

COMMONWEALTH OF PENNSYLVANIA

Isaac L. Diehl : State Civil Service Commission  
v. :  
Department of Labor and Industry : Appeal No. 30777

Isaac L. Diehl : Peter Von Getzie  
*Pro Se* : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Isaac L. Diehl challenging his removal from probationary Unemployment Compensations Claims Intermittent Intake Interviewer employment with the Department of Labor and Industry. A hearing was held on February 24, 2022, via video, before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Brief submitted by the parties. The issue before the Commission is whether appellant established the appointing authority's determination to remove him was motivated by discrimination.

FINDINGS OF FACT

1. On July 23, 2021, appellant was informed he was removed from probationary Unemployment Compensation Claims Intermittent Intake Interviewer employment with the appointing authority, effective July 26, 2021. Comm. Ex. A; N.T. p. 344.

2. The July 23, 2021, removal letter provides the following reason for appellant's removal:

Specifically, on May 27, 2021, June 21 and June 22, 2021 and July 1, 2021, you absented yourself from work; however, you did not have sufficient leave to cover your absences and were charged with unauthorized absences, leave code AW for a total of 19.16 hours. Additionally, on July 1, 2021, you reported for work at your 8:00am [sic] start of shift and left 8:20am [sic] without providing notice or seeking approval prior to your departure. As a result, you were charged with 7.17 hours of AW.

Comm. Ex. A.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. C.

4. Appellant began his employment as an Unemployment Compensation Claims Intermittent Intake Interviewer (hereinafter “UC III”) on May 10, 2021. N.T. pp. 81, 134.
5. As a UC III, appellant was required to work in the office for the six months of his probationary period. N.T. pp. 155, 191, 313.
6. As a UC III, appellant was required to have sufficient leave to cover his absences. If he did not have sufficient leave, appellant understood his absences would be characterized as unauthorized absences. N.T. pp. 195, 276; AA Ex. 11.
7. Appellant was charged with unauthorized absence on May 27, 2021, from 8:58 a.m. to 9:20 a.m. N.T. pp. 79, 352, 356.
8. UC Supervisor Lindsay Hankerson provided appellant his fact-finding meeting notice informing appellant that his attendance is mandatory for a May 28, 2021 fact-finding about the unauthorized absence. N.T. pp. 266-267; AA Ex. 10.

9. On May 28, 2021, Operations Manager Lou Ann Bickel and Hankerson conducted appellant's fact-finding meeting. N.T. pp. 193, 268-269; AA Ex. 11.
10. During the fact-finding meeting, Hankerson informed appellant that he was being charged for 0.37 hours of unauthorized absence for his absence from 8:00 a.m. to 9:20 a.m. N.T. pp. 192, 267, 268-269; AA Ex. 11.
11. When Bickel asked appellant "[a]re you aware that you could be charged with unauthorized absence, leave code AW for 0.37 hours for your absence on Thursday 5/27/2021?", appellant responded "[y]es." N.T. p. 195; AA Ex. 11.
12. On May 28, 2021, appellant emailed Hankerson that he was following up with his doctor regarding his Cushing Disease and "potentially other things." N.T. pp. 50-52, 90-91; Ap. Ex. 3.
13. On June 10, 2021, appellant asked Bickel how to file a disability accommodation request. In response, Bickel provided appellant documents and information necessary for him to complete his request. N.T. p. 200; AA Ex. 22.

14. Human Relations Analyst 3 Denise Fahie received and was assigned to appellant's disability accommodation request. N.T. pp. 362-363.
15. As an UC III, appellant is required to make his disability clearly known and if his disability is not clearly seen, he is required to complete a Health Care Provider Questionnaire to substantiate his medical condition. N.T. pp. 200-201, 213-214, 385.
16. Appellant's disability accommodation request was to telework from home and did not mention having a fan in his office space. N.T. pp. 229, 232, 388.
17. Attached to appellant's disability accommodation request, Fahie reviewed appellant's submitted screenshots from his phone reflecting medical terminology from a website without identifying appellant as the patient. N.T. pp. 55, 363-364, 388-389, 403; Ap. Ex. 5; AA Ex. 60 (p.2).
18. On June 11, 2021, Fahie contacted appellant to inform him that she was handling his disability accommodation request. N.T. p. 373; AA Ex. 63.

19. On June 14, 2021, Fahie informed appellant he would need to complete a Health Care Provider Questionnaire within fifteen days because the information appellant provided did not describe or identify appellant's disability. N.T. pp. 373, 389, 408; AA Ex. 63 (p. 1).
20. From June 14, 2021, through June 18, 2021, appellant was absent from work due to experiencing COVID-19 symptoms. N.T. pp. 133, 135, 136; AA Exs. 29, 30.
21. Appellant's absences from June 14, 2021, through June 18, 2021, were approved as emergency sick leave. N.T. pp. 205-206, 339, 393; AA Ex. 40.
22. Appellant's emergency sick leave did not extend beyond June 18, 2021, because he received a negative COVID-19 test result. N.T. p. 339; AA Ex. 81.
23. On June 21, 2021, appellant contacted Operations Manager Paula Reid, did not report for work, and requested to work from home stating he was forced medically to have a follow-up appointment. He

further told Reid that if he could not work from home, then appellant asked to use any sick leave he had remaining. N.T. pp. 140-141, 213; AA Exs. 38 (pp. 7-8), 50 (p. 5).

