

BEFORE  
THE PRINCE GEORGE'S COUNTY  
HUMAN RIGHTS COMMISSION

IN RE: KEVIN BOATWRIGHT  
Complainant,

By  
EXECUTIVE DIRECTOR  
vs.

10 ROADS EXPRESS, LLC  
Respondent.

Human Rights Commission  
Clerk Received  
May 23, 2024

OHR Case No.: OHR23-0605  
EEOC Case No.: 531-2022-00806

Human Rights Commission  
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**MEMORANDUM OPINION**

Pursuant to the Prince George's County Code, Subtitle 2, Division 12, Subdivision 1, §2-185 et seq. (2023 Edition) and MD Code, State Government, § 10-210 (formerly, Article 41 of the Administrative Procedures Act of the State of Maryland), before the Prince George's County Human Rights Commission ("Commission") are Respondent's Motion to Dismiss, or in the Alternative, Motion For Summary Judgment and the Executive Director's Opposition Motion on behalf of Complainant. Having fully considered these pleadings, the parties' exhibits, the parties' arguments presented at the Pre-hearing Conference held on May 9, 2024, and the Respondent's Post-Hearing Conference Brief received on May 10, 2024, for the reasons set forth below, the Respondent's Motion to Dismiss is denied but we grant Respondent's Motion for Summary Judgment.

**SUMMARY OF FACTS**

The following undisputed facts are contained in the parties' pleadings. Complainant Kevin Boatwright began to work as a Tractor Trailer Driver for Respondent, 10 Roads Express,

LLC on or about April 28, 2022. Complainant hauled mail for the United States Postal Service (“USPS”) in interstate commerce and was a driver of a commercial motor vehicle. (See Respondent’s Motion to Dismiss; Respondent’s Exhibit (“Ex.”) A, Executive Director’s (“ED’s”), Letter of Determination. As the driver of a commercial motor vehicle, Complainant performed safety-sensitive duties and was therefore subject to the rules and regulations implemented by the Department of Transportation (“DOT”) and the DOT’s Federal Motor Carrier Safety Administration (“FMCSA”). *Id.*

In Complainant’s job description as a Tractor Trailer Driver for Respondent, one of the “essential functions” of the job requires that Complainant “comply with state and federal laws, DOT rules and regulations, and company policies and procedures”. (See Respondent’s Ex. 1, Complainant’s Job Description). Complainant was also required to “meet, and continue to meet, all standards (medical, safety, etc.) required by the DOT, including compliance with all regulations pertaining to Drug and Alcohol misuse as adopted by the Company for this position”. *Id.* The position is also “classified as Safety Sensitive based on its exposure to operating a motor vehicle with other motorists on public roadways”. *Id.*

On or about October 12, 2022, Respondent granted Complainant a leave of absence from work to seek rehabilitation and treatment for alcohol abuse. Respondent had previously informed Complainant that he was ineligible for leave from work under the Family and Medical Leave Act (“FMLA”) because he had been employed by Respondent for less than the mandatory 12 months required for FMLA coverage. (See Respondent’s Ex. A). Due to the safety-sensitive nature of Complainant’s position, Respondent required that Complainant complete a Return-to-Work Process prior to returning to work. (See Respondent’s Motion; Ex. A).

On or about October 31, 2022, Respondent sent an email to Sunrise House Treatment Center (“Facility”), where Complainant had received treatment, requesting Complainant’s medical information in order to process Complainant’s Return-to-Work request. *Id.* Shortly thereafter, on or about November 2, 2022, the Facility responded by sending Complainant’s medical report and signed release form. *Id.* The medical report contained an intake note made by Complainant’s treatment provider, Jeffrey Thomas, APN, on 10/14/2022, that read, in part: (*See* Respondent’s Ex. B, p. 29; Ex. A) (emphasis added).

He reports that his drinking gradually increased and for the past 12 to 14 months [he] has been drinking anywhere from 1/2 to 1 whole bottle containing 750 mL of either tequila, bourbon, cognac, or vodka. Last use: 10/11/2022 . . . **Patient states he was starting to get worried about his alcohol use as he was starting to drink throughout the day, not only in the evening, and was also going to work intoxicated and drinking while driving.**

On or about October 31, 2022, Respondent also emailed Facility Case Manager Georgina Gonzalez and asked for the following: (1) a diagnosis date for Complainant’s alcohol use disorder; (2) Complainant’s treatment plan going forward after discharge; and (3) when Complainant was drinking, to include, the time of day and whether it occurred while he was on duty or outside of work hours. (*See* Respondent’s Ex. B, p. 4). The Facility’s Compliance and QA Coordinator, Deborah Johnson, responded to question three by stating that, “[a]s per the [Complainant] . . . [t]he last use was 10/10/2022 . . . [h]e would drink when he was not at work, in the evening or on days off. He only drank outside of work hours”. (*See* Respondent’s Exs. A-C). The parties agree that Compliance and QA Coordinator Deborah Johnson’s statement contradicts the intake note made by the treatment provider, Jeffrey Thomas, at the time of Complainant’s treatment. (*See* Respondent’s Motion; Ex. A).

