of his limitations adversely affected which aspects of his job, and that he must provide medical verification of such limitations. Ms. Brown explained the form and the process to Mr. Cedar but did not elicit information from Mr. Cedar beyond asking Mr. Cedar whether he had any questions of her. Ms. Brown does not recall Mr. Cedar asking her any questions or requesting her to help him complete the form.

33. Ms. Brown again provided much the same information regarding the reasonable request form to Mr. Cedar on or about June 14, 2007.

34. Mr. Tedesco told this investigation that he attended a meeting

during which Ms. Brown described to Mr. Cedar what parts of the request for reasonable accommodations form he needed to complete. Mr. Tedesco's recollection is that the meeting lasted fifteen minutes or less. Mr. Tedesco does not recall discussion at the meeting regarding Mr. Cedar's claimed disability or limitations.

35. Ms. Brown did not receive a completed request for reasonable accommodation form from Mr. Cedar before his termination in May 2008 and she is unaware of Mr. Cedar having submitted a completed form to any AOT personnel. Ms. Brown did not inquire of Mr. Cedar why he did not submit a completed request for reasonable accommodation form.

36. According to Ms. Brown, on several occasions Mr. Cedar requested that Ms. Brown provide him with forms to request unpaid (FMLA) medical leave and other forms. Mr. Cedar submitted six or more written requests for unpaid medical leave to Ms. Brown during his tenure at AOT. Mr. Cedar successfully completed and submitted those forms without assistance from Ms. Brown. Additionally, it was Ms. Brown's experience that Mr. Cedar did not hesitate to contact her with questions regarding requests for unpaid (FMLA) medical leave and seemed to understand the information Ms. Brown provided to him.

37. Mr. Cedar stated that throughout his tenure with AOT, he

understood that Penny Brown was the person within AOT who handled requests for medical leave and who could provide information about medical leave. Mr. Cedar stated, however, that he never learned whether there was an AOT staff member who handled requests to accommodate disabilities. Because he asked his supervisors on several occasions to identify such a staff person, and because he did not receive an answer, he assumed that no AOT personnel were assigned to handle requests for disability accommodation.

38. According to Mr. Cedar, on the occasions Ms. Brown provided him with the reasonable accommodation request form, she did not engage him in dialogue about his limitations or his perceived need for accommodation.

39. Asked why he did not submit a completed request for reasonable accommodation form to AOT for virtually his entire tenure at AOT, Mr. Cedar stated that he did not know how to answer the questions on the form including the one asking what accommodations might be useful. Although Ms. Brown invited his questions, he believed he needed either direct assistance or additional information to complete the form.

40. According to Mr. Cedar, in approximately late 2007, AOT disseminated information to AOT employees about the Job Accommodation Network, an organization that recommends possible job accommodations

for a variety of disabilities. Mr. Cedar stated that the material he secured from the Job Accommodation Network provided him with information that allowed him to complete the state's request for reasonable accommodation form. On May 5, 2008, Mr. Cedar submitted a completed request for reasonable accommodation form to AOT's Human Resources unit. In that form, Mr. Cedar states that he has "functional limitations as described in meeting" with AOT supervisors in January 2008, and he offers to provide medical documentation upon request. Mr. Cedar's form requests as reasonable accommodations, 1) flexibility in work hours, 2) treatment and relief on an off payroll status as needed, 3) general flexibility in accordance with Job Accommodation Network materials attached to the form, and 4) "advancement training." The Job Accommodation Network materials attached to Mr. Cedar's form regard accommodations for people with alcoholism, people with depression, and for people returning to work after a disability-related absence.[5] These materials list a wide variety of reasonable accommodations that might fit employees in those categories, including work schedule flexibility, providing praise and positive reinforcement, and reminding the employee of important dates.

[5] As will be described below, Mr. Cedar was placed on administrative leave starting on December 21, 2007 until the time of his termination on May 7, 2008.

