Clerk of the Court
Received 11/18/2024 10:42 AM
Filed 11/18/2024 10:42 AM

Case No. 24-cv-298
DISTRICT OF COLUMBIA
COURT OF APPEALS

Thomas Rabon	
Plaintiff-Appellant,	
v.	
Pepco Holdings Inc	
Defendant-Appellee.	

On Appeal from the Superior Court of the District of Columbia

Civil Division. Case No. 2022 CA 003673B (Hon. Yvonne Williams)

Brief of Plaintiff-Appellant Thomas Rabon

Arinderjit Dhali
Dhali PC
DC Bar No. 495909
1629 K. Street. NW. Suite 300
Washington D.C. 20006
Telephone: (202) 556-1285
Facsimile: (202) 351-0518
ajdhali@dhalilaw.com

Attorney for Appellant Thomas Rabon

Rule 28 Certificate of Parties Below

The undersigned counsel, appeared as the attorney of record, for the Plaintiff-Appellant Thomas Rabon, in all proceedings at the D.C Superior Court. We continue to represent Rabon in this Court. Susan Carnell was the counsel for Pepco at the D.C Superior Court. Carnell continues to be the counsel for Pepco.

Respectfully,

/s/ Arinderjit (A.J) Dhali
Dhali PC
DC Bar No. 495909
1629 K. Street. NW. Suite 300
Washington, DC 20006
T (202) 556-1285. F (202) 351-0518
ajdhali@dhalilaw.com
Sunday November 17, 2024
Attorney for Appellant Thomas Rabon

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended June 17, 2024), this certificate must be filed in all cases with all briefs and motions submitted in all cases designated with a "CV" docketing number, to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases. This form only needs to be filed once and should be filed under "Redaction Certification Form" on Ctrack.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief or motion, please initial the box below at "No. 7" to certify you are unable to file a redacted brief or motion. Once Box "No. 7" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I A.J Dhali certify [as the attorney for my client, or on behalf of OAG/PDS/USAO/other institutional litigant] that [I/institutional litigant] will review the guidelines outlined in Administrative Order No. M-274-21, amended June 17, 2024, and Super. Ct. Civ. R. 5.2, and I, or any later assigned attorney, will be sure the following information will be redacted from any subsequent briefs and motions filed in this case:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-

identification number would have been included;
(3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(4) the year of the individual's birth;
(5) the minor's initials; and
(6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

7. **I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact any filings. This form will be independently filed as record of this notice and the filing will be unavailable for viewing through online public access**

/s/ A.J Dhali, Attorney for Rabon
Signature

24-cv-298
Case Number(s)

A.J Dhali
Name

8/9/2024
Date

ajdhali@dhalilaw.com
Email Address

Table of Contents

Table of Authorities

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal arises from the March 15, 2024, Order of the DC Superior Court, granting the defendant employer Pepco Holdings Inc.'s (Pepco) R.56 motion for summary judgment for claims under the DC Human Rights Act (DCHRA), DC Code §2-1401-01 *et seq*., and the Coronavirus Support Emergency Amendment Act (CESA), D.C Act 23-326. This Court has jurisdiction over this appeal relating to final orders of the Superior Court. Rabon timely filed his notice of appeal on March 25, 2024.

ISSUES PRESENTED FOR REVIEW

1. Did Rabon state a claim of disability discrimination when he was diagnosed with Covid and was absent from work for four months, only to be terminated by Pepco a month after his doctor cleared Rabon to return to work?
2. Could a jury determine that Rabon was subject to retaliation under the DCHRA where (i) Pepco used his request for accommodations as grounds to terminate him and (ii) where Pepco terminated Rabon a month after his physician cleared Rabon to return to work?
3. Did Rabon state a claim of retaliation under the Coronavirus Support Emergency Amendment Act (CSEA)?

STATEMENT OF THE CASE

On August 18, 2022, the Plaintiff-Appellant Thomas Rabon (Rabon), in his *pro se* capacity, filed a complaint of discrimination and retaliation for claims under the DC Human Rights Act (DCHRA). The employer, Defendant-Appellee Pepco, filed a motion to dismiss.