24. On June 21, 2021, appellant emailed Hankerson. He referred to his disability accommodation request and asked for his doctor's request to work from home be allowed. N.T. p. 54; Ap. Ex. 2 (p. 1); AA Ex. 4.
25. Appellant attached his UPMC Altoona Emergency Department Return to Work, School, Gym, or Sports Form to his June 21, 2021 email. Upon review of the form, the restrictions state, "may work from home due to headaches." The form indicates that appellant was discharged from the ER on June 16, 2021. Ap. Ex. 2 (pp. 2-3).
26. The UPMC Altoona Emergency Department Return to Work, School, Gym, or Sports Form does not identify or describe appellant's medical condition or expressed disability. N.T. pp. 89, 97; Ap. Ex. 2.

27. For appellant's June 21, 2021, absence, appellant was charged with utilizing 3.38 hours of paid sick leave from 8:00 a.m. to 11:23 a.m. and was charged with 4.17 hours of unauthorized absence. N.T. pp. 106, 108, 201-202; AA Ex. 32.
28. For his June 22, 2021, absence, appellant was charged with 7.5 hours of unauthorized absence. N.T. p. 108.
29. On June 24, 2021, Fahie sent appellant his disability accommodation request denial letter. N.T. p. 95
30. The June 24, 2021, disability accommodation request denial letter provides the following:

The Bureau has concluded its review of your accommodation request. During the review process, the Bureau reviewed all available documentation and obtained clarifications and additional information through direct communications with you and the agency. Based on a thorough review of all available and relevant information, we are unable to recommend that the request be approved at this time.

N.T. pp. 95, 376-378; AA Exs. 25, 68.

31. Fahie recommended appellant's disability accommodation request be denied because appellant failed to provide supporting medical documentation to describe his expressed disability. N.T. pp. 383, 389-391.
32. On June 28, 2021, appellant appealed the initial disability accommodation request denial and submitted a doctor's note to Fahie in support of his appeal. N.T. pp. 379, 380-381; AA Ex. 70.
33. The submitted doctor's note stated "[appellant] has been under my medical treatment. He is to be working from home until July 12, 2021, due to medical reasons." N.T. pp. 380, 384-385, 398; AA Ex. 76.
34. The June 28, 2021 doctor's note did not provide any explanation or description of appellant's medical condition or expressed disability. N.T. p. 385; AA Ex. 76.
35. On July 1, 2021, appellant left a fan running inside of his office space throughout the previous night. When Hankerson informed appellant that he needed

to ask for permission to use his co-worker's equipment and if he needed a fan, she had one available for him to use, appellant left the office for the emergency room. N.T. pp. 138, 139-140, 270-271.

36. Appellant never requested a fan or a cool room to work. N.T. pp. 140, 175.
37. Administrative Officer Jennifer Walters confirmed that appellant's July 1, 2021, absence did not qualify for Family Medical Act Leave because appellant did not have enough hours to qualify. N.T. p. 325; AA Ex. 80.
38. Appellant was charged with 7.17 hours of unauthorized absence for his July 1, 2021, absence. N.T. pp. 211, 326; AA Exs. 49, 82.
39. On July 7, 2021, appellant's appeal of the determination denying his disability accommodation request was denied. N.T. pp. 74, 93-95, 383, 410; AA Exs. 25, 26, 72.

40. On July 22, 2021, UC Site Administrator Billie Jo Loucks received a calculation of appellant's unauthorized absences. By the date of the email, appellant had accrued 19.16 hours of unpaid absences. N.T. pp 298-299; AA Ex. 56.
41. Human Resource Analyst 2 Brandon Roberts conducted the investigation into appellant's unauthorized absences. N.T. pp. 339, 341.
42. Walters created the LABP-1 form requesting appellant's removal from probationary UC III employment. N.T. p. 327; AA Ex. 83.
43. Roberts received Walter's request to remove appellant from probationary UC III employment. N.T. pp. 341-342. As a result, Roberts authored the Case Summary for appellant's removal and appellant's removal letter. N.T. pp. 342, 350; AA Ex. 84 (pp. 2-3).

## DISCUSSION

The issue in the present appeal is whether appellant established his removal from probationary Unemployment Compensation Claims Intermittent Intake Interviewer (hereinafter "UC III") employment with the appointing authority

was motivated by discrimination. Specifically, the appointing authority charged appellant with unauthorized absences on May 27, 2021, June 21, 2021, June 22, 2021, and July 1, 2021, without sufficient leave to cover the absences. Comm Ex. A.

Before this Commission, appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018 based upon an allegation the decision to remove him was due to discrimination in violation of Section 2704 of Act 71. 71 Pa. C.S.A. §§ 2704, 3003(7)(ii).<sup>1</sup> Specifically, appellant alleges the appointing authority's determination to remove him was motivated by his expressed disability and by the appointing authority's failure to provide an accommodation. Comm. Ex. B.

In an appeal alleging discrimination, the burden of presenting evidence in support of all allegations of discrimination lies with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d. 844, 846 (1991). Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish his claims of discrimination. Section 2704 of Act 71 of 2018 provides:

An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other non-merit factors.

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<sup>1</sup> Act of June 28, 2018 P.L. 460, No. 71, § 1.

71 Pa.C.S.A § 2704.<sup>2</sup> The prohibition set forth in this section encompasses two general types of discrimination. First, “traditional discrimination” encompasses claims of discrimination based on race, gender, religion, disability, political, partisan or labor union affiliation, or other non-merit factors; and second, “technical discrimination” involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). In the instant matter, this appeal involves claims of traditional discrimination.