F. TERMINATION OF EMPLOYMENT

41. On January 3, 2008, AOT's Program Development Division Director Richard Tetreault held a meeting with Mr. Cedar to discuss potential disciplinary action against Mr. Cedar. Mr. Cedar was accompanied by Jonathan Goddard, a field representative of the Vermont State Employees Association. Sherwood Farnsworth, Ted Tedesco, and Wayne Symonds were also in attendance. Mr. Cedar stated that during the meeting he described his disabilities and the accommodations for those disabilities he received during his college education. Mr. Cedar stated further that he requested similar reasonable accommodations of AOT including schedule flexibility. AOT denies that Mr. Cedar described his disabilities or proposed any accommodations during the January 3, 2008 meeting. During his interview with this investigation, Mr. Goddard stated his recollection of the January 3, 2008 meeting was dim, but that Mr. Cedar may have stated at that meeting that he was recovering from abuse of alcohol and suffered from depression. Mr. Goddard stated he was unsure but "fairly certain" that Mr. Cedar did not request a reasonable accommodation at that meeting.

42. A May 6, 2008 letter to Mr. Cedar from Richard Tetreault announced Mr. Cedar's termination effective on May 7, 2008. Mr.

Tetreault's letter stated that the reasons for Mr. Cedar's termination were those detailed in his letter of December 20, 2007, i.e. Mr. Cedar's failure to notify his supervisor of absences, early departures and late arrivals to work, and his failure to provide doctor's certificates regarding absences for medical reasons.

G. STATEMENTS OF MR. CEDAR'S HEALTH CARE PROVIDERS

43. Mr. Cedar provided this investigation with documentary evidence indicating that he was struck by a truck in July 1995. He stated that the accident caused a head injury. An April 26, 1996 memo from Dennis Rosati M.D., F.A.A.P.M. & R. (Fellow of the American Academy of Physical Medicine and Rehabilitation) stated, in part, that Mr. Cedar had a "7% permanent partial impairment rating of his head, secondary to severe chronic daily tension vascular headaches."

44. As noted above, Mr. Cedar stated that his psychiatric disabilities preceded the 1995 accident.

45. Don Rhoades, M.A. has been providing psychotherapy and substance abuse counseling since 1995 and is licensed in both fields by the State of Vermont. Mr. Cedar has received therapeutic counseling from Mr. Rhoades since March 2007. In response to questions from this

investigation, Mr. Rhoades stated the following:

> Asked whether Mr. Cedar was an individual with disabilities during calendar year 2007 pursuant to Vermont's statutory definition (21 VSA § 495d(5)), Mr. Rhoades responded that Mr. Cedar "was a recovering alcoholic and suffered from bipolar disorder ... most of the time showing symptoms of moderate to severe depression."

> Mr. Rhoades noted Mr. Cedar's report of partial disability resulting from head trauma.

> Based on Mr. Rhoades "clinical observations," Mr. Cedar's limitations included that he "would not do well in an environment with rigid, inflexible expectations, high stress or pressure. He would be limited in his tolerance for a conflict-ridden or emotionally charged atmosphere. His head trauma would require accommodations to allow for more time to perform certain tasks. The limitations were around ability to concentrate, focus on tasks for a substantial period of time, inability to perform basic life functions (self-care, etc.)"

> Asked, what, if any, effect Mr. Cedar's disability(ies)had on his ability to maintain regular attendance on a job in 2007, Mr. Rhoades stated, "In 2007 his symptoms were fairly severe causing him at times to be withdrawn and unable to perform basic life functions. At that time he had a major depressive episode with symptoms of anxiety and an inability to perform basic life functions."

> Asked what, if any, effect Mr. Cedar's disability(ies)had on his ability to complete work-related forms such as time sheets and requests for leave in 2007, Mr. Rhoades stated, "The above-stated symptoms, possibly exacerbated by his pervious head trauma, resulted in some confusion and the inability to focus on tasks at hand ... "

> Asked what, if any, effect Mr. Cedar's disability(ies) had on his ability to take directions and follow instructions from a supervisor regarding work-related tasks, Mr. Rhoades stated, "[D]epending on how the directions and instructions were given, and what they were, it would have been difficult for him to be organized and follow through on tasks, due to his depression and previous head trauma."