On or about November 10, 2022, the Facility cleared Complainant to return to work without restriction. A few days later, on or about November 14, 2022, Respondent terminated Complainant's employment and informed him of his termination. *Id.*

### **Respondent's Argument**

According to Respondent, although Complainant now disputes that he drank during work hours, the statements contained in the intake note of the medical report submitted by the Facility's treatment provider, Jeffrey Thomas, constitute Complainant's admission to drinking while operating a commercial motor vehicle, in violation of FMCSA regulation 49 C.F.R. § 382.205. This regulation provides that "[n]o driver shall use alcohol while performing safety-sensitive functions". (*See Respondent's Motion*). Complainant's admission, therefore, provided Respondent with actual knowledge that he used alcohol while performing safety-sensitive functions in violation of FMCSA regulations. *Id.* Thus, Respondent was prohibited from allowing Complainant to perform safety sensitive functions per 49 C.F.R. § 382.205. The DOT regulations also required that Respondent report Complainant's violation to the FMCSA's Drug and Alcohol Clearinghouse pursuant to 49 C.F.R. § 382.705(b)(4). *Id.* Further, 49 C.F.R. § 382.501 required Respondent to "take [Complainant] out of service and prohibit him from performing safety-sensitive functions, including his position as a driver of a commercial motor vehicle". *Id.* (*See Respondent's Motion*).

Respondent requests that the Commission dismiss the present case pursuant to Md Rules 2-322(b)<sup>1</sup> and 2-305<sup>2</sup>, because the ED's Certification for Public Hearing ("Certification") did not contain "a clear statement of the facts necessary to constitute a cause of action". (Respondent's Motion to Dismiss). According to Respondent, the Certification contains no allegations that: Complainant is disabled; was qualified for his position as a commercial driver with or without reasonable accommodation; Respondent failed to reasonably accommodate Complainant and failed to engage in the interactive process; and that there existed any reasonable accommodation that would allow Complainant to perform his position. (*See* Respondent's Motion).

Alternatively, Respondent requests that the Commission grant summary judgment because there is no genuine dispute as to any material fact and Respondent is entitled to judgment as a matter of law. (*See* Respondent's Motion). According to Respondent, "there is a difference between being 'disabled' under the ADA and being qualified to perform work under DOT regulations". *Id.* Respondent argues that Complainant is not a "qualified individual" because he was not disabled within the meaning of Title I of the Americans with Disabilities Act (the "ADA") since Respondent did not regard him as disabled; only that Complainant was uncertifiable under DOT regulations due an admission to drinking while operating a commercial motor vehicle. *Id.*

Respondent further argues that Complainant was eligible to work for any other job except a job that was a DOT regulated position. *Id.* Complainant was not qualified to perform the

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<sup>1</sup> Maryland Rule 2-322(b) provides a list of permissive defenses to a pleading which may be made by motion to dismiss filed before a party's answer, including a "failure to state a claim upon which relief can be granted". *See* Md. R. Civ. P. Cir. Ct. 2-322(b)(2).

<sup>2</sup> Maryland Rule 2-305 provides that a pleading "shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought". *See* Md. R. Civ. P. Cir. Ct. 2-305.

essential functions of his position per DOT regulations. The Federal Motor Carrier Safety Regulations<sup>3</sup> (“FMCSR”) contain physical qualifications for drivers of commercial motor vehicles, including the prohibition of driving a commercial motor vehicle due to drug and/or alcohol use. (*See* Respondent’s Motion). Respondent disagrees with the ED’s position in the Certification that there was a “conflicting statement” provided by the Compliance and QA Coordinator Deborah Johnson. (*See* Respondent’s Motion; ED’s Response to Motion to Dismiss (“Opposition Motion”); ED’s Ex. 1). Instead, Respondent argues that Compliance and QA Coordinator Deborah Johnson was merely quoting Complainant’s statement that he only ever drank outside of work hours; that this statement was not an affirmative statement by Complainant’s treatment provider; and that this statement was directly contradictory to the intake note made by Complainant’s treatment provider, Jeffrey Thomas, that was created at the time of Complainant’s treatment. *Id.*