At the hearing, appellant testified on his own behalf. In response, the appointing authority presented the testimony of Operations Manager Lou Ann Bickel,<sup>3</sup> UC Supervisor Mary Hall,<sup>4</sup> Referee Lindsay Hankerson,<sup>5</sup> UC Site

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<sup>2</sup> The provisions of Section 2704 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language. Section 905.1 provides:

Prohibition of Discrimination—No officer or employe[e] of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

71 P.S. § 741.905a.

<sup>3</sup> Bickel is employed and temporarily working out of class as an Operations Manager for the appointing authority. N.T. p. 183. As an Operations Manager, Bickel is responsible for supervising her staff on the Altoona UC Service Center’s work floor and training newly hired employees. N.T. p. 184. Prior to her current position, Bickel was a Staff Development Specialist responsible for training new employees. N.T. pp. 184-185.

<sup>4</sup> Hall is currently employed as an UC Supervisor. N.T. pp. 238-239. In May 2021, Hall worked as an UC Claims Examiner and temporarily out of class as a Staff Development Specialist. N.T. p. 238.

<sup>5</sup> Hankerson is currently employed and working temporarily out of class as a Referee for Pandemic Unemployment Assistance within the Department of State. N.T. pp. 261-262, 263. Prior to her employment as a Referee, Hankerson was an UC Supervisor during appellant’s employment with the appointing authority. N.T. p. 263. Hankerson was appellant’s supervisor throughout his employment. N.T. p. 264. Hankerson was not responsible for determining appellant’s leave. N.T. p. 277.

Administrator Billie Jo Loucks,<sup>6</sup> Classes and Operations Manager Paula Reid,<sup>7</sup> Administrative Officer Jennifer Walters,<sup>8</sup> Human Resource Analyst 2 Brandon Roberts,<sup>9</sup> and Human Relations Analyst 3 Denise Fahie.<sup>10</sup>

Appellant began his employment as a UC III on May 10, 2021. N.T. pp. 81, 134. Probationary UC III employees, such as appellant, were required to work in the office for the first six months of their probationary period.<sup>11</sup> N.T. pp. 155, 191, 313. If UC III employees, such as appellant, do not have sufficient leave to cover their absences, then their absences will be characterized as unauthorized absences. N.T. pp. 195, 276; AA Ex. 11.

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<sup>6</sup> Loucks is employed as an UC Site Administrator. N.T. p. 283. Loucks's responsibilities include overseeing the Altoona UC Service Center, guiding, and dismissing staff, and ensuring the appointing authority's policies and procedures are followed. N.T. p. 285.

<sup>7</sup> Paula Reid is employed as a Classes and Operations Manager in the appointing authority's Altoona UC Service Center. N.T. p. 126. Reid is responsible for directing staff, answering the call-off line and staff questions, and holding staff meetings. N.T. p. 128. As a Classes and Operations Manager, Reid is a supervisor. N.T. p. 128. As supervisor, Reid reviews daily requests for leave, call logs, employee's types of leave. N.T. p. 129.

<sup>8</sup> Walters is employed as an Administrative Officer. N.T. p. 323. Walters is stationed in the Unemployment Compensation Service Center's Central Office. N.T. p. 323.

<sup>9</sup> Roberts is employed as a Human Resource Analyst 2. N.T. p. 337. As a Human Resource Analyst 2, Roberts provides guidance and interpretation of policies and procedures, including employee relations. N.T. p. 340.

<sup>10</sup> Fahie is employed as a Human Relations Analyst 3. N.T. p. 359. Prior to being a Human Relations Analyst 3, Fahie worked within the Bureau of Equal Employment Opportunity Policy and Appeals, where she reviewed and made determinations for disability accommodation requests for every agency under the Governor's jurisdiction. N.T. p. 361.

<sup>11</sup> Operations Manager Bickel and UC Supervisor Hall testified that the appointing authority attempted to have newly hired UC IIIs train from home. However, because of the technological difficulties that arose and the UC IIIs poor work performance, the appointing authority required all probationary UC IIIs to complete their training at the office. N.T. pp. 191-192, 241, 292. However, after their probationary period, UC IIIs can telework. N.T. pp. 187-188, 220.

It is undisputed whenever UC IIIs, including appellant, inquire about requesting accommodations, the appointing authority provides the proper information to the employee. N.T. pp. 200-201, 213-214. Employees requesting accommodations are required to make their disabilities clearly known. N.T. p. 385. If the medical disabilities are not clearly seen, such as a physical impairment, they must complete a Health Care Provider Questionnaire to substantiate and describe the disabilities. N.T. p. 385.

Here, appellant argued the appointing authority should have provided his accommodation to work from home based on his disability. Furthermore, appellant asserted he should not have been charged with unauthorized absences because he was available to work from home. The appointing authority disputes appellant's claims. Discussed below is the evidence and arguments presented by the parties regarding: 1) appellant's disability accommodation request, and 2) appellant's unauthorized absences.

#### Appellant's Disability Accommodation Request

In support of his disability discrimination claims, appellant argued his disability accommodation request to work from home was because of an un-ruptured aneurysm and herniated disc. N.T. pp. 78, 101. Contrastingly, the appointing authority contended that appellant failed to substantiate that he had a disability. N.T. pp. 383, 389-390. The relevant facts regarding appellant's disability accommodation request are not in dispute.

Appellant contended he initiated the disability accommodation request as soon as he was aware of his condition. N.T. p. 45. For instance, on May 28, 2021, appellant informed UC Supervisor Hankerson that he was following up with his doctor regarding his medical condition. N.T. p. 50; Ap. Ex. 3. Specifically, appellant testified his medical condition was an un-ruptured aneurysm in his carotid artery that caused severe headaches and neck pain. N.T. p. 51-52.

