

**COOK COUNTY COMMISSION ON HUMAN RIGHTS**  
69 West Washington Street, Suite 3040  
Chicago, Illinois 60602

Brandon ROBERTSON, Complainant	)	
	)	
v.	)	Case No. 2013E030
	)	
ALLSTATE-LOUIS DODD AGENCY,	)	Entered: April 15, 2016
Respondent	)	
	)	
	)	

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**INITIAL RECCOMENDED DECISION AND ORDER ON LIABILITY AND  
REMEDIES**

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Complainant Brandon Robertson (“Robertson” or “Complainant”) filed a complaint on October 22, 2013 against Respondent Allstate–Louis Dodd Agency (“Respondent” or “Louis Dodd Agency”) for unlawful employment discrimination on the basis of a disability in violation of Section 42-35(b)(1) of the Cook County Code of Ordinances (“County Code”). Robertson alleged that Respondent terminated his medical insurance benefits and employment based on his disability and failed to provide a reasonable accommodation for the same. On November 20, 2014, the Cook County Commission on Human Rights (“Commission”) dismissed Robertson’s complaint because its investigation showed a lack of substantial evidence that a violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”) occurred. Complainant filed a Motion to Reconsider, and, on May 14, 2015, the Commission reinstated Complainant’s claim that his termination was discriminatory. This matter was assigned to Administrative Law Judge, Joanne Kinoy. After completion of discovery, the parties filed a Joint Prehearing Memorandum<sup>1</sup> and an administrative hearing was held on November 10, 2015. At the conclusion of the hearing, both sides agreed to submit Post Hearing Memoranda in lieu of oral closing statements. Each party submitted a Post Hearing Memorandum on or about February 17, 2016.<sup>2</sup> This matter is now ready for decision.

**Proposed Statement of Facts**

1. Robertson completed a four year degree at Chicago State University and then worked in the insurance business, including employment

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<sup>1</sup> The Joint Prehearing Memorandum will be cited as: “PHM.”

<sup>2</sup> Complainant Post Hearing Memorandum will be cited as: “Cp. Post H.M.” Respondent’s Post Hearing Memorandum will be cited as: “Resp. Post H.M.” Respondent’s Post Hearing Memorandum is a short document with no citations supporting the proposed Findings of Fact. Respondent’s counsel, Mr. Sciliano, wrote a letter after submitting the Post Hearing Memorandum indicating that he had been unable to obtain a copy of the transcript. Both parties had been informed in writing and orally on more than one occasion that a copy of the transcript was available for review by the public at the offices of the Commission. *See, e.g.*, Order (Dec. 10, 2015). No weight will be accorded to Respondent’s proposed Findings of Fact unless they were part of the stipulated facts submitted in the Joint Prehearing Memorandum.

with Allstate Insurance Company. Near the end of 2012, Robertson held an insurance sales position with AIG. At AIG, Robertson was earning \$40,000 annually plus commissions of approximately \$500 to \$1000 per month. (Resp. Ex. 2; Tr. 20.)<sup>3</sup>

2. Allstate-Louis Dodd Agency is engaged in the business of soliciting and writing insurance policies for the Allstate Insurance Company. Respondent's office is located in Calumet City, Illinois. The business is owned in whole or in part by Louis Dodd ("Dodd").
3. The Office Manager for Respondent is Kimberley Yelverton ("Yelverton"). She handles the day to day operations of the business and is also involved in sales. Dodd makes all final decisions for the business. At all relevant times, the business had less than 5 employees.
4. Robertson applied for a position of Licensed Sales Professional with Respondent in November, 2012. He interviewed initially with Yelverton and then with Dodd. (Tr. 17.)
5. Robertson received an offer letter which provided for a salary of \$36,000 per year plus commission. The letter provides that that Robertson will be a probationary employee for 90 days during which time he would be paid "on a 1099 basis." The letter further provides: "The successful performance in this position will be contingent on meeting the agreed upon goals and job duties (see Exhibits 1 &2). At the end of the 90-day period, both parties will review the performance to determine if a permanent position will be established. Once the permanent position is confirmed, the position will become a W-2 position." (Resp. Ex. 1.) Complainant was also required to maintain his state insurance license. (PHM ¶ 3.)
6. Normally Respondent would not offer health insurance until after the successful conclusion of a 90-day probationary period. Robertson negotiated with Respondent for his health insurance to commence immediately on the start of his employment. He told them he had a condition that needed ongoing medical treatment. (Tr. 21, 22.) The contract provided that "Employee will be immediately eligible to enroll in plan. There is a cost share associated with the health care plan. Employee will pay \$51.58 bi-weekly(\$103.16/month or 10% of monthly cost." (Resp. Ex. 1.) Complainant initially informed Respondent about his medical condition, psoriasis, but he did not describe how the psoriasis affects

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<sup>3</sup> The transcript of November 10, 2015 Administrative Hearing in this matter will be cited: "Tr. \_\_\_."

him. (Tr. 26, 27.) Complainant's medical benefits did not take effect until February 28, 2013. (Tr. 21.)