Respondent further argues that, in compliance with DOT regulations and the FMCSR, Respondent was required to report Complainant’s alcohol violation to the FMCSA’s Drug and Alcohol Clearinghouse, take him out of service, and prohibit him from performing in his position as a driver operating a commercial motor vehicle. (*See* Respondent’s Motion). Thus, since Complainant could not meet the DOT’s regulation standards, he is not a qualified individual as necessary to maintain a claim of disability discrimination under the ADA. *Id.* Additionally, Respondent asserted that even if Complainant were determined to be a qualified individual with a disability under the ADA, Respondent’s action of terminating Complainant’s employment was

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<sup>3</sup> These are regulations issued by the Federal Motor Carrier Safety Administration and compiled in the U.S. Code of Federal Regulations. *See* 49 C.F.R. §§ 300-399.

due to a non-discriminatory reason, was not pretextual, and Complainant could not have been reasonably accommodated unless Respondent were to ignore and violate federal regulations. *Id.*

### **Executive Director's Argument**

The ED argues that Respondent's Motion to Dismiss pursuant to Md. Rules 2-322(b) and 2-305 should be denied. According to the ED, the Rules of Procedure for Hearings before the Prince George's County Human Rights Commission ("Commission Rules of Procedures"), the County Code, and Section 10-206 of the Administrative Procedures Act, do not require Certifications to meet the pleading requirements of Maryland Rule 2-305". (*See* ED's Opposition Motion). Thus, the Certification complies with the requirement of Section 5(a)(2) of the Commission Rules of Procedure, since there is no requirement that the ED provide all of the evidence that will be introduced at the public hearing in the Certification. *Id.* The Certification clearly sets forth Respondent's actions, which the ED considered to be in violation of Complainant's civil rights. *Id.*

Regarding Respondent's alternative Motion for Summary Judgment, the ED argues that summary judgment is not appropriate because there is a genuine dispute of material facts. *Id.* The ED disputes whether Complainant drank alcohol during work hours arguing that the statement provided by the Facility Compliance and QA Coordinator conflicted with the intake note from the Facility treatment provider that was contained in Complainant's medical report. (*See* ED's Opposition Motion; Respondent's Ex. A). According to the ED, Respondent's "decision to terminate the Complainant was based on the intake note indicating an admission to drinking during work hours and the Respondent did not seek to verify the accuracy of this information despite the conflicting information provided by the [Compliance and QA Coordinator] of the

[Facility]”. (See ED’s Ex. 1; ED’s Opposition Motion). The ED argues that Complainant asserted that he never made any confession to working intoxicated and never worked intoxicated. (See Respondent’s Ex. A; Respondent’s Motion).

The ED further argues that Respondent “did not engage in an interactive dialogue with the Complainant to clarify the contradictory statement prior to taking serious disciplinary action”. (See Respondent’s Ex. A). In disputing Respondent’s argument that Complainant is not a qualified individual within the meaning of the ADA, the ED states in the Opposition Motion that “[the ED] will present evidence at the public hearing that the [Complainant] has a recognized disability, Alcohol use disorder that is an ADA defined disability”. (See ED’s Opposition Motion). In disputing Respondent’s argument that Complainant was not qualified to perform the essential functions of his position, the ED states in the Opposition Motion that “[the ED] will present evidence at the public hearing that the [Complainant] could perform the essential functions of his position and that ‘actual knowledge’ is not an automatic ground for dismissal”. *Id.*

Furthermore, in disputing Respondent’s argument that it had non-discriminatory reasons for terminating Complainant’s employment, the ED states in the Opposition Motion that, “[the ED] will present evidence at the public hearing that the reasons listed for termination were pretextual”. Lastly, in disputing Respondent’s argument that it could not have made reasonable accommodations for Complainant, the ED states in the Opposition Motion that, “[the ED] will present evidence at the public hearing that multiple accommodations were available and sanctioned by the Department of Transportation (DOT)”. (See ED’s Opposition Motion).

## STANDARD OF REVIEW

Public hearings before the Commission are governed by the Commission Rules of Procedure, which are subordinate to the Prince George's County Code, Subtitle 2, Division 12, Subdivision 4 ("County Code") and the MD Code, State Government, § 10-210 (formerly, Article 41 of the Administrative Procedures Act of the State of Maryland). As authorized by MD Code, State Government, § 10-210, the Commission may dispose of a contested case by "summary disposition<sup>4</sup>; or . . . dismissal". *See* Md. Code, State Gov't § 10-210.

Pursuant to Md. Rule 2-322(b)(2), a trier of fact may grant a motion to dismiss if a pleading fails to state a claim upon which relief may be granted. *See* Schisler v. State, 177 Md.App. 731, 742 (2007). In reviewing a motion to dismiss, "reasonable inferences are drawn in a light favorable to the non-moving party". *See* Litz v. Md. Dep't of the Env't, 434 Md. 623, 643 (Md. 2013). Thus, a determination must be made on "whether the complaint, on its face, discloses a legally sufficient cause of action". *See* Schisler, 177 Md. App. at 743. Whenever the trier of fact considers matters or evidence outside of the pleading, then the motion to dismiss must be treated as a motion for summary judgment under Md. Rule 2-501. *See* Converge v. Curran, 383 Md. 462, 476 (Md. 2004).