However, upon review of the May 28, 2021 email, appellant does not cite to an un-ruptured aneurysm. Instead, appellant refers to his medical condition as Cushing's Disease "or potentially other things." N.T. pp. 90-91; Ap. Ex. 3. Appellant acknowledged he was unaware of the un-ruptured aneurysm and presumed his headaches were because of his Cushing's Disease. N.T. pp. 51-52. Nevertheless, appellant argued that his disability accommodation request was for his herniated disc and un-ruptured aneurysm. N.T. pp. 47-48, 52, 91.

On June 10, 2021, appellant asked Operations Manager Bickel about filing a disability accommodation request. As a result, Bickel emailed appellant information and attached documents necessary for him to request an accommodation. N.T. p. 200; AA Ex. 22.

Human Relations Analyst 3 Fahie testified she received and was assigned to review appellant's disability accommodation request. N.T. pp. 362-363. Fahie confirmed appellant's disability accommodation request was to telework and did not mention having a fan in his office. N.T. pp. 229, 232, 388. With appellant's

disability accommodation request, Fahie recalled that appellant initially submitted screenshots from his phone reflecting medical terminology. Fahie believed it was an attempt to explain his medical condition. N.T. pp. 55, 363-364; Ap. Ex. 5; AA Ex. 60 (p. 2).

Upon review of appellant's screenshots, Fahie explained they were not supporting medical documentation because they were pictures describing a brain tumor from a website but also, they did not identify appellant. N.T. pp. 388-389, 403. While the screenshots had medical terminology and drug information, the screenshots were vague. N.T. p. 403.

On June 11, 2021, Fahie called appellant to inform him that she was handling his disability accommodation request but could not reach him. N.T. p. 373; AA Ex. 63. As a result, Fahie followed up with an email to appellant and asked him to submit any additional medical documentation to substantiate his disability for his accommodation. N.T. p. 363; AA Ex. 60 (p. 1).

On June 14, 2021, appellant responded to Fahie's email and stated he wanted to try to avoid his medical condition increasing his chances of catching COVID.<sup>12</sup> N.T. pp. 365, 367. Additionally, appellant stated he had asthma and attention deficient disorder but did not state in his response that he suffered from a stroke or unruptured aneurysm. AA Ex. 61.

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<sup>12</sup> Also, in his response, appellant claimed he was getting treated like garbage because he has disabilities. As a result, Fahie referred him to Office of Administration's Bureau of Equal Employment Opportunity Investigations and their phone number. N.T. pp. 367-368, 390; AA Ex. 61.

Fahie informed appellant that in light of the medical documentation he submitted, he would need to complete a Health Care Provider Questionnaire within fifteen days. N.T. pp. 373, 389, 408; AA Ex. 63 (p. 1). Fahie explained to appellant that while he would be completing the Health Care Provider Questionnaire, she would contact appellant's management team to see whether it was possible for him to work from home during the review process. Fahie emphasized to appellant that without sufficient medical documentation, it would be difficult, but she would try. N.T. pp. 373-374; AA Ex. 63.

During the fifteen-day period, Fahie spoke with appellant, and he insisted his position was allowed to telework. N.T. pp. 41, 56, 370, 388-389. Specifically, appellant claimed his mandatory overtime assignments at home showed that working from home could be possible. N.T. p. 63; Ap. Exs. 6, 8. Fahie explained appellant's request to telework would not be a reasonable accommodation for a probationary UC III. She believed a probationary UC III would be unable to know how to complete all the different aspects of the job working from home during the probationary period. N.T. pp. 393-394. Additionally, Fahie was not aware of any policy that would require a disability accommodation request to be given for telework. N.T. p. 396. Fahie also received confirmation from UC Site Administrator Loucks that all probationary UC IIIs were instructed their training was to be in person at the office. N.T. p. 369; AA Ex. 62. Fahie spoke with management and due to his performance issues, inability to log on during the time that he is teleworking, they could not approve a temporary timeframe for telework. N.T. pp. 391-392

On June 21, 2021, appellant asserted he emailed UC Supervisor Hankerson about his disability accommodation request. N.T. pp. 46, 53. Appellant claims he also explained to the appointing authority that if the aneurysm would rupture, then it could cause a stroke or his death. As a result, appellant argued that his neurosurgeon recommended appellant work from home. N.T. p. 54; Ap. Ex. 2 (p. 1); AA Ex. 4.

Notably, in his June 21, 2021 email, appellant attached an UPMC<sup>13</sup> Altoona Emergency Department Return to Work, School, Gym, or Sports Form from June 16, 2021. Upon review of the form, the restrictions do not list appellant's alleged unruptured aneurysm or herniated disc but state, "may work from home due to headaches." Ap. Ex. 2 (pp. 2-3). Appellant admitted the attached form did not identify his medical condition or disability. N.T. pp. 89, 97; Ap. Ex. 2.

On June 24, 2021, Fahie sent appellant his disability accommodation request denial letter. The cited reasons for denying appellant's disability accommodation request were as follows:

The Bureau has concluded its review of your accommodation request. During the review process, the Bureau reviewed all available documentation and obtained clarifications and additional information through direct communications with you and the agency. Based on a thorough review of all available and relevant information, we are unable to recommend that the request be approved at this time.

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<sup>13</sup> The acronym UPMC was not defined during the course of these proceedings.

N.T. pp. 95, 377-378; AA Exs. 25, 68. Appellant admitted he was never informed that his request was denied because it would create an undue hardship. N.T. pp. 93, 94-95; AA Exs. 25, 68.