7. Complainant began working for Respondent on a probationary basis as a Licensed Sales Professional on December 3, 2012. ( PHM ¶ 1.)<sup>4</sup> Complainant's job duties were to solicit and sell auto and home insurance, and to try and get referrals for life insurance to Dodd. (Tr. 23.)
8. As part of the contractual agreement, Complainant was required to maintain his state insurance license. (PHM ¶ 3.) Complainant's state insurance licenses lapsed with Respondent. Respondent learned that Complainant's insurance licensed lapsed on or about April 25, 2013. (PHM ¶ 4.)
9. Jason Siriano ("Siriano"), non-disabled, was hired shortly prior to Complainant, in the same position as Complainant. Complainant and Siriano both reported to Yelverton. (Tr. 24:10-19, 24:23-25:3.)
10. Both Siriano and Robertson failed to meet their targeted sales goals during their 90-day probationary periods. (PHM ¶ 13.) At the end of Siriano's probationary period, Respondent extended his probationary period and reduced his compensation from \$15.00 an hour to \$12.00. (PHM ¶ 13.) Siriano did not have an absenteeism problem. (Tr. 187.) Siriano resigned when his salary was reduced. (Tr. 182-83.)
11. Complainant suffers from plaque psoriasis over 80% of his body. (Tr. 27:20-21.) When Complainant has a flare-up, it causes large lesions from the plaque buildup that begins to slip and bleed. (Tr. 28:3-11.) The bleeding can be severe, and cause Complainant to be unable to wear clothes and become unsanitary. (Tr. 122.) It restricts his ability to sit in a chair, or to focus mentally due to the pain he experiences. (Tr. 122.) As a result, Complainant's psoriasis flare-ups can render him unable to wear clothes and leave his home. (PHM ¶ 5.)
12. After beginning employment with Respondent, Complainant had his first flare-up in January 2013. Yelverton and told her that he had a flare-up and sent her pictures of his body. Yelverton told

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<sup>4</sup> The prehearing memorandum is part of the Record in the proceedings. CCHR Pro. R. 460.205 (stating in relevant part, "[t]he official record of every Administrative Hearing shall consist of the Complaint, any amended Complaint(s), the notice of hearing, and all subsequent pleadings, notices, motions, briefs, and memoranda, and objections and rulings/orders thereon, and transcripts as set forth in Section 460.205(B) below, including all exhibits thereto."). Complainant also notes that the facts set forth in the parties Joint Prehearing Memorandum are undisputed, per Section 460.155 of the Commission's procedural rules.

Complainant to let them know when he was feeling better. (Tr. 31:20-22.)

13. Respondent does not have a written absenteeism policy. Yelverton did not tell Complainant that there was a limit on the number of days he could be absent. (Tr. 23-24.) Dodd makes the determination as to when an employee has missed too much work. (Tr. 129.)
14. Complainant had a few flare-ups in February 2013, causing him to be out a few days at a time. (Tr. 33:9-16.) Between December 3, 2012 and February 28, 2013, Complainant missed approximately 16 days of work. (Tr. 109.)
15. Robertson never asked permission from Respondent to work from home. No one ever told Complainant that he was not allowed to perform work from home. (Tr. 43:13-18.) Complainant made one referral for a policy to Respondent. Yelverton processed the paperwork and credited Complainant with the sale. (Tr. 160.) While at home, Complainant responded to Yelverton's requests for information about his prior accounts but did not complete any new business after February 28, 2013.
16. On or about February 28, 2013, Complainant experienced a severe flare-up of the psoriasis. (Tr. 33.) At the time of the major flare-up, Complainant followed his normal protocol of texting Yelverton to notify her of his condition. He would text Yelverton in the morning and inform her he would not be in that day, and follow up with a text or email of pictures of his body. (Tr. 34-35.) Yelverton would tell Complainant to let Respondent know when he was ready to come back. (Tr. 35.)
17. Complainant contacted Yelverton every day while he was out, via text and/or email. (Tr. 35-36.) Sometimes Yelverton would respond, and sometimes she would not. (Tr. 36:2-4.) At no time did Yelverton tell Complainant that his method of notification was unacceptable. (Tr. 35.)
18. In late March 2013, Respondent requested that Robertson provide verification from his physician. On March 24, 2013, Robertson obtained a "return to work authorization" from his primary care physician: Dr. Zafar Ahmed ("Ahmed"). The note indicated that Robertson could return to work on March 25, 2013 without restrictions. Ahmed faxed the release directly to the company. (Tr. 36-39.)
19. Robertson did not return to work on March 25, 2013 because he had a new flare-up of the psoriasis, which prevented him from returning

on that date. (Tr. 40.) He notified Yelverton of his change in condition but he did not seek or submit a revised medical statement. Yelverton did not request any additional medical documentation. (Tr. 40.)