When a party files a motion for summary judgment, a judgment is entered "in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law". *See* Rhoads v. Sommer, 401 Md. 131, 148 (Md. 2007). The motion and

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<sup>4</sup> Summary Disposition is the administrative equivalent of Summary Judgment in Judicial proceedings. *See* Brawner Builders, Inc. v. Md. State Highway Admin., 476 Md. 15, 31 (Md. 2021) (holding that "[t]he legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501").

response are viewed “in the light most favorable to the non-moving party” and the trier of fact may “construe any reasonable inferences that may be drawn from the facts against the moving party”. *Id.*

A disputed fact is material if, “depending on how it is decided by the trier of fact, [it] will affect the outcome of the case”. *See Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 315 (Md. Ct. Spec. App. 2019) (quoting *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 634, 985 A.2d 156 (2009)). The dispute about a material fact is “genuine” if the “evidence is such that a reasonable [fact-finder] could return a verdict for the nonmoving party”. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, the burden is on the party opposing a motion for summary judgment to “show disputed material facts with precision in order to prevent the entry of summary judgment”. *Id.* In other words, “summary judgment is not defeated by bare allegations or ‘a mere scintilla’ of evidence”. *See Warsham*, 189 Md. App. at 634 (internal quotation marks omitted).

### **ANALYSIS**

#### **Respondent’s Motion to Dismiss Pursuant to Md. Rules 2-322(b) and 2-305**

The Commission disagrees with Respondent’s argument that dismissal is appropriate because the ED’s Certification does not meet the pleading requirements of Md. Rule 2-305. Public hearings before the Commission are governed by the Commission’s Rules of Procedure, the County Code, and the MD Code, State Government, § 10-210. Pursuant to Section 2-204 of the County Code, when the ED determines that a discriminatory practice has occurred in violation of the County Code and that conciliation or mediation between the parties has failed, the ED shall certify a complaint and any and all findings to the Commission. *See Prince George’s*

County Code, Subtitle 2, Division 12, Subdivision 4, §2-204(a). The ED's Certification to the Commission "shall set out with specificity those actions of the Respondent that the [ED] considers to be violations of [Complainant's] civil rights for which supporting evidence exists that is anticipated to be introduced at the Public Hearing". *See* Section 5(a)(2) of the Commission's Rules of Procedure.

Here, Respondent argues that the Certification does not contain the following allegations: that Complainant is disabled; that Complainant was qualified for his position as a commercial driver, with or without reasonable accommodation; or that Respondent failed to reasonably accommodate Complainant. (*See* Respondent's Motion). However, the ED's Certification sufficiently complied with the requirements of the Commission Rules of Procedure and the County Code for the purpose of bringing the case before the Commission for a Public Hearing. (*See* ED's Opposition Motion).

As required, the Certification contains the specific actions of Respondent, which the ED considers to be violations of Complainant's civil rights. The Certification includes allegations that, *inter alia*: Complainant was Respondent's employee and disabled within the meaning of the ADA; Respondent's decision to terminate Complainant was based on conflicting information contained in the Facility Compliance and QA Coordinator's email versus the intake note made in Complainant's medical report by the Facility treatment provider; Respondent did not seek to verify the accuracy of the information; Respondent terminated Complainant after he completed his Return-to-Work Process and was cleared by the Facility to return to work; Respondent's actions constitute discrimination against Complainant based on his disability in violation of the

ADA; and Respondent failed to correct its employment rules and regulations or train its staff on laws against discrimination. (*See* ED's Ex. 1; ED's Opposition Motion).

Moreover, even if the ED's Certification were subject to strict adherence to Md. Rule 2-305, Respondent's Motion to Dismiss fails on that basis. Especially since, in drawing "reasonable inferences . . . in a light favorable to [the ED]", the Commission reaches the same conclusion that the ED's Certification contains facts necessary to constitute a charge of disability discrimination in violation of the ADA. *See Litz*, 434 Md. at 643. Further, the Certification "on its face, discloses a legally sufficient cause of action" to initiate a public hearing before this Commission. *See Schisler*, 177 Md. App. at 743. Accordingly, we find that the ED's Certification met the pleading requirements of Md. Rule 2-305 and we deny Respondent's Motion to Dismiss this case on the grounds alleged.