Fahie testified she recommended appellant's disability accommodation request be denied. N.T. p. 388. Despite appellant's assertions of his medical disabilities, Fahie did not receive any supporting medical documentation confirming the medical conditions appellant described to her. N.T. pp. 383, 389-390. Fahie explained that throughout the review process of his disability accommodation request, appellant changed his reasons several times. However, appellant did not provide supporting medical documentation. Fahie emphasized that without supporting medical documentation to substantiate his disability, the appointing authority could not identify how to accommodate appellant's needs. N.T. p. 391.

On June 28, 2021, appellant appealed the initial disability accommodation request denial and submitted a doctor's note to Fahie in support of his appeal.<sup>14</sup> N.T. pp. 67, 376, 379, 380-381; AA Exs. 67, 70. Specifically, the doctor's note from appellant's doctor stated "[appellant] has been under my medical treatment. He is to be working from home until July 12, 2021 due to medical reasons." N.T. pp. 380, 384-385, 398; AA Ex. 76. Fahie noted the June 28, 2021 doctor's note did not provide any explanation or description of appellant's medical condition that would establish his disability. N.T. p. 385; AA Ex. 76.

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<sup>14</sup> During his appeal, appellant claimed he continued to communicate with Fahie. N.T. pp. 69, 100-101.

On July 7, 2021, Fahie sent appellant's denial letter of his appeal. N.T. pp. 74, 93-95 383; AA Exs. 26, 72. Fahie explained that appellant's appeal was denied because he again failed to provide information establishing his disability. N.T. pp. 383, 410. Appellant further acknowledged his appeal was not denied because it would create an undue hardship. N.T. pp. 93-95. Fahie emphasized appellant's submitted documentation did not describe, identify, or establish his expressed disabilities that would warrant him to work from home. N.T. pp. 383, 410. Notably, Fahie emphasized that appellant failed to complete the Health Care Provider Questionnaire during the review process. N.T. p. 383.

Appellant asserted he completed his Health Care Provider Questionnaire and submitted it to Fahie on July 20, 2021. N.T. pp. 59, 61; Ap Ex. 7; AA Ex. 73 (pp. 2-3). Upon review of the Health Care Provider Questionnaire, the listed physical impairments are as follows: "right hand numbness, tingling, weakness-right C6-C7 radrealepathy [sic]; migraine -cognitive slowing/foggy; vital left cervical ICIA dissection with small pseudoaneurysm." AA Ex. 73 (p. 2). Regarding how appellant's listed impairments affect his ability to perform the essential job functions, it states "no heavy lifting > 10lbs, no cervical manipulations. Patient concern with driving into work due to right hand numbness/weakness. Encouraged routine, frequent small meals, hydration, etc. for migraine management." AA Ex. 73 (p. 2). The listed accommodation section provides: "work from home until R [sic] hand numbness/weakness improves. No heavy lifting >10lbs." Ap. Ex. 7; AA Ex. 73; (p. 3). Appellant acknowledged this submission was after his appeal was denied. N.T. p. 61. Nevertheless, appellant asserted that he continually attempted to acquire an accommodation until his removal on July 23, 2021. N.T. p. 62.

Having carefully reviewed the record, we now consider whether appellant successfully established his claim of disability discrimination.<sup>15</sup> In analyzing claims of discrimination under Section 2704 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 Pa.C.S.A. § 2704; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990).

Once a *prima facie* case of discrimination has been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretextual. *Henderson*, 126 Pa. Commw. at 614-615.

Regarding appellant's disability discrimination claims, the American with Disabilities Act (hereinafter "ADA") prohibits discrimination not only by adverse actions motivated by prejudice and fear of disabilities, but also when an employer fails to make reasonable accommodations for an appellant's disabilities.<sup>16</sup>

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<sup>15</sup> After the conclusion of appellant's presentation, the appointing authority moved to dismiss the appeal for appellant's failure to establish a *prima facie* case of discrimination. N.T. pp. 120, 414. Ruling was deferred at the hearing. N.T. p. 342.

<sup>16</sup> The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2). See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d, 296, 306 (3rd Cir. 1999).

*Taylor v. Phoenixville Sch. Dist.*, 184 F.3d, 296, 306 (3rd Cir. 1999). Specifically, the ADA provides an employer discriminates against a qualified individual with a disability when the employer does “not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer].” *Id.* citing 42 U.S.C. § 12112(B)(5)(A).

To establish a *prima facie* case for a disability discrimination claim of failure to accommodate, appellant must demonstrate “(1) he was disabled and his employer knew it; (2) he requested an accommodation or assistance; (3) his employer did not make a good faith effort to assist; and (4) he could have been reasonably accommodated.” *Allen v. State Civil Serv. Comm’n*, 992 A.2d 924, 932 (Pa. Commw. 2010) citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 306 (3rd Cir. 1999). A reasonable accommodation includes the “employer’s reasonable efforts to assist the employee and to communicate with the employee in good faith.” *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F. 3d 751, 761 (3rd Cir. 2004).

Upon review of appellant’s presentation, we find appellant demonstrated he was disabled, and his employer knew it and that he requested an accommodation. Specifically, appellant communicated to Hankerson the consequences of his aneurysm rupturing and his need to work from home. Moreover, it is undisputed that appellant requested a disability accommodation to work from home because of his expressed medical issues.