20. On April 8, 2013, without notice to Robertson, Respondent terminated his medical insurance. (PHM ¶ 7.) Dodd terminated the benefits to force Robertson to present himself at the office. (Tr. 194.) Dodd believed that terminating the health insurance would be the only way to bring Robertson into the office for a “face to face” discussion. (Tr. 142.) Dodd stated that a face to face meeting was required before a decision could be made regarding permanent employment. (Tr. 142, 143, 147, 204.)
21. Robertson found out that his medical benefits were terminated through communications with Blue Cross Blue Shield of Illinois after being denied coverage and treatment. (Tr. 45.)
22. When Robertson contacted Yelverton about his health insurance, she replied that Complainant should speak to Dodd about the matter, and a meeting was scheduled. (Tr. 46-47.) Complainant had another flare-up, and Dodd became unavailable, so the meeting was not held until April 25, 2013. (Tr. 46-47.)
23. Robertson, Yelverton and Dodd attended the meeting on April 25, 2013. According to Complainant, he spoke to Dodd and Yelverton about this condition, and physically showed them the condition of his body. He was told by Dodd that his medical benefits had been terminated due to finances and that he could apply for an individual policy. Robertson recalls that, during the meeting, Dodd agreed that Complainant did not appear well enough to work, and told Complainant to keep them in the loop, and let him know when he was ready to return. (Tr. 47-49.) Yelverton testified that Robertson was told by Dodd that he was not going to be offered a permanent position because of finances, lack of production and him being out of the office. (Tr. 154.) Yelverton testified that she then told Robertson that he continue his health insurance under “Illinois continuation” and explained how much he would have to pay. (Tr. 154.) Dodd additionally denies that Robertson showed him his lesions (Tr. 210.)

After reviewing the evidence and observing the witnesses, the Administrative Law Judge finds that Robertson was told by Dodd at the April 25, 2013 meeting that his health benefits had already been terminated and that he was not going to be offered a permanent non-probationary position at that time. He was further told by Yelverton that he had an option for paying for his own benefits. Neither Dodd

nor Yelverton said anything, however, to discourage Robertson from keeping in contact and pursuing an ongoing relationship with company. There was an unfortunate lack of clarity and finality in the conversation. This is supported by the fact that Yelverton didn't tell Robertson to stop updating her on his medical condition (although he no longer did so on a daily basis) and she continued to contact him regarding past policies he had produced. The absence of any documentation of a "separation" and Yelverton's reluctance to respond to Complainant's subsequent emails also contributed to the ongoing lack of clarity in this employment relationship. It is understandable that Robertson did not grasp the finality of the situation until the July 1, 2013 phone call with Yelverton when she clarified the company's position.

24. Robertson never received any written notification that his employment was terminated. Robertson contends that he was not informed of the termination until a phone conversation on July 1, 2013 with Yelverton. (Tr. 71.)
25. Yelverton contends that Robertson was told during the April 25, 2013 meeting that he was not being offered a permanent position. (Tr. 146.) Dodd states that Robertson was really terminated on March 2, 2013, the end of the probationary period and that the continuation of insurance after that time was just due to Dodd's goodwill and empathy. (Tr. 196, 208.)
26. Robertson applied for unemployment benefits during May 2013. He notified Yelverton of his application for benefits. (Tr. 167.) Robertson, Dodd and Yelverton participated in a phone hearing to determine eligibility for benefits. Dodd testified during the phone hearing that Robertson had abandoned his job and that he would be willing to rehire him. Ultimately Robertson was awarded unemployment benefits. (Tr. 85, 107; Compl. Exs. C21, C22.)
27. After the April 25, 2013 meeting, Complainant continued to follow up with Yelverton regarding his condition and expected return date through text and email. (Compl. Exs. C24, C25, C29.)
28. On June 17, 2013, Complainant emailed Yelverton to notify her that his condition was better, and that he would return to work on June 24, 2013. Yelverton never responded to this June 17, 2013 return to work inquiry. (PHM ¶ 10.) Instead, Yelverton continued to communicate with Complainant regarding insurance policies written by Complainant. (Tr. 54; Compl. Exs. C20, C24-C26.) Complainant continued to inquire about his return date, and Yelverton did not respond. (Compl. Ex. C27.)