> This investigation asked Mr. Rhoades to state what, if any, reasonable accommodations may have been appropriate to address Mr. Cedar's limitations. This investigation provided Mr. Rhoades with the Job Accommodation Network materials that Mr. Cedar had provided to AOT listing possible accommodations for people with alcoholism and people with depression. (Those Job Accommodation Network materials are attached to this report.) Mr. Rhoades responded, "Practically any of the accommodations listed under the headings 'Concentration,' 'Difficulty Staying Organized and Meeting Deadlines,' or 'Difficulty Handling Stress and Emotions' in the JAN handout you gave me would be helpful."

> Asked the likelihood that implementation of the accommodations he highlighted in his previous answer would have been successful for Mr. Cedar in his workplace, Mr. Rhoades stated, "Had these accommodations been implemented, based on my clinical observations, Mr. [Cedar] would have welcomed the support and would have functioned adequately, as he was very unhappy with the conditions at his job and badly wanted the situation to improve."

> Asked whether Mr. Cedar presented a threat to others during December 2007, especially in the period immediately following his receipt of a letter indicating he was at risk of being terminated from his job, Mr. Rhoades stated, "Absolutely not. Mr. [Cedar] at no time ever indicated any ideation or desire for revenge, and certainly not any indication of potential violence. Indeed, Mr. [Cedar] had been subject to what he characterized as continual hostility and harassment at his workplace which was the focus of much of his treatment with me for a long time, so if issues of violence and revenge were there, they would have most likely manifested before this."

46. Dr. Francis Kalibat is a licenced Vermont physician who has practiced psychiatry since 1968. Mr. Cedar has received psychiatric care from Dr. Kalibat since November 6, 2007. In response to questions from

this investigation, Dr. Kalibat stated the following:

> Asked whether Mr. Cedar was an individual with disabilities during calendar year 2007 pursuant to Vermont's statutory definition (21 VSA § 495d(5)), Dr. Kalibat responded, "Yes. Mental illness and history of traumatic brain injury."

> Asked to specify Mr. Cedar's limitations, Dr. Kalibat referred this investigation to his letter of November 12, 2008 addressed to another body. That letter states in pertinent part:

> ... [Mr. Cedar] is an alcoholic. But, as the record indicates, his primary problem is a Mood Disorder. His medication regimen fully supports this ... His many hospitalizations also support this diagnosis.
>
> He has struggled with depression since he was 20 years old.[6] He has repeatedly experienced disturbance of mood with significant manic and depressive syndromes. His mood disorder (affective disorder) affects his entire life. His depressive symptoms include anhedonia, sleep disturbance, psychomotor agitation alternating with psychomotor retardation, decreased energy, feelings of guilt and worthlessness, difficulty concentrating and thinking, and thoughts of suicide. His manic symptoms have included hyperactivity, pressure of speech, flight of ideas, decreased need for sleep, and easy distractability. He has been paranoid and frequently misinterprets the intentions of others. These symptoms occur when he is depressed as well as when he is manic.

> Asked what, if any, effect Mr. Cedar's disability(ies)had on his ability to maintain regular attendance on a job in 2007, Dr. Kalibat stated, "The effect is global, and would be exacerbated by any perceived stress at work."

> Asked what, if any, effect Mr. Cedar's disability(ies)had on his ability to complete work-related forms such as time sheets and requests for leave in 2007, Dr. Kalibat responded, "Substantial."

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[6] At the time Dr. Kalibat wrote this letter, Mr. Cedar was 44 years old.