However, we find appellant failed to demonstrate the appointing authority did not make a good faith effort to assist. From the beginning of the interactive process, appellant was provided with the information and necessary

forms to make his request. While Fahie was processing and reviewing appellant's medical documentation, appellant acknowledged he communicated with her and continued to provide medical documents in support of his request. Moreover, when Fahie waited for appellant to submit his Health Care Provider Questionnaire, she contacted appellant's management team to see whether it was possible for him to work from home. When appellant's request was denied, he received information from Fahie to appeal the request. Although appellant continued to change his underlying disability that supported his accommodation request, the appointing authority continued to receive and review appellant's submitted information. The appointing authority continuous support provided to appellant throughout the interactive process indicates it made a good faith effort to help him. As such, appellant did not demonstrate the appointing authority did not make a good faith effort to assist. *Allen, supra.*

Even if appellant established a *prima facie* case, we find the appointing authority presented legitimate non-discriminatory reasons for denying appellant's disability accommodation request. Fahie credibly<sup>17</sup> explained, appellant's supportive medical documentation did not provide her or the appointing authority with sufficient information or knowledge of appellant's medical condition. While appellant asserts that his screenshots mention his disability, Fahie noticed that the screenshots were from a website and did not identify whether the illustrated medical terminology or medical treatments were related to appellant. Indeed, appellant's supportive medical documentation describes appellant's medical condition as headaches and vaguely requests that appellant should be working from home due to medical reasons.

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<sup>17</sup> It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

Because appellant's alleged disability was not clearly seen and the medical documentation insufficiently identified his conditions, it was appellant's responsibility to submit the Health Care Provider Questionnaire to Fahie. Nevertheless, appellant failed to submit the Health Care Provider Questionnaire within fifteen days of receiving it and did not submit it during his appeal of the denial of his disability accommodation request. Appellant contends that he submitted the Health Care Provider Questionnaire during his employment on July 20, 2021. Yet, the submission of his Health Care Provider Questionnaire does not indicate an unruptured aneurysm. While the Health Care Provider Questionnaire indicated that appellant suffered from a back condition, the impairment affected his ability to lift objects heavier than ten pounds. Although the accommodation requested was for appellant to work from home, it was cited because of his right-hand numbness, not for appellant's asserted unruptured aneurysm.

Because appellant failed to provide the Health Care Provider Questionnaire within the review period and did not submit the Health Care Questionnaire until three days before his removal, the appointing authority could not ascertain the medical reason to support appellant's accommodation request. As Fahie credibly emphasized, the appointing authority could not help appellant with an accommodation when it did not have the information confirming his medical needs or how his medical needs affected his ability to work inside the office. Therefore, we find the appointing authority did not fail to provide appellant with an accommodation and had legitimate non-discriminatory reasons to deny the request. *Nwogwugwu, supra.*

Appellant's Unauthorized Absences

Now, we turn to whether appellant established his removal was motivated because of his expression of his disability. Appellant contends that he should have been considered available for work on each day he was charged with an unauthorized absence if he was allowed to work from home pursuant to his disability accommodation request. In response, the appointing authority argued that appellant's removal was not motivated by appellant's expressed disability or his disability accommodation request. Rather, the appointing authority contended that appellant's removal was the result of his unauthorized absences on May 27, 2021, June 21, 2021, June 22, 2021, and July 1, 2021.

First, on May 27, 2021, appellant was charged with paid sick leave from 8:00 a.m. to 8:57 a.m., and was charged absent without leave from 8:58 a.m. to 9:20 a.m. N.T. pp. 79, 352, 356. Appellant does not dispute that he was absent in the morning. Yet, in response to the May 27, 2021 absence, appellant believed he notified UC Supervisor Hall that he was experiencing technological difficulties and lost connection to the training program in the afternoon. N.T. pp. 42-44; Ap. Ex. 1 (p. 3).

As a result of appellant's absence in the morning of May 27, 2021, UC Supervisor Hankerson provided appellant a fact-finding meeting notice informing appellant that his attendance is mandatory for a May 28, 2021 fact-finding meeting. N.T. pp. 266-267; AA Ex. 10. On May 28, 2021, Operations Manager Bickel and Hankerson conducted appellant's fact-finding meeting. N.T. pp. 193, 268-269; AA Ex. 11. During the fact-finding meeting, Hankerson informed appellant that he was being charged for 0.37 hours of unpaid absence for his absence from 8:00 a.m. to

9:20 a.m. N.T. pp. 192, 267, 268-269; AA Ex. 11. Additionally, Bickel asked appellant “[a]re you aware that you could be charged with unauthorized absence, leave code AW for 0.37 hours for your absence on Thursday 5/27/2021?” Appellant responded “[y]es.” N.T. p. 195; AA Ex. 11. When asked about why he was absent, appellant stated “I had a headache and pressure in my forehead, and I was not able to get to a phone to call prior.” AA Ex. 11. During his fact-findings, appellant did not mention any of his technological difficulties. N.T. pp. 195, 268. Hankerson confirmed appellant was not charged with an unauthorized absence for his technological difficulties at the end of his training on May 27, 2021<sup>18</sup>. N.T. p. 268.

Next, on June 21, 2021, appellant was charged with utilizing 3.38 hours of paid sick leave from 8:00 a.m. to 11:23 a.m. and was charged with 4.17 hours of unauthorized absence. N.T. pp. 106, 201-202; AA Ex. 32. On June 21, 2021, appellant contacted Operations Manager Paula Reid, did not report for work, and requested to work from home stating he was forced to have a follow-up medical appointment. He further told Reid that if he could not work from home, then appellant asked to use any sick leave he had remaining. N.T. pp. 140-141, 213; AA Exs. 38 (pp. 7-8), 50 (p. 5).

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<sup>18</sup> Appellant described instances of experiencing technological difficulties from working at home throughout his probationary period. N.T. pp. 40, 48, 50, 132-133; Ap. Ex. 3. The appointing authority further presented how Hall and Bickel trained and interacted with appellant in resolving his exhaustive technological difficulties. N.T. pp. 188, 196-199, 242-243, 245-247, 249-250, 252-253; AA Exs. 14, 15, 21. As a result of appellant’s technological difficulties, appellant was instructed to come into the office to work because they could not have him connect to work from home. N.T. p. 190. These facts are not instructive on the issue before us. Rather we note that appellant’s technological difficulties indicate appellant’s need to work in the office.