29. Complainant had a phone conversation with Yelverton on July 1, 2013. (Tr. 53.) During this conversation, Yelverton cited financial reasons, and Complainant attending law school as the reasons he would not be offered a full time position. (Tr. 54.) Afterwards, Complainant sent emails asking Respondent to reconsider but heard nothing back. (Tr. 55). On July 3, 2013, Robertson also requested a job with lower pay, but received no response. (Tr. 66-67; Compl. Ex. C28.)
30. Yelverton eventually told Robertson that he could only return to work on a “commission only basis and he could come and go as he pleased. (Tr. 74, 178, 180.)
31. Dodd stated that he would never have hired Robertson even as a probationary employee if he had known of “his malady,” his absences and his performance. (Tr. 214.)
32. Robertson suffered emotionally due to his unemployment and lack of income. He had to borrow money from his aunt and mother to cover his mortgage and basic expenses. Robertson claims that the stresses he experienced exacerbated his psoriasis. After April 8, 2013, he had to deal with his medical condition without insurance which delayed his recovery. The summer of 2013 was a “very difficult time” for him financially and emotionally. (Tr. 89.) He received unemployment compensation benefits for about a year and held several jobs. He is currently employed at a full time position that pays more than his position with the Respondent. (Tr. 89.)

#### **Proposed Findings of Law**

1. Complainant is a disabled individual as defined in section 42-31 of the Human Rights Ordinance.
2. Respondent is an employer as defined in section 42-31 of the Human Rights Ordinance.
3. Respondent discriminated against Complainant on the basis of Robertson’s disability in violation of the Human Rights Ordinance when it terminated his employment.
4. Complainant is not entitled to back pay damages as he has failed to produce sufficient evidentiary support of such damages;
5. Complainant has waived reinstatement as a remedy;
6. Complainant is awarded \$5000.00 (five thousand dollars) in compensatory damages resulting from the emotional injuries suffered as a result of the discrimination;

7. Complainant is entitled to his reasonable attorney's fees; and
8. Any additional relief considered and ordered by the Commission.

### **Contentions of the Parties**

Complainant contends that Respondent discriminated against him based on his disability, plaque psoriasis, by terminating him from his employment. Robertson argues that a comparable non-disabled employee, Jason Siriano, was treated more favorably than Complainant in that Siriano was offered an extended probationary period after he did not meet quota during his first 90 days. Respondent did not offer Robertson the same opportunity. Complainant further states that the discriminatory nature of Respondent's actions are corroborated by the untimely termination of Robertson's medical insurance on April 8, 2013 and the company's shifting rationale for Robertson's termination from employment.

Respondent contends that it had a contractual relationship with Robertson which provided for a 90-day probationary period. The contract also provided that at the conclusion of the probation, Respondent would evaluate performance and determine if it would offer a permanent position. The probationary period ended on March 2, 2013. Complainant had not met performance goals and had an unsatisfactory attendance record. Respondent notified Robertson at a meeting on April 25, 2013 that he would not be offered a permanent position. Respondent concludes that "the status of complainant as a 90 day probationary employee of the Respondent remained constant beginning with the first day of his 90 day probationary period and concluded when the Respondent terminated his services." (Resp. Post H.M., p.4.)

### **DISCUSSION**

The Human Rights Ordinance prohibits an employer, *inter alia*, from discriminating against any individual in discharge, or other term, privilege, or condition of employment "on the basis of unlawful discrimination." County Code, § 42-35(b)(1). The Human Rights Ordinance defines "unlawful discrimination" to include discrimination on the basis of actual or perceived "disability," and then 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 an impairment; or
- C) Being regarded as having such an impairment. Excluded from this definition is an impairment relating to the illegal use, possession or distribution of "controlled substances" as defined in schedules I through V of the Controlled Substances Act (21 U.S.C. § 812).

*Id.* at § 42-31.<sup>5</sup>

There is no dispute as to whether Robertson is disabled. Robertson's psoriasis substantially limits<sup>6</sup> one or more of his major life activities,<sup>7</sup> and there is a record of such impairment. Respondent has not argued that Robertson's medical condition does not constitute a disability as defined under the Human Rights Ordinance. Robertson's complaint is therefore based on a qualified disability under the Human Rights Ordinance.