### **Respondent's Motion for Summary Judgment**

In considering Respondent's Motion for Summary Judgment, the Commission may enter a judgment "in favor of . . . [Respondent] if the [Respondent's Motion] and [the ED's Opposition Motion] show that there is no genuine dispute as to any material fact and that [Respondent] is entitled to judgment as a matter of law". *See Rhoads*, 401 Md. at 148. The Commission views Respondent's Motion and the ED's Opposition Motion "in the light most favorable to [the ED]" and may "construe any reasonable inferences that may be drawn from the facts against [Respondent]". *Id.*

Although the parties may dispute certain facts, the Commission's determination on Respondent's Motion for Summary Judgment rests on whether any fact disputed by the parties is actually material to the case. A disputed fact is material if, "depending on how it is decided by

[the Commission], [it] will affect the outcome of the case”. See Macias, 243 Md. App. at 315. The burden is on the [ED] to “show disputed material facts with precision in order to prevent the entry of summary judgment”. *Id.* In other words, in reviewing the ED’s Opposition Motion and any attached exhibits, Respondent’s request for “summary judgment is not defeated by bare allegations or ‘a mere scintilla’ of evidence”. See Warsham, 189 Md. App. at 634 (internal quotation marks omitted). Further, the Commission must determine whether the dispute of a material fact is “genuine” because there is “sufficient evidence favoring the nonmoving party for a [fact-finder] to return a verdict for that party”. See Anderson, 477 U.S. at 243. Thus, “[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted”. See Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

The Commission must decide on whether to grant or deny Respondent’s Motion for Summary Judgment by determining whether there is a genuine dispute on each of the following material facts that<sup>5</sup>: (1) Complainant was an individual with a disability under the ADA; (2) Respondent had notice of Complainant’s disability; (3) Complainant was a qualified individual with a disability who with or without a reasonable accommodation (which Respondent could have made in compliance with DOT regulations) could have performed the essential functions of his safety-sensitive job position; and (4) Respondent failed to make such reasonable accommodations. See Peninsula Reg’l Med. Ctr. v. Adkins, 448 Md. 197, 239 (Md. 2016).

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<sup>5</sup> The material facts are facts which establish a prima facie case for a failure to accommodate claim. An employee must show that: (1) they are an individual with a disability; (2) the employer had notice of their disability; (3) with or without a reasonable accommodation, they could perform the essential functions of the position (in other words, that he or she was a “qualified individual with a disability”); and (4) the employer failed to make such accommodations. See Adkins, 448 Md. at 213.

**a. There is no genuine dispute of material fact that Complainant is disabled under the ADA.**

The present case involves Complainant, a former employee of Respondent, who took a leave of absence from his employment with Respondent as a Tractor Trailer Driver (hauling mail for the USPS in interstate commerce) to seek rehabilitation and treatment for alcohol abuse. (*See* Respondent's Motion; ED's Ex.1; ED's Opposition Motion). The ADA permits employers to enact workplace policies in order to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other federal laws and regulations regarding drug and alcohol use by employees in the workplace. *See* 42 U.S.C. § 12114. In addition, the ADA provides certain protections from discrimination for employees who are alcoholics or recovering drug abusers. *Id.* Since the ADA recognizes that an individual who is an alcoholic is an individual with a disability, Complainant was an individual with a disability at the time of his employment with Respondent<sup>6</sup>. The parties do not genuinely dispute this material fact.

**b. There is no genuine dispute of material fact that Respondent had knowledge of Complainant's disability.**

Regarding whether Respondent had notice of Complainant's disability, the parties do not genuinely dispute that Respondent had knowledge that Complainant had an alcohol abuse problem (which is distinct from the issue of whether Respondent had knowledge that Complainant drank alcohol during work hours). The parties acknowledge that, on or about October 12, 2022, Complainant took a leave of absence from his employment with Respondent to seek rehabilitation and treatment for alcohol abuse at the Facility. (*See* Respondent's Motion; ED's Ex. 1; ED's Opposition Motion).

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<sup>6</sup>*See* 29 C.F.R. § 1630, Appendix to Part 1630 ("Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under [the ADA]").