On June 22, 2021, appellant was charged with 7.5 hours of unauthorized absence. N.T. p. 108. Appellant claimed that his approved emergency sick leave should have been extended to his absences on June 21, 2021, and June 22, 2021, because he believed it should have lasted at least two weeks. N.T. pp. 106, 107.

Specifically, from June 14, 2021, through June 18, 2021, appellant was absent from work due to experiencing COVID-19 symptoms.<sup>19</sup> N.T. pp. 103, 133, 135, 136; AA Exs. 29, 30. Human Resource Analyst 2 Roberts and Bickel confirmed appellant was approved for emergency sick leave for these absences based on the medical documentation he provided.<sup>20</sup> N.T. pp. 205-206, 339, 393; AA Ex. 40.

Roberts testified he was informed that although appellant insisted he should have received more emergency sick leave, appellant's approved emergency sick leave could not be extended beyond June 18, 2021, when appellant received a negative COVID-19 test result. N.T. p. 339; AA Ex. 81 (pp. 1-2).

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<sup>19</sup> Appellant and the appointing authority described appellant's absences related to experiencing COVID-19 symptoms. N.T. pp. 145, 186, 215, 203-204, 269-270, 294-295; AA Exs. 4, 16, 38, 54 (pp. 28, 33), 79, 80. Additionally, appellant and the appointing authority described appellant's absence due to attending a hearing on May 19, 2021. N.T. pp. 306-307; AA Ex. 38 (pp. 29-30). We note appellant's absences that were not listed in his removal letter are not before the Commission. Rather, the issue before us is whether appellant's removal was motivated by his disability.

<sup>20</sup> Emergency sick leave is appropriate for employees suffering from COVID-19. It is obtained when an employee coordinates with a Family Medical Leave Act (hereinafter "FMLA") coordinator. N.T. p. 135. An employee's documentation must be official medical documentation from a medical provider to qualify for emergency sick leave. N.T. p. 333. If the medical documentation substantiates that the employee is suffering from the COVID-19 virus, then the employee would receive ten days of emergency sick leave that would not affect the employee's leave balances. N.T. pp. 345-346. Until a letter is finalized approving the emergency sick leave, an employee's leave approval would be pending the coordinator's determination. N.T. p. 135.

Then, on July 1, 2021, appellant worked for 15 minutes and then left work. As a result, appellant was charged with 7.17 hours of unapproved absence. N.T. p. 109. In response to the charged absence, appellant emphasized he was instructed to turn his fan off while working inside his office. N.T. pp. 111-112. Appellant asserted that he communicated to the appointing authority he would need a fan for his medical condition. N.T. pp. 71-72; Ap. Ex. 12. Also, appellant claimed that he received permission from his co-worker to use the fan while his co-worker was working from home. N.T. p. 72. After receiving the instruction, appellant informed Hankerson and Bickel that he was going to the emergency room. N.T. pp. 71, 101, 109; Ap. Ex. 12. While in the emergency room, appellant acquired an Emergency Department Work Release Form, which provides the following instruction: “can have a fan at his desk as higher temperatures worsen his headaches.” N.T. pp. 65, 98; Ap. Ex. 9.

Appellant contended that when the appointing authority allowed and approved his leave for the emergency room on May 14, 2021, then his leave for the emergency room on July 1, 2021, should have been approved. Appellant believes that the appointing authority’s approval of his emergency room visit on May 14, 2021, created a pattern of behavior to approve future emergency room visits. N.T. pp. 422-423.

Contrasting appellant’s recollection, Operations Manager Reid discovered as she entered the office in the morning that appellant’s fan was operating in his office throughout the night. N.T. p. 138, 162; AA Ex. 38 (pg. 2), 52. Reid explained if an employee has a device running in the office, then the employee is instructed to turn the device off at the end of their day. N.T. pp. 138, 158. As a result, Reid asked Hankerson to remind appellant that he could not have a fan run

throughout the night in the office. N.T. pp. 139, 270. Hankerson told appellant that he needed to ask permission to use his co-worker's equipment.<sup>21</sup> Hankerson also informed appellant that if he would have told her that he needed a fan, she had one at her desk for him to use. N.T. p. 271.

Abruptly, appellant put on his jacket, grabbed his backpack, went to Hankerson, and said he was leaving for the hospital. When Hankerson asked what type of leave he was using, appellant responded, "I am going to the hospital. That is excusable. I'm taking care of myself and paperwork." After responding, appellant abruptly left the office. N.T. pp. 139-140, 271. Reid recalled that appellant never asked for a fan or needed a cool room to work. N.T. pp. 140, 175.

Hankerson testified she is unaware of any policy that excuses an employee from work when the employee leaves for the emergency room. N.T. p. 272. Hankerson stated that if an employee had to go to the emergency room, the employee would use sick leave to cover the absence. N.T. p. 272. Hankerson denied telling appellant that he could not use a fan in the office or to turn the fan off until he received permission to use it from his coworker. N.T. pp. 272, 279. Hankerson denied telling appellant that everyone gets headaches on July 1, 2021. N.T. p. 279.

Administrative Officer Walters also testified that appellant's July 1, 2021, absence did not qualify for FMLA leave. Walters explained as a newly hired UC III, appellant did not have enough hours in order to qualify for FMLA leave.