The central issue to be determined at this time is whether Respondent engaged in unlawful discrimination on the basis of that disability when it terminated Robertson's employment. Employment discrimination claims in courts and pending before administrative agencies are usually analyzed using the three-step *McDonnell Douglas* burden-shifting approach. *Marino v. Chicago Horticultural Society*, 2012E029, \*6 (CCHRC Mar. 20, 2015) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)); *Cambron v. Kelvyn Press Inc.*, 2011E021 (CCHRC July 28, 2014); *Alvarado v. Holum & Sons, Inc.*, 2012E016 (CCHRC Jan. 9, 2014); *Jiminez v. Consumers Insurance Services, Inc.*, 2006E039 (CCHRC June 16, 2009). Under this method, a complainant must first establish a *prima facie* case of discrimination by showing that: (1) he is a member of a protected class; (2) he was performing his job duties satisfactorily; (3) he suffered an adverse employment action; and (4) a similarly situated employee outside the protected class was treated more favorably. *Id.* The Commission recently adopted a new hybrid test which allows a complainant to satisfy the fourth element of the traditional *prima facie* case by providing any kind of "*strongly probative evidence*" that "appropriately raise[s] the inference that the respondent had a discriminatory motive." *Marino*, 2012E029 at \*6 (explaining how Commission's hybrid test combines the burden-shifting of the well-established *McDonnell Douglas* test with the greater flexibility of a newer "mosaic" test).

Once Complainant makes this *prima facie* showing, "the analysis will continue on to the second and third parts of the familiar burden-shifting test (*i.e.* whether the employer can articulate a non-discriminatory reason for its adverse employment action and whether that proffered explanation is true or pretextual)." *Marino*, 2012E029 at \*6.

Complainant establishes the first and third prongs of the *prima facie* test without further comment. As shown above, Robertson meets the definition of disabled. Further, termination from his employment is the ultimate adverse employment action.

Respondent's witnesses argued throughout the hearing that Robertson failed to meet reasonable performance expectations in that Robertson literally did not meet the production quota during his probationary period and was excessively absent. In fact, at various points, this was the reason Respondent's witnesses gave for terminating Robertson's employment. While

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<sup>5</sup> This definition is a nearly verbatim replication of the definition of "disability" under the federal Americans with Disabilities Act ("ADA"). See 42 U.S.C. § 12102(2). The Commission treats authority interpreting the ADA as persuasive, though not binding, in its interpretation of the Human Rights Ordinance. CCHR Pro. R. 620.100.

<sup>6</sup> While Robertson's impairment is only substantially limiting during flare-ups, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines[.]" CCHR Pro. R. 620.110.

<sup>7</sup> "Major life activities' under the [Human Rights] Ordinance's definition shall include such activities as . . . walking . . . working, lifting, and mobility in general." CCHR Pro. R. 620.130.

Complainant does not address this second element of the *prima facie* test (*i.e.* that his performance was adequate) in his Post Hearing Memorandum, at the *prima facie* stage of a discrimination case, a complainant is not required to provide sufficient evidence to rebut respondent's proffered nondiscriminatory reasons for discharge; that assessment belongs in the third stage pretext analysis, addressed below. *See id.* at \*7 (citing *Cline v. Catholic Diocese*, 206 F.3d 651, 661 (6th Cir. Ohio 1999)).

The final prong of the *prima facie* case – that Robertson was treated less favorably than comparable employee – requires some discussion. Complainant's non-disabled comparable, Jason Siriano, failed to meet performance quotas during his probationary period but was offered an extended probationary period at a reduced salary plus commissions.<sup>8</sup> Robertson, who also did not meet the quota during his 90-day probationary period was not offered an extended probation at a reduced salary. Robertson was ultimately offered a less favorable "commission only" sales position.

Respondent could have argued that Siriano was not comparable because at the conclusion of his probationary period Siriano did not have an absenteeism problem.<sup>9</sup> This position would have been compelling had Respondent promptly terminated Robertson at the conclusion of his probationary period and not offered him any form of continued employment. But because Respondent created a murky area of undefined continuing employment between March 3, 2013 and April 25, 2013, by the time Robertson was ready to return to work, he was arguably comparable to Siriano. Robertson and Siriano were both employees who had not met their production quotas during probation and were seeking continued employment with the company. Further under the hybrid *Marino* standard, there is additional probative evidence to support an inference that Respondent had a discriminatory motive. Both the fact that Respondent cancelled Robertson's health insurance weeks before terminating his employment and Dodd's admission during the hearing that "had the malady been brought to the attention of the Respondent, the Complainant would never have been hired even as a probationary employee" appropriately raise the inference of a discriminatory intent. The *prima facie* case has been established.

Once a *prima facie* case is established, it is Respondent's burden to articulate a nondiscriminatory rationale for the adverse employment action.<sup>10</sup> Respondent herein has met its burden. Respondent's nondiscriminatory rationale is that Robertson's probationary period was unsuccessful and he was not offered a permanent position. Respondent argues that it acted legally and reasonably within the parameters of the contractual relationship when it terminated the employment relationship at the end of the probationary period. While there is an attractive simplicity in Respondent's approach to this case, it fails to address the myriad of facts that support a conclusion that Respondent's rationale for termination is mere pretext for unlawful

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<sup>8</sup> Since Siriano resigned due to the reduced salary, there is no indication of whether he survived the second probationary period and moved into a permanent position.