> Asked what, if any, effect Mr. Cedar's disability(ies) had on his ability to take directions and follow instructions from a supervisor regarding work-related tasks, Dr. Kalibat responded, "Substantial." Dr. Kalibat also stated that Mr. Cedar's alleged "misconduct" on the job was "the result of his mental illness – a mental impairment that substantially limits his ability to work: i.e. understand and comply with requests. This impairment is amplified when he is experiencing stress."

> This investigation asked Dr. Kalibat to state what, if any, reasonable accommodations may have been appropriate to address Mr. Cedar's limitations in 2007 and the likelihood that implementation of those accommodations would have been successful for Mr. Cedar in his workplace. Dr. Kalibat responded that Mr. Cedar would have responded well if a workplace supervisor had "sat down with him and discussed" the difficulties he was having at the workplace. Dr. Kalibat believes that with "good will" on the part of both Mr. Cedar and a supervisor, reasonable accommodations would have been developed and Mr. Cedar would have successfully continued on his job. Although Dr. Kalibat did not suggest any particular accommodations for Mr. Cedar, he said that he would have emphasized measures to reduce Mr. Cedar's stress on the job, because when Mr. Cedar experiences stress he is apt to conduct himself poorly. Dr. Kalibat added that the process of discussion with a supervisor, by its show of respect for Mr. Cedar, would have been as important for Mr. Cedar's success on the job as the implementation of reasonable accommodations.

> Asked whether Mr. Cedar presented a threat during December 2007, Dr. Kalibat responded, "I do not believe that he represented a threat to others."

II. ANALYSIS

Vermont's Fair Employment Practices Act (FEPA), 21 VSA §495(a)

provides in pertinent part as follows:

> (a) It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, ancestry, place of birth, age, or physical or mental condition:
>
> (1) For any employer, employment agency or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, or age or against a qualified individual with a disability.

FEPA at 21 VSA §495d(6) provides as follows:

> "Qualified individual with a disability" means:
>
> (A) An individual with a disability who is capable of performing the essential functions of the job or jobs for which the individual is being considered with reasonable accommodation to the disability.
>
> (B) Does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

As mentioned above in footnote 1, Vermont's Supreme Court has stated that alcoholism is a disability protected by Vermont's Fair Employment Practices Act, while misconduct related to misuse of alcohol is not protected. Kennedy v. Dept. of Public Safety, 168 Vt. 601, 602 (1998) (mem.dec.).

Vermont's Supreme Court has noted the similarity of the disability discrimination provisions of FEPA and the federal Americans with Disabilities Act (ADA). Potvin v. Champlain Cable Corp., 165 Vt. 504, 508 (1996). For this reason, the Court looks to ADA case law, regulations and administrative guidance in its interpretation of FEPA. Id.[7] This investigation likewise looks for interpretive assistance in ADA case law, regulations and administrative guidance.

A. PRIMA FACIE ELEMENTS; BURDEN SHIFTING ANALYSIS

Direct evidence of employment discrimination resulting in adverse employment action is rarely available because "an employer who discriminates against its employees is unlikely to leave a well-marked trail, such as a notation to that effect in the employee's personnel file." Carleton v. Mystic Transportation, Inc., 202 F.3d 129, 135 (2d Cir. 2000). However, a charging party may use circumstantial evidence to prove discrimination. When circumstantial evidence is used, the employee must first establish a prima facie case by a preponderance of the evidence. The charging party's

[7] According to the Vermont Supreme Court, FEPA was "patterned after" section 504 of the federal Rehabilitation Act of 1973. State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995). "Therefore, we look to federal case law to guide our interpretation [of FEPA], the allocations of burdens and standards of proof." Id. at 180. The ADA was, in turn, partially modeled after section 504 of the Rehabilitation Act. The ADA expressly requires that it shall be interpreted to meet or exceed the standards pursuant to the Rehabilitation Act and its regulations. 42 USC §12201(a).

burden of proof to establish a prima facie case is "a relatively light one." Carpenter v. Central Vermont Medical Center, 170 Vt. 565, 566 (1999).