**c. There is no genuine dispute of material fact on whether the Complainant is a qualified individual with a disability.**

The ED's Opposition Motion does not show a genuine dispute on the material fact of whether Complainant is a qualified individual with a disability because there were no reasonable accommodations, which Respondent could have made (in compliance with DOT regulations) to enable Complainant to perform the essential functions of his safety-sensitive job position. Under the ADA, a qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position". *See* 29 C.F.R. § 1630.2. The essential functions of a job position are the "fundamental job duties of the employment position the individual with a disability holds or desires". *Id.* An example of an essential job function is the "[w]ritten job description[] prepared before advertising or interviewing applicants for the job". *Id.*

In the present case, the written job description of Complainant's position as a Tractor Trailer Driver for Respondent is to "[c]omply with state and federal laws, DOT rules and regulations, and company policies and procedures". (*See* Respondent's Ex. 1). Complainant must also have "[k]nowledge of all applicable DOT Requirements and FMCSA Regulations" and "meet, and continue to meet, all standards (medical, safety, etc.) required by the DOT including compliance with all regulations pertaining to Drug and Alcohol misuse as adopted by the Company for this position". *Id.* Further, the position is also "classified as Safety Sensitive based on its exposure to operating a motor vehicle with other motorists on public roadways". *Id.*

Respondent argues that there is no genuine dispute that Complainant was not qualified to perform work as a commercial truck driver because he could not perform the essential functions

of his position—which was to be in compliance with the DOT regulations. (*See* Respondent’s Motion). According to Respondent, upon review of Complainant’s medical report from the Facility treatment provider containing Complainant’s admission that he “was also going to work intoxicated and drinking while driving”, Respondent gained actual knowledge of Complainant’s alcohol use violations and was required to report the violation to the FMCSA<sup>7</sup>. Respondent also states that, due to Complainant’s alcohol use during work hours, the FMCSR required Respondent to “take the driver out of service and prohibit him from performing safety-sensitive functions, including [driving] a commercial motor vehicle”. (*See* Respondent’s Motion; Ex. B, p. 29; Ex. A). We agree.

“Congress, the DOT, Maryland’s General Assembly, and Maryland’s Motor Vehicle Administration view the FMCSRs as essential to the safety of our highways and crucial in reducing the number of accidents involving commercial motor vehicles”. *See Zei v. Md. Transit Admin.*, 433 Md. 254, 272-73 (Md. 2013). The FMCSR establishes minimum qualifications for persons who drive commercial motor vehicles and imposes minimum duties of the motor carriers regarding the qualifications of their drivers. *See* 49 C.F.R. § 391.1. “A driver who is **disqualified shall not drive a commercial motor vehicle**. A motor carrier shall not require or permit a driver who is disqualified to drive a commercial motor vehicle”. *See* 49 C.F.R. § 391.15(b) (emphasis added). “The following offenses are **disqualifying** offenses: (i) Driving a commercial motor vehicle while under the influence of alcohol . . . .” *See* 49 C.F.R. § 391.15(c)(2) (emphasis added).

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<sup>7</sup>“Employers must report . . . by the close of the third business day following the date on which the employer obtains actual knowledge, as defined at § 382.107, of . . . [o]n-duty alcohol use pursuant to § 382.205”. *See* 49 C.F.R. § 382.705(b)(4).

The regulations further state that “[n]o driver shall . . . [u]se alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle”. *See* 49 C.F.R. § 392.5(a)(2). Regarding employers such as Respondent, “[n]o motor carrier shall require or permit a driver to . . . [v]iolate any provision of paragraph (a) of . . . section [392.5] . . .” *See* 49 C.F.R. § 392.5(b)(1).

Thus, since Complainant was “disqualified” per DOT regulations from driving a commercial motor vehicle while under the influence of alcohol—and compliance with the DOT regulations is an essential function of his job position—Respondent was required to take necessary action to prevent Complainant from continuing to perform the safety-sensitive function of driving a commercial motor vehicle. *See* 49 C.F.R. § 382.205 (“No driver shall use alcohol while performing safety-sensitive functions. No employer **having actual knowledge** that a driver is using alcohol while performing safety-sensitive functions **shall permit the driver** to perform or continue to perform safety-sensitive functions”) (emphasis added).

The ED argues that a “material factual and legal dispute exists” because the ED “will present evidence at the public hearing that the complainant could perform the essential functions of his position and that ‘actual knowledge’ is not an automatic ground for dismissal”. (*See* ED Opposition Motion). The ED further states that “material factual and legal dispute exists” because the ED “will present evidence at the public hearing that multiple accommodations were available and sanctioned by the [DOT]”. *Id.* However, the ED’s argument, without more, does not defeat Respondent’s Motion for Summary Judgment by making “bare allegations” and

providing “a mere scintilla” of evidence or no evidence at all in support of the allegations in the Opposition Motion. *See Warsham*, 189 Md. App. at 634.

Even in viewing Respondent’s Motion and the ED’s Opposition Motion “in the light most favorable to” the ED, and “constru[ing] any reasonable inferences that may be drawn from the facts” against Respondent, the Commission is not persuaded by the ED’s mere assertion in the Opposition Motion that, there were “multiple” reasonable accommodations available and “sanctioned” by the DOT, which would have allowed Complainant to remain in compliance with the DOT regulations and, thus, enable him to perform the essential functions of the job position. *See Rhoads*, 401 Md. at 148.