<sup>9</sup> Since Respondent failed to address any of the elements of a discrimination claim, it has essentially waived potential arguments and it is left to the Commission to attempt an analysis of these claims.

<sup>10</sup> Complainant fails to proceed in the analysis beyond the establishment of the *prima facie* case. He fails to address Respondent's nondiscriminatory rationale for termination or why he is entitled to a finding of pretext. It is troubling that both parties in this case have abdicated their responsibilities in presenting complete and cogent legal arguments in support of their respective positions.

discrimination and that Respondent intentionally discriminated against Robertson on the basis of his disability.

In the final prong of the burden-shifting analysis, the complainant must prove, by a preponderance of the evidence that the respondent's rationale was pretext for discrimination. Pretext can be established by showing that the employer's explanation is inherently unbelievable; the employer is "less than candid", or shifting explanations for making employment decisions. *Iverson v. Horwitz*, 1994E021, 10 (CCHRC Feb. 8, 1996). A complainant will seek to identify "such weaknesses, implausibilities, inconsistencies, or contradictions" in respondent's asserted justification "that a reasonable person could find [it] unworthy of credence." See *Marino*, 2012E029 at \*8; *Corporate Bus. Cards, Ltd. v. Ill. Human Rights Comm'n*, 2012 Ill. App. Unpub. LEXIS 2124 (1st Dist. 2012) (citing *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 537 (1st Dist. 2000)) (suggesting ways to show "pretext").

The Commission finds that pretext has been established in this case on the basis of the following:

**1. Dodd's testimony lacked clarity, consistency and credibility.**

Allstate-Louis Dodd Agency is a small owner-operated insurance agency. There are fewer than five employees. Dodd, the owner, claims to have little day-to-day contact with his staff, yet he is the decision maker on all business and employee matters. Dodd's selective recollections about the circumstances of Robertson's employment appeared evasive and his repeated portrayal of himself as a benevolent and empathetic employer appeared unresponsive and exaggerated.

Dodd could not or would not state when Robertson was terminated. Dodd testified that "in his mind" Robertson had been terminated on March 3, 2013, the end of the probationary period, while his office manager testified that Robertson was terminated at the April 25, 2013 meeting. Dodd later testified that he told Robertson that he would not be offered a permanent position on April 25, 2013. Dodd testified that Robertson was not an employee when his insurance benefits were terminated. These inconsistencies are intensified by the fact that there is no corroborating documentation to indicate when the decision to terminate was made or when it was communicated to Robertson. Dodd determines when an individual employee's absenteeism has become "unexcused" or "excessive," yet there is no procedure for communicating this information to the employee.

Dodd testified that he was unaware that his office manager, Yelverton, and Robertson were communicating after March 2, 2013, which is inconsistent with Yelverton's testimony and the record. Dodd further testified that Yelverton made numerous attempts to bring Robertson into the office staring immediately after March 2, 2013. This is also unsupported by Yelverton's testimony or the email documents of record.

Dodd's assertion that he could not take any employment action regarding Robertson until he had a "face to face" meeting is contradicted by his decision to terminate Robertson's medical insurance on April 8, 2013, two weeks before the "face to face" occurred on April 25, 2013.

Dodd's testimony regarding his reason for terminating Robertson's health insurance lacks credibility and raises an inference of discrimination. Dodd terminated Robertson's health

insurance on April 8, 2013 but gave no notice to Robertson. Dodd testified that he made the decision to terminate the insurance to force Robertson to come in to the office for a meeting. Dodd surmised that because Robertson had failed to present himself even after receiving a physician's return to work authorization,<sup>11</sup> Robertson was malingering and the only way to pressure him to come in would be by terminating his benefits. If that was his real motive, Dodd would have contacted Complainant and told him that his benefits were terminated. Instead, Dodd did nothing.

The record supports a strong inference that Respondent was motivated at least in part by an unwillingness to spend money for health insurance for a disabled employee who suffers from a serious chronic condition. This discriminatory animus is further corroborated by Dodd's admission that he wouldn't have ever hired Robertson if he had known the nature of his "malady."<sup>12</sup>

## **2. Evidence of shifting rationales support an inference of discrimination.**

The trail of shifting rationales for the decision to terminate Robertson's employment in this case is difficult to follow. At the hearing, Dodd and Yelverton testified that Robertson was not offered a permanent position because of lack of production, finances and absenteeism. Robertson testified that he was told by Yelverton on July 1, 2013 that one reason for the termination was that there was concern about Robertson leaving to attend law school. During the unemployment compensation hearing, Dodd stated Robertson had been terminated due to "job abandonment" and that he could return. In the post hearing memorandum, Respondent appears to raise issues regarding Robertson's expired license and his failure to appear at the office after being released by his physician. (Resp. Post H.M., p. 4.)<sup>13</sup>

Interestingly, Respondent did offer Robertson a "commission only" employment relationship, which suggests that Respondent would consider an ongoing employment relationship but only with terms that insure that Respondent would not incur any financial risk due to potential costs of an employee with a disability. While the record of this hearing and subsequent written arguments are sparse, there is sufficient evidence to support a finding of pretext.