With each claim, if Mr. Cedar successfully establishes a prima facie case, the burden then shifts to AOT to "offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer articulates such a reason, the plaintiff then has the opportunity to show that the proffered reason is pretextual." Id.

B. FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

To establish a prima facie case of discrimination in employment because of an employer's failure to provide reasonable accommodations, Mr. Cedar must show the following by a preponderance of the evidence:

> (1) Charging party was a person with one or more disabilities pursuant to FEPA;
> (2) Respondent employer is covered by FEPA and had notice of the charging party's disability(ies);
> (3) With reasonable accommodation, the charging party could have performed the essential functions of his job; and
> (4) Respondent employer failed to make such accommodations.

Adapted from Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 183-184 (2d Cir. 2006).

This investigation believes Mr. Cedar has met these case elements, as follows:

> Element 1 - Mr. Cedar's medical care providers have stated that he is an individual with mental disabilities; no contrary evidence has been provided.
> Element 2 - AOT is an "employer" covered by FEPA. 21 VSA §495d(1).
> Element 2 - AOT has been on notice of Mr. Cedar's mental disabilities since at least 2004 when it received a letter from the Brattleboro Retreat stating, in part, that Mr. Cedar was diagnosed with cognitive disorder, major depression and alcohol dependence. This notice was underscored by medical documentation AOT received after 2004.
> Element 3 - Mr. Cedar's medical care providers stated their opinion that, with reasonable accommodations, Mr. Cedar could have successfully continued on his job.
> Element 4 - There is no dispute that AOT did not provide Mr. Cedar with reasonable accommodations.

Because Mr. Cedar met the prima facie case elements, the burden shifts to AOT "to offer a legitimate, non-discriminatory reason" for failing to provide Mr. Cedar with reasonable accommodations. Based on the interviews with AOT personnel, it appears that AOT's asserted reason for failing to provide Mr. Cedar with a reasonable accommodation is that he did not request one at any time before his termination was imminent. The remainder of this section explains why this investigation believes that such assertion is incorrect and does not constitute a "legitimate, non-discriminatory reason."

Where employer knew or should have known of disability

In Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008), representatives of the defendant employer argued that the plaintiff never requested an accommodation, defendant did not believe the plaintiff needed an accommodation, and that the plaintiff failed to demonstrate that an appropriate reasonable accommodation was feasible. Id. at 134-35. The Second Circuit noted that generally an employee must first inform the employer that s/he needs an accommodation. Id. at 135. The Court, however, held that the general rule [a request for accommodation is a prerequisite to liability for failure to accommodate] "is not warranted . . . where the disability is obvious or otherwise known to the employer without notice from the employee." Id. The Court held that "an employer has a duty reasonably to accommodate an employee's disability ... if the employer knew or reasonably should have known that the employee was disabled." Id.

In the instant matter, AOT received medical documentation regarding Mr. Cedar in 2004 that put AOT on notice that Mr. Cedar was diagnosed with a cognitive disorder, major depression and alcohol dependence. This investigation believes that such knowledge, combined with AOT's conviction that Mr. Cedar's productivity on the job was insufficient,

triggered AOT's duty to determine whether there were reasonable accommodations that could improve Mr. Cedar's productivity.

Request for reasonable accommodation

Even if, *arguendo*, such medical documentation of Mr. Cedar's disabilities were deemed not to trigger AOT's duty to provide a reasonable accommodation, this investigation believes that Mr. Cedar's e-mail of May 31, 2007 (paragraph 25, above) constitutes an express request for reasonable accommodation and should certainly have triggered such duty. In that e-mail, Mr. Cedar stated that he is an individual with "certain limitations or frailties that would and are considered dissabilities [sic]." Mr. Cedar then makes the following request:

> Please let me know of how I can best communicate these frailties that are directly linked to some or all of [Mr. Cedar's work] problems to varying degrees, so that a complete disclosure and understanding can be utilized to best capture my best attributes and assetts [sic] in my employment assignments with the State of Vermont.