On November 15, 2022, Rabon through his undersigned counsel filed his first amended complaint (FAC) as of right under Superior Court Rule 15 (JA 11-27). We filed a three (3) count complaint of (i) discrimination under the DCHRA (Count I), (ii) retaliation under the DCHRA (Count II) and (iii) violation of the Coronavirus Support Emergency Amendment Act (Count III). Pepco filed an Answer to the FAC and discovery commenced. At the close of discovery, Pepco filed their Rule 56 motion for summary judgment.

On March 15, 2024, the Superior Court granted Pepco's motion on all three counts. Ten days later, on March 25, 2024, we filed our timely appeal in this Court.

FACTUAL BACKGROUND

The Plaintiff, Thomas Rabon, was employed at Pepco from July 2020 until March 16, 2021. Rabon was hired as a "helper cable splicer mechanic." His job was physically demanding. (JA 336: Angela Forester Dep. 46:5-12). It required Rabon to lift cables weighing 3-50 pounds. (JA 352: Broen Dortch Dep. 25:9). Rabon has a learning disability. When he started at Pepco, he provided Pepco with

his "individualized education plan" (IEP), documenting his learning disabilities. (JA 354-63.[1]) The Maryland Department of Education also found that Rabon has category I: "most significant disability," that affects his "ability to work." (JA 354).

As part of his duties at Pepco, Rabon was to take two tests, the "construction and skills trades" (CAST) test and the "task specific exercise." Rabon passed both tests. Pepco also provided ADA accommodations for both tests.[2] His October 2019 offer letter proposed that he start on December 16, 2019.[3] His start date was moved to July 2020. From July 2020 to September 2020, Rabon was in training. On September 15, 2020, Rabon was told to take the "helper cable splicer" test. It was a written test. Rabon failed this test. (JA 367: Tyler Dep. 11:1-6.) Rabon failed this test because ADA accommodation was not provided. Pepco provided Rabon with ADA accommodations to retake the test on September 25, 2020. (JA 485-86).[4] Rabon asked for an additional 30-60 minutes as an accommodation. (Id.)

In the interim, on September 24-25, 2020, Rabon called in sick. Rabon, on or about September 28, 2020, also informed Pepco that he contracted Covid.[5] (JA

[1] See also Answer by Pepco to Rabon's First Amended Complaint ¶¶10-11, admitting that he provided his IEP to Pepco to document his request for accommodations. This IEP is also bates stamped by Pepco.
[2] Pepco Answer to ¶13, admitting that Rabon passed both tests.
[3] Pepco Answer and admission to ¶14.
[4] See also Pepco Answer and admission to ¶23.
[5] Pepco Answer and admission to ¶24.

487.) Rabon was on approved short-term disability (STD) leave for Covid from approximately September 28, 2020, to January 26, 2021. (JA 329: Forester Dep. 20: 2-14). His Covid status was confirmed in October 2020, when Rabon visited the emergency room (ER) at Howard General Hospital. (JA 376, "He was diagnosed with Covid in 8th of October at Howard County General Hospital.") Being diagnosed as Covid positive, Rabon continued to seek medical treatment. All of his medical documents were also provided to Pepco (JA 372-89). His medical note dated January 13, 2021, from his physician Dr. Rifino states that Rabon has "significant fatigue [and] short of breath." (JA 376.)

While on STD, Rabon was assigned to Pepco's Occupational Health Services (OHS). Rabon was first assigned to Tracy Donaldson.[6] He was later assigned to Angela Forrester, the case manager and Nurse at OHS. Forrester is not a doctor and never met Rabon or conducted any physical tests on Rabon. (JA 328: Forester Dep. 15:1-21; 16:1.) Forrester received her degree in nursing in 2022 (JA 327: Forrester Dep. 9:10-12) Based on the "little literature" that Forrester read on long term Covid, she admits that fatigue is a symptom of long term Covid. (JA 336: Forester Dep. 47:8-12.)