Especially since the ED did not state what those reasonable accommodations were; nor did the ED provide evidence sufficient to support the allegations in the Opposition Motion. Generally, in administrative proceedings, the strict rules of evidence do not apply. However, when the Commission is “functioning in an adversary proceeding, the fundamentals applicable to the decision of adjudicative facts by any tribunal must be preserved”. *See Gorin v. Board of Co. Comm'rs*, 244 Md. 106, 110 (Md. 1966). Thus, the Commission need not resort to speculation and/or conjecture in order to determine what reasonable accommodations Respondent could have made for Complainant in compliance with DOT regulations.

As previously stated, the burden was on the ED, opposing the Motion for Summary Judgment, to show “disputed material facts with precision in order to **prevent** the entry of summary judgment”. *Macias*, 243 Md. App. at 315. In other words, the ED necessarily had the burden of proffering the “evidence”, which the ED states exists, at the time of the filing of the

Opposition Motion and **before** the Commission rules on Respondent's Motion for Summary Judgment.

Furthermore, by stating that there were "multiple accommodations . . . available and sanctioned by the [DOT]", the ED acknowledges that the DOT regulations are controlling in this case because "[r]oute drivers are subject to strict rules and regulations by nature of being a safety-sensitive function under the FMCSA". (See ED's Opposition Motion; Respondent's Ex. A). Accordingly, we find that there is no *genuine* dispute that an essential function of Complainant's job position is, inter alia, to comply with DOT regulations; and that Complainant's violation of these regulations by drinking alcohol during work hours rendered him unqualified to perform the essential functions of his position with or without a reasonable accommodation.

**d. There is no genuine dispute of material fact that Respondent could not have reasonably accommodated Complainant in accordance with DOT Regulations.**

Respondent argues that, even if the Commission were to find that Complainant was a qualified individual with a disability, Respondent had a non-discriminatory reason for its actions and could not have reasonably accommodated Complainant without violating the DOT regulations. (See Respondent's Motion). In response, the ED argues that Respondent's reasons listed for termination were pretextual and that the ED "will present evidence at the public hearing that the reasons listed for termination were pretextual". (See ED's Opposition Motion). This is in addition to the ED's argument that there were multiple accommodations available and sanctioned by the DOT. *Id.*

However, the Commission finds that Respondent had a “legitimate, nondiscriminatory reason for” terminating Complainant’s employment (i.e., due to his disqualification per DOT regulations) and that the ED has not created a genuine issue of material fact as to whether that reason was pretextual”. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (holding that if an employer articulates a legitimate, nondiscriminatory reason for the challenged action, the burden shifts to the employee to show that the articulated reasons were a pretext for discrimination).

The DOT regulations, including 49 C.F.R. § 382.217, prohibit an employer such as Respondent from operating a commercial motor vehicle once the employer has actual knowledge that the employee used alcohol while performing safety-sensitive functions in violation of § 382.205. *See* 49 C.F.R. § 382.217. Under the ADA, Respondent may hold Complainant, “who is an alcoholic to the same qualification standards for employment or job performance and behavior that [Respondent] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of [Complainant]”. *See* 42 U.S.C. § 12114. This means that Respondent could impose discipline against Complainant for violating its drugs and alcohol use policies in the same way that Respondent would for other employees without a disability.

Furthermore, the ADA requires that all employees, like Complainant, “comply with the standards established in such regulations of the [DOT]” if Complainant is “employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry”. *See* 42 U.S.C. § 12114.

Thus, the DOT regulations and the ADA permitted Respondent—as an employer in the transportation industry—to establish policies in accordance with the DOT regulations which prohibit the use of alcohol by employees while operating motor vehicles. Respondent was permitted to hold Complainant to the same standard as other employees without a disability. As Respondent states, Complainant’s termination was not because of his disability, but because he violated the DOT regulations and was no longer qualified for his safety-sensitive job position. (*See* Respondent’s Motion). The ED did not proffer and evidence to show a genuine dispute as to the material fact that Complainant’s use of alcohol while operating a commercial vehicle was in violation of DOT regulations. Nor did the ED show a genuine dispute as to the material fact that the weight of Complainant’s own medical record that included the intake note from the Facility treatment provider<sup>8</sup>, showed his admission to using alcohol while driving a commercial motor vehicle. (*See* Exs. A, C).

We find here that, Complainant was fired because of his misconduct of drinking alcohol during work hours, and not because of his alcoholism. Respondent had knowledge that Complainant enrolled in a rehabilitation program due to his alcoholism but did not terminate him. (*See* Respondent’s Motion). In fact, rather than terminate him, Respondent granted Complainant leave so that he could receive treatment. (*See* Respondent’s Motion). It was only after Respondent received actual knowledge based on Complainant’s admission that he “was also going to work intoxicated and drinking while driving”, that Respondent terminated Complainant’s employment. (*See* Respondent’s Motion; Ex. B, p. 29) (emphasis added).