One week later, Mr. Cedar sent an e-mail (see paragraph 27, above) that stated in part:

> I have repeatedly requested ADA dissability, confidential coordination, in regards to my ADA and FMLA rights and the issues and services of coordination I have requested on my behalf have not been responded too [sic] and have been ignored ...
>
> I say this in complete confidence since these are medically sensitive protected information rights pertaining to my health and the

> negative affects [sic] of which I am suffering due to my circumstances and treatment in the workplace.

This investigation believes that these two e-mails taken together are a clear request for reasonable accommodation plus a complaint that Mr. Cedar's request was not addressed by AOT.

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces the ADA's employment provisions. EEOC guidance states, in pertinent part, as follows:

> When an individual decides to request accommodation, the individual ... must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."
>
> * * * *
>
> Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication. An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request.

From EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, October 17, 2002.[8]

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[8] Available on the internet at http://www.eeoc.gov/policy/docs/accommodation.html at numbered

Interactive process

Once an employer's duty to reasonably accommodate has been triggered, federal law requires that it engage in an "interactive process" with the employee. "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 CFR § 1630.2(o)(3).[9] The ADA "envisions an interactive process by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." Jackan v. New York State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000), cert. denied, 531 U.S. 931 (2000).

AOT apparently believes that providing Mr. Cedar with a copy of the reasonable request form and making Penny Brown available to answer questions either constituted a sufficient interactive process or that Mr. Cedar failed to perform his part in an interactive process. This investigation disagrees.

The general rule regarding the interactive process is that the

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paragraphs 1 and 3.

[9] The Vermont Supreme Court has adopted the same requirement using a different term. The Court has held that an employer "should conduct an *individualized inquiry* to determine whether a handicapped employee requires an accommodation." State v. G.S. Blodgett Co., 163 Vt 175, 184 (1995). (Emphasis added.)

employer and the employee have an equal duty to participate in good faith:

> [An] interactive process requires the input of the employee as well as the employer ... The need for bilateral discussion arises because each party holds information the other does not have or cannot easily obtain ... However, recognizing that the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer, courts have held that an employer cannot be found to have violated the ADA when responsibility for the breakdown of the ... interactive process is traceable to the employee and not the employer.

Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 735-736 (5th Cir. 1999).

(Cites and quotation marks removed.)

> The general rule does not hold in all circumstances.
>
> [T]he unique problems presented in some mental illness cases may affect the interactive process. Some mentally ill employees may not be fully aware of the limitations their conditions create, or be able to effectively communicate their needs to an employer. Accordingly, the employer may have an extra duty to explore the employee's condition in these cases and the interactivity of the process may be of less importance. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1284 (7th Cir. 1996) ("an understanding of mental illness is central to understanding Bultemeyer's request for accommodation"); Taylor v. Phoenixville School Dist., 174 F.3d 142, 160 (3d Cir. 1999) (medical records available to employer indicated that employee lacked insight into her own condition).

Loulseged at 736, footnote 5. (Emphasis added.)

There is a small but consistent body of federal judicial opinions that flesh out the "extra duty" of employers with employees who have

psychiatric disabilities. See, e.g. Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285-1287 (7th Cir. 1996) in which the Seventh Circuit stated, "In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary ... [I]f it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." The Bultemeyer Court held that the defendant employer "had a duty to engage in the interactive process and find a reasonable way" for the employee to work despite his irrational fears.

In Taylor v. Phoenixville School District, 184 F.3d 296, 314, 317, 318 (3d Cir. 1999), the Third Circuit held that, when invited to do so, it is "incumbent" upon the employer of an individual with a psychiatric disability to ask the employee's physician for medical information needed to justify an accommodation. The Court also stated that an employer can show good faith engagement in the interactive process in a number of ways, including meeting with the employee and requesting information about the employee's limitations. See also, Criado v. IBM, 145 F.3d 437, (1st Cir. 1998) (citing Bultemeyer with approval).