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<sup>11</sup> Robertson presented a return to work authorization allowing him to return without restrictions on March 25, 2013. He did not actually return to work on that date, however, because of a new exacerbation of the psoriasis and sent a note with additional photos to Yelverton. Complainant failed to submit an amended physician's note creating a legitimate basis for Respondent's suspicion that he was malingering to avoid a meeting. Had Respondent at that point terminated Robertson and concurrently cancelled his health insurance this claim may have failed.

<sup>12</sup> It should be noted that Respondent was not without legal means to terminate Robertson. An employer does not have to maintain an employee (disabled or not) on medical leave for unlimited periods of time. If a disabled individual cannot work, he/she can be terminated, provided that it is handled in a manner that is consistent with other employees and the workplace rules. If that was the case, Robertson should have been informed that as of March 3, 2013, that his employment relationship with Respondent was severed and the health insurance benefits subject to cancellation. But that did not happen. Robertson received no notification and he continued to communicate with Yelverton about his medical status and projected time frame for returning to the office. Robertson's perception that he remained an employee during his "medical leave" is supported by the record.

<sup>13</sup> There is also a reference by Respondent to a meeting on April 8, 2013 which never occurred, further complicating Respondent's "facts." (Resp. Post. H.M., p. 3.)

Complainant has sustained his complaint of intentional employment discrimination.

### DAMAGES

After a finding of liability, a successful complainant is entitled to seek remedies as specified in the Human Rights Ordinance. Specifically victims of employment discrimination can seek an order to, *inter alia*, (1) cease the illegal conduct complained of and to take steps to alleviate the effect of the illegal conduct complained of; (2) pay actual damages, as reasonably determined by the Commission, for injury or loss suffered; (3) hire, reinstate, or upgrade the complainant, with or without back pay, or to provide such fringe benefits as the complainant may have been denied; (4) pay the complainant all or a portion of the costs, including reasonable attorney's fees, expert witness fees, witness fees, and duplicating costs, incurred in pursuing the complaint before the Commission or at any stage of judicial review; (5) take such action as may be necessary to make the complainant whole, including, but not limited to, awards of interest on the actual damages and back pay from the date of the violation; (6) pay a fine of not less than \$100.00 and not more than \$500.00 for each offense. *See* County Code, § 42-34.

Counsel for both parties knew or should have known that this proceeding was not bifurcated and that evidence as to both liability and damages was to be introduced during the administrative hearing. To insure that there was no confusion as to that issue, Administrative Law Judge Kinoy admonished the parties on the record at the beginning of the hearing as follows:

THE COURT: [J]ust so that we understand where we're going today; and I assume you understand this because of the way you drafted the prehearing memorandum, that this is not a bifurcated proceeding; we are dealing with both liability and damages. Is that your understanding?

MS. CUNNINGHAM: Yes.

THE COURT: Is that your understanding?

MR. SCILIANO: Yes.

(Tr. 11:14-21.)

Neither party addressed the issue of damages in their respective Post Hearing Memorandums. Neither party proposed findings of fact relating to damages. Complainant did not submit proposed damage calculations. Instead, Complainant in his Conclusion to his Post Hearing Memorandum requests that the Commission "set this matter for hearing and/or further determination of Complainant's damages, and for any other relief the Commission deem just and fair." (Cp. Post H.M., p. 11.) There will not be an additional hearing or other proceeding relating to the calculation of damages in this matter. A decision as to damages will be made based on the record as it now stands.

**Back Pay Damages:** The record is devoid of sufficient probative evidence that would allow the Complainant to be awarded back pay. *Conway v. Trans-action Database Marketing Inc.*, 1999E010, \*16 (CCHRC Mar. 3, 2003); *McClellan v. Cook County Law Library*, 1996E026,

\*20-21 (CCHRC June 7, 1999); *Glusek v. Stadium Sports Bar and Grill*, 1999E052 (CCHRC Mar. 16, 1995) (claimed back pay is speculative because of lack of sufficient proof). Robertson testified generally as to several positions he held after his termination from Respondent. He also testified as to receiving unemployment benefits for approximately a year and that as of August 2015 he had obtained a position with Combined Workplace Solutions that pays him “50K plus commission off of what my employees write.” (Tr. 88: 23-24.) There are no documents of record as to any compensation received from this subsequent employment or government benefits obtained. There is no proposed calculation as to the determination of back pay. It is not the responsibility of the administrative law judge to sift through the record and attempt to reach a calculation of back pay. There is no way to speculate as to the level of pay Robertson would have received had he been hired and what, if any, commissions he would have been entitled to on the basis of the record established by Complainant at the hearing.