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<sup>8</sup> Under the Maryland rules of evidence, MD 5-803(b)(6), Complainant’s medical records may be an exception to the hearsay rule as the Records of Regularly Conducted Business Activity. Thus, in administrative proceedings before the Commission, Complainant’s medical records are admissible as evidence.

Additionally, Respondent argues that it could not engage in the interactive process with Complainant because there was no reasonable accommodation which would allow Complainant to perform the essential functions of his position. Under Maryland law, a “reasonable accommodation” may include “job restructuring”; “[r]eassigning or transferring an employee to a vacant position, light duty job, different work location, or other alternative employment opportunity which is available under the employer’s existing policies or practices”; or “[m]aking reasonable modifications in the covered entity’s rules, policies, and practices if the modification may enable an applicant or employee with a disability to perform the essential functions of the job”. *See Adkins*, 119 A.3d at 159.

In order to determine the appropriate reasonable accommodation, “it may be necessary for the [Employer] to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations”. *See* 29 C.F.R. § 1630.2(o)(3). The interactive process “is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position”. *See Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 347 (4th Cir. 2013) (quoting *Rehling v. City of Chi.*, 207 F.3d 1009, 1015 (7th Cir. 2000)). “[A]n employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible”. *Id.* Further, an employee “alleging that an employer failed to properly engage in the interactive process must also establish that the interactive process would have likely produced a reasonable accommodation”. *Id.*

(quoting Barber ex rel. Barber v. Colorado Dep't of Revenue, 562 F.3d 1222, 1231 (10th Cir. 2009)).

Once this has been established, absent “undue hardship”, the employer is required “to provide a reasonable accommodation to an otherwise qualified individual” with a disability under the ADA. *See* 29 C.F.R. § 1630.2(o)(4). The employer can establish undue hardship by showing that such an accommodation would create “significant difficulty or expense” to the employer. *See* 29 C.F.R. § 1630.2(p).

Here, the ED did proffer evidence to show that Respondent’s failure to engage in the interactive process resulted in a failure to make reasonable accommodation. Especially since the ED did not identify the reasonable accommodation that would have enabled Complainant to perform the essential functions of the job—considering Complainant’s disqualification under DOT regulations. (*See* ED’s Opposition Motion).

Furthermore, Respondent disagreed with the ED’s argument at the pre-hearing conference that Respondent could have provided reasonable accommodation by providing Complainant “either extended leave or allowing [Complainant] to undergo Substance Abuse Professional (“SAP”) assessment”. (*See* Respondent’s Post-Conference Brief). According to Respondent, providing Complainant with “indefinite leave is not a reasonable accommodation and [Respondent] does not maintain a SAP program; nor is it equipped to provide the follow-up testing required by the DOT FMSCA regulations following a drug or alcohol violation”. *Id.*<sup>9</sup> Respondent further argues that “even after the employee completes the SAP’s required treatment

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<sup>9</sup> To note, the DOT regulations do not require that an employer provide a “SAP evaluation or any subsequent recommended education or treatment for an employee who has violated a DOT drug and alcohol regulation”. *See* 49 C.F.R. § 40.289(a).

and education plan, the employee still cannot return to a safety-sensitive function until the employee takes and passes the return-to-duty test required by 49 C.F.R. § 40.305(a)”. *Id.*, which also includes Complainant being subjected to “six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee’s return to a safety-sensitive function”. *Id.* Respondent, however, maintains that it “does not have the manpower or the ability to provide the [SAP] testing”. *Id.*

As previously stated, the ED did not identify a possible reasonable accommodation which could have been discovered in the interactive process and would have allowed Complainant to perform the essential functions of his position—which is to drive a commercial motor vehicle and remain qualified under the DOT regulations. Even if Respondent were so equipped and could provide Complainant with another leave of absence for further evaluation by a SAP assessment, Complainant could not perform the essential functions of operating a commercial motor vehicle because he would be in a leave status and not working in the job. Thus, he would not be a qualified individual with a disability who could perform the essential functions of operating a commercial motor vehicle with or without reasonable accommodation. Accordingly, we find that the ED has not shown that a genuine dispute of any material facts in this case, including the material fact that Respondent could not have reasonably accommodated Complainant as a qualified individual with a disability in compliance with DOT regulations.

### **CONCLUSION**

Based on the foregoing, the Commission finds that there is no genuine dispute of material facts in this case. Respondent’s Motion for Summary Judgment is GRANTED.