It is important to note that an employer's engagement in an interactive process is an ongoing duty. Even if AOT did not understand at first that Mr. Cedar needed some assistance requesting a reasonable accommodation, the fact that Mr. Cedar did not submit a completed request for reasonable accommodation form until the eve of his termination should have triggered AOT to provide that assistance. In Humphrey v. Memorial Hospitals Assoc., 239 F. 3d 1128, 1138 (9th Cir. 2001), cert. denied 535 U.S. 1011 (2002), the Ninth Circuit held that the employer's failure to continue exploring possible accommodations for an employee with a psychiatric disability after a chosen accommodation did not work out constituted a failure to engage in the interactive process in good faith and a failure to reasonably accommodate the employee; the defendant employer had an affirmative duty to explore further methods of accommodation before terminating the employee for absenteeism. See also, Deane v. Pocono Medical Center, 142 F.3d 138, 149 (3d Cir. 1998) (a single telephone interaction between the employer and employee failed to satisfy the requirement that the employer make reasonable efforts to engage in an interactive process with the employee in good faith); Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171 72 (1st Cir. 1998) ("duty to provide reasonable accommodation is a continuing one . . . and not

exhausted by one effort."). Further, an employer who has notice of a request for reasonable accommodation cannot escape its duty to engage in the interactive process simply because an employee does not come forward with a reasonable accommodation that would prevail in litigation. Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 953 (8th Cir. 1999).

The Second Circuit recently held that failure to engage in an interactive process, alone, does not constitute a basis for an employer's liability. An employee/plaintiff must also demonstrate that some accommodation of his disability was possible. McBride v. BIC Consumer Products Manufacturing Co., 583 F.3d 92 (2d Cir. 2009). In the instant matter, medical providers have stated their opinion that an accommodation was indeed possible for Mr. Cedar. The McBride Court expressly left open the question whether "a failure to engage in a sufficient interactive process where accommodation was, in fact, possible constitutes prima facie evidence of discrimination on the basis of disability." McBride at 101.

Uncertainty as to benefits of a reasonable accommodation

In Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir.2001), the court found an issue of fact existed as to whether a certain reasonable accommodation for an employee's obsessive compulsive disorder would

succeed. While the benefits of the accommodation were not definite, the court provided that "[a]s long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation." Id. at 1136.

Conclusion regarding alleged failure to provide reasonable accommodation

This investigation believes that there is a preponderance of the evidence showing that Mr. Cedar has met the prima facie elements. This investigation believes further that AOT has not provided a "legitimate, non-discriminatory reason" for failing to provide Mr. Cedar with a reasonable accommodation. Additionally, this investigation believes the evidence indicates that AOT did not engage in a good faith interactive process; although this alone would not create liability, the lack of good faith engagement in an interactive process combined with the opinions of Mr. Cedar's medical care providers that a reasonable accommodation was feasible points to AOT's liability for its failure to even attempt to provide Mr. Cedar with a reasonable accommodation. Had AOT engaged in a real dialogue with Mr. Cedar and, to the extent feasible, with Mr. Cedar's

medical care providers, AOT could have made good faith attempts to provide reasonable accommodations and then gauged whether it believed Mr. Cedar's productivity improved.

C. DISCRIMINATORY TERMINATION

To establish a prima facie case of discriminatory termination of employment, Mr. Cedar must show the following by a preponderance of the evidence:

> (1) Respondent employer is subject to FEPA;
> (2) Charging party was an individual with a disability within the meaning of FEPA;
> (3) Charging party was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and
> (4) Charging party was discharged from his job under circumstances giving rise to an inference of discrimination.

Adapted from Kennedy v Dept. of Public Safety, 168 Vt 601 (1998) (mem. dec.)

Elements one and two

Evidence regarding the first two elements has already been discussed. (See Section B, above, Failure to Provide Reasonable Accommodations.) This investigation believes that there is a

preponderance of evidence to prove these two elements.