**Reinstatement:** Complainant has never requested reinstatement to his employment with Respondent and has therefore waived any right to reinstatement.

**Emotional Distress Damages:** Robertson testified as to emotional injury he suffered as a result of being unemployed and uninsured in 2013. Robertson credibly testified as to increased stress he experienced as a result of having to borrow money from family to make mortgage payments on a newly purchased home and to pay for other basic necessities. (Tr. 89-91.) He further testified that having to fight for his unemployment benefits and the struggle to find programs to provide necessary medication as a result of being uninsured were additional stressors. (*Id.*) Robertson testified that the summer was “horrible” for him. Robertson testified that the stresses he experienced worsened his psoriasis during this period. (*Id.*)

The determination of the appropriate compensation for emotional damages is discretionary and not subject to any specific rules or calculations. This Commission has, however, adopted a frame work in which to analyze claims for emotional injury damages:

In considering an appropriate award for emotional distress damages, the Commission considers previous Commission and other tribunal decisions, as well as the following factors: (a) the extent of testimony concerning the emotional distress, *i.e.* was there negligible or merely conclusory testimony or was there detailed testimony revealing specific effects of the distress; (b) the length of the discriminatory conduct; the type of discriminatory conduct, *i.e.*, acts occurring briefly or egregious behavior accompanied by face to face conducts, epithets and/or actual malice; (d) the duration of the discriminatory conduct’s effects; (e) whether medical treatment was sought and /or whether and to what extent physical manifestations or psychiatric manifestations related to the distress; (f) whether the discriminatory conduct was so egregious that one would expect a reasonable person to experience severe emotional distress; (g) the vulnerability or fragility of the complainant due to past discriminatory experiences or pre-existing condition; (h) whether the conduct involved refusal to rent, rather than harassment, or an attempt to evict or refusal to sell; (l) whether the discriminatory act

was accompanied by acts or threats of violence; and (j) whether serious medical or psychological reactions to the discriminatory acts were present.

*McClellan v. Cook County Law Library*, 1996E026, \*22-23 (CCHRC June 7, 1999).

Robertson testified very briefly regarding his emotional damages. He appeared serious and credible and this ALJ has no reason to challenge his sincerity or veracity. Robertson, however, provided very few details or specific examples to support his claim for damages. While it is often very difficult to articulate the manifestations of emotional injury, Robertson's limited testimony coupled with the absence of any corroborating testimony (from family or friends) makes this record unfortunately thin.

While Complainant accurately described the severity of the flare-ups he experienced during this period, he failed to produce any medical testimony to support the correlation between increased stress and exacerbations of his chronic psoriasis. Robertson's testimony regarding the stressors of not having income after February 28, 2013 were also credible and consistent with the record. Respondent, however, is not responsible for Robertson's lack of income between February 28, 2013 and June 24, 2013, because Robertson was unable to work during that time due to his serious and chronic plaque psoriasis.<sup>14</sup> Robertson did not testify specifically as to any emotional injuries for the period after the summer of 2013 until the following year when he became reemployed.

Respondent's actions in cutting off Robertson's medical insurance without notice while he was suffering an exacerbation of his medical condition and keeping him in an unclear and misleading employee status contributed to Robertson's stress and emotional injury and are therefore compensable.

It is hereby recommended:

1. That Respondent pay to Complainant \$5,000 (five thousand dollars) to compensate for emotional injuries;
2. That Respondent be assessed fines and penalties as determined by the Commission for terminating Complainant's employment in violation of the Human Rights Ordinance; and
3. That Complainant be awarded his reasonable attorney's fees and costs.

Pursuant to the Commission's procedural rules, the parties have 21 days from the date of this order in which to file any objections to this Initial Recommended Decision and Order. CCHRC Pro. R. 470.100(B). Judge Kinoy will then address any objections and issue a Final

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<sup>14</sup> Complainant's contention that he "worked" during his time away from the office is not supported by the record. Complainant made one referral that was processed by the office. There is no evidence of additional contacts or sold policies. Complainant never asked to work from home and Respondent contends that such an arrangement would not be feasible.

Recommended Order and Opinion. CCHRC Pro. R. 470.100(C). This Opinion and Order is not final or appealable until approved and issued by the Cook County Commission on Human Rights.

April 15, 2016

/s/Joanne Kinoy  
Joanne Kinoy  
Administrative Law Judge  
Commission on Human Rights