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<sup>21</sup> When Hankerson asked appellant if he asked for his co-worker's permission to use the fan, appellant replied no, and that if he broke it, he'll place twenty dollars under it in order for her to purchase another fan. N.T. p. 270.

N.T. p. 325; AA Ex. 80. Walters reported to Roberts and Loucks that appellant did not qualify for FMLA leave. N.T. p. 326.; AA Ex. 82 (pg. 1). Consequently, appellant had no leave to cover his absence on July 1, 2021. N.T. pp. 211, 326; AA Exs. 49, 82.

On July 22, 2021, UC Site Administrator Loucks received a calculation of appellant's unauthorized absences. By the date of the email, appellant had accrued 19.16 hours of unpaid absences. N.T. pp 298-299; AA Ex. 56. Because of appellant's absences, Roberts conducted the investigation and the final review process of appellant's discipline. For instance, Roberts asked FMLA Specialist Leslie Unfried about the status of appellant's absences that were referred to the FMLA office. N.T. p. 339; AA Ex. 81 (pg. 1). Roberts further recalled he received information that appellant was experiencing time and attendance issues in May 2021 that resulted in a fact-finding meeting and counseling. N.T. p. 341.

Walters testified she created the LABP-1<sup>22</sup> form requesting appellant's removal from probationary UC III employment. N.T. p. 327; AA Ex. 83. Walters also provided copies of appellant's previous discipline, counseling sessions, fact-finding meetings, and relevant information about appellant. N.T. p. 323; AA Ex. 83. Loucks also recommended to remove appellant. Loucks explained she recommended appellant's removal because of appellant's continuous issues with attendance, and technological difficulties related to connecting to the system. N.T. p. 300.

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<sup>22</sup> The term LAPB-1 was not described during the course of the proceedings.

Roberts received Walter's request to remove appellant from probationary UC III employment. N.T. pp. 341-342. As a result, Roberts authored the Case Summary for appellant's removal and appellant's removal letter. N.T. pp. 342, 350; AA Ex. 84 (pg. 2-3). Roberts relied upon the information provided to him by appellant's supervisors and confirmed what the supervisors provided. N.T. p. 351. Robert confirmed that Human Resource Director Matthew Stine agreed with the recommendation to remove appellant and signed appellant's removal letter. N.T. p. 344.

On July 23, 2021, Loucks sent appellant a meeting notice to review the results of the prior fact-finding meetings. N.T. p. 299; AA Ex. 57. Loucks testified the results were that appellant would be removed from his UC III employment because of his unpaid absences. N.T. p. 300. At the conclusion of the meeting, Loucks presented appellant with his removal letter.<sup>23</sup> Comm. Ex. A; N.T. p. 302.

Upon review of the record, we find the appointing authority established legitimate non-discriminatory reasons to support appellant's removal.<sup>24</sup> It is undisputed that appellant was absent without leave on May 27, 2021, June 21, 2021, June 22, 2021, and July 1, 2021. Hankerson and Bickel credibly described how during appellant's May 28, 2021 fact-finding meeting appellant was aware that he would be charged with unauthorized absences if he did not have leave. Despite being

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<sup>23</sup> After Loucks presented appellant with his removal letter, she emailed it to him. N.T. p. 302; AA Ex. 58. After receiving it, appellant questioned that he thought he had leave remaining. In response, Loucks sent the question to Vivian Davis and asked her to send him the Human Resources Service Center's phone number. N.T. p. 302.

<sup>24</sup> In his brief, appellant asserted that his removal was motivated by retaliation for his requesting his disability accommodation request. Ap. Br. (p. 1). However, appellant failed to preserve a retaliation claim in his Appeal Request Form and failed to introduce the claim during these proceedings. Appellant's sole focus at the hearing was his disability discrimination claims. Therefore, we will not address appellant's retaliation claim as part of this adjudication.

informed, appellant continued to be absent without leave. Although appellant contended that his approved emergency sick leave should have been extended to cover his June 21, 2021, and June 22, 2021, absences, Roberts credibly explained that since appellant's COVID-19 test results were negative, the emergency sick leave could not be extended any further. Although appellant argued his July 1, 2021 absence should have been approved based on past practices, we disagree. It is unreasonable to suggest that because the appointing authority approved one instance of leaving work for the emergency room, it is sufficient to establish a pattern of approving future absences without sufficient leave. Moreover, none of the appellant's unauthorized absences were related to appellant's expressed disability or disability accommodation request. Appellant's continuous unexcused absences are sufficient legitimate non-discriminatory reasons to support the appointing authority's determination to remove appellant from probationary UC III employment and these reasons were not rebutted as pretextual. *Nwogwugwu, supra*.

### Summary

The Commission finds appellant failed to establish a *prima facie* case of disability discrimination. Moreover, the appointing authority established legitimate non-discriminatory reasons to deny appellant's disability accommodation request because appellant failed to provide sufficient medical documentation describing his expressed disability. The appointing authority further established legitimate non-discriminatory reasons to remove appellant based on his unauthorized absences that were not related or motivated by appellant's disability or disability accommodation request. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 2704 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Isaac L. Diehl challenging his removal from probationary Unemployment Compensations Claims Intermittent Intake Interviewer employment with the Department of Labor and Industry, and sustains the action of the Department of Labor and Industry in the removal of Isaac L. Diehl from probationary Unemployment Compensations Claims Intermittent Intake Interviewer employment, effective July 23, 2021.

State Civil Service Commission

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Maria P. Donatucci  
Chairwoman

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Gregory M. Lane  
Commissioner

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Bryan R. Lentz  
Commissioner

Mailed: October 25, 2022