Element three

Regarding the third element, asserting that the charging party was otherwise qualified to perform the essential functions of his job with or without reasonable accommodation – the Second Circuit has held that only a minimal showing of qualification is required to establish this element. In Sista v. CDC Ixis North America, Inc., 445 F.3d 161 (2d Cir. 2006), the Second Circuit held that a plaintiff can meet this element by demonstrating he possesses the basic skills necessary to perform the job. The Sista Court went on to explain the analytical distinction between (i) qualification for a job and (ii) disqualification arising from a legitimate, non-discriminatory, reason for an adverse employment decision. The Court stated that "misconduct may certainly provide a legitimate and non-discriminatory reason to terminate an employee" but such "misconduct is distinct ... from the issue of minimal qualification to perform a job." The Court continued, "An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive." The Court held that, even where an employer can prove an employee has engaged in misconduct, that misconduct does not nullify an employee's minimal

qualifications for employment. Sista at 171-172.

In the instant matter, this investigation believes the evidence shows that Mr. Cedar was qualified for his job as a civil engineer at AOT. From August 2001 to June 2005, Mr. Cedar held a civil engineering position in AOT's Planning and Transportation unit and received performance evaluations of "excellent" and "satisfactory." While AOT asserts that Mr. Cedar was insufficiently productive and had attendance problems when he moved to the Structures unit in June 2005, AOT has not suggested that Mr. Cedar did not have the skills required to meet his job description. This investigation believes there is no dispute that Mr. Cedar has met the third element.

Element four

This investigation believes that Mr. Cedar was discharged from his job under circumstances giving rise to an inference of discrimination. As discussed above, this investigation believes that AOT violated FEPA by failing to engage Mr. Cedar in an interactive process to explore whether there was a reasonable accommodation that would allow him to be successful at his job. According to Don Rhoades and Dr. Kalibat (Mr. Cedar's therapist and psychiatrist), had AOT provided Mr. Cedar with

reasonable accommodations like the ones contained in the Job Accommodation Network materials (attached), he would likely have been successful at his job. The evidence from Mr. Cedar's medical care providers indicates that, without such accommodations, Mr. Cedar was destined to fail at his job in the Structures unit; the statements of Mr. Rhoades and Dr. Kalibat indicate to this investigation that the absence of reasonable accommodations to reduce his stress at work led to the difficulties that resulted in Mr. Cedar's termination. Despite its knowledge of Mr. Cedar's disabilities and Mr. Cedar's requests for reasonable accommodations, AOT failed to engage in an interactive process, thereby withholding the prospect of reasonable accommodations for Mr. Cedar. The statements of Mr. Cedar's medical providers lead this investigation to believe AOT's failures to engage in an interactive process and to at least attempt to provide a reasonable accommodation likely resulted in Mr. Cedar engaging in the acts and omissions that led to his termination. This investigation believes that gives rise to an inference of discrimination sufficient to meet the fourth element.

AOT's asserted legitimate, non-discriminatory reason

Because this investigation believes Mr. Cedar has met all four

elements, the burden shifts to AOT to offer a legitimate, non-discriminatory reason for terminating Mr. Cedar. AOT's offer is, in essence, a recitation of the reasons it fired Mr. Cedar, i.e., Mr. Cedar's failure to notify his supervisor of absences, his early departures and late arrivals to work, and his failure to provide doctor's certificates regarding absences for medical reasons. AOT personnel also asserted that Mr. Cedar was unproductive. However, Mr. Cedar's medical providers indicated that Mr. Cedar likely needed reasonable accommodations to address these issues, and with such accommodations he could have been successful on the job. This investigation does not believe such asserted reason suffices to meet AOT's burden.

PRELIMINARY RECOMMENDATIONS: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Agency of Transportation illegally discriminated against Mr. Cedar because of his disability in violation of 9 VSA §4502 by its failure to provide him with reasonable accommodations and by terminating Mr. Cedar's employment.

_____

Paul Erlbaum Date
Investigator

APPROVED:

_____

Robert Appel Date
Executive Director