In reviewing the medical reports from his physicians, including the January 13, 2021 report from Mary Rifino, M.D., (JA 376-78) which found that Rabon has

[6] Pepco Answer and admission to ¶29.

dyspnea (shortness of breath), chest heaviness, and various aches and pains, Forrester considered these to be "symptoms," of an unknown condition. (Forester Dep. 26-27:1). Forrester also disagreed with Dr. Rifino's January 27, 2021, diagnosis[7] (JA 332: Forester Dep. 31: 11; JA 373-75) and medical report that Rabon was not able to return to work. (JA374 ("**pt not able to work at this time to be reevaluated in one month**."). To that end, Forrester in January 2021 informed Rabon that he needs to return to work. (JA 330: Forester Dep. 22:13-15).[8]

Pepco Pressures Rabon to Return to Work & Terminates Him a Month After Being Cleared to Return to Work by his Physician Dr. Rifino.

On January 29, 2021, Rabon emails Forrester and HR that he is sending over the January 27, 2021 progress notes from Dr. Rifino. He states that he is still suffering from Covid and begs not to be terminated. He also states that his doctor states that he cannot return to work (JA 374). This email says:

From: Thomas Rabon <t.rabon@comcast.net>
To: "Forrester, Angella:" <Angella.Forrester@exeloncorp.com>, "Kathleen B: Thompson" <Kathleen.Thompson@exeloncorp.com>, kgentry-may@pepco.com
Cc: MCBaptist@pepco.com, Matthewhaynes@pepco.com, jwilliford@ibew1900.org
Date: 01/29/2021 12:17 PM

[7] This is bizarre. We are unaware of any instance where an employer has taken the position that a medical doctor's report is nonsense, more so when Forrester is not a physician and also did not examine Rabon. Forrester also admitted that it was her opinion that Rabon could return to work (Q. I want to be clear that it was your opinion that Mr. Rabon could come back to work? A. Yes. Forrester Dep. 34:2-5)
[8] Forrester is not sure when she made this request (Forrester Dep. 22:16-18.)

Subject: My Progress Notes

Good Morning all,

The most recent progess notes were faxed to Ms. Angela Forrester on January 27th, by Dr. Rifino my primary care doctor. Please confirm you received these notes.

The notes state I am still suffering with COVID, and am no not released for work.

I don't want my non-certified absence to lead to disciplinary action or termination.

I've been Struggling with COVID symptoms since October and I'm starting to finally feel better but not good enough to return to PEPCO.

Please let me know if I need to make daily calls to a manager? If so, who do I place these calls to? It took me over a year of applying with PEPCO to finally be hired, so I will be devastated to lose my job due to COVID. [9]

On February 3, 2021, Rabon receives a letter from Pepco, scheduling a conference call for February 9, 2021. Attached to this letter was also Pepco's policy on job abandonment. (JA 491)[10] There is nothing in Rabon's January 29, 2021, email stating that he was abandoning his job. On February 9, 2021, Rabon connects to the conference call. He is the only person on the call. Despite Pepco confirming with Rabon their attendance on this call, no one from Pepco attended the conference call.[11] Later that evening on February 9, 2021, Rabon receives an email from Karen Gentry-May (HR Manager) that that the conference call was being rescheduled (JA 523: ¶25, Rabon Aff.)

[9] Pepco Answer and Admission ¶35.
[10] Pepco Answer and Admission ¶36.
[11] Pepco Answer and Admission ¶38. See also Rabon Aff. ¶24 (JA 523)

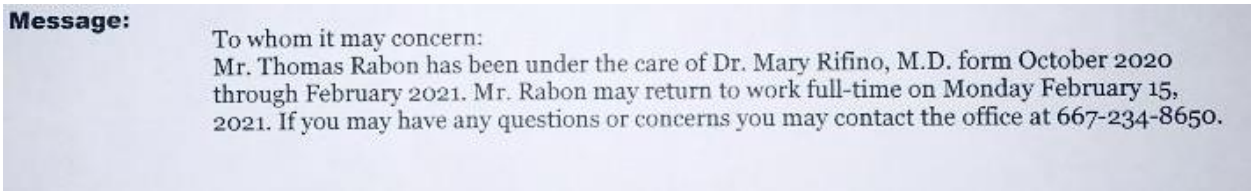
On February 11, 2021, Rabon receives a text message from Abdulai Kargbo, manager of underground utility lines at Pepco. Kargbo informs Rabon that the conference call is being rescheduled to February 12, 2021. (JA 523: ¶26, Rabon Aff.) Present on the February 12, 2021, call were Rabon, Karen Gentry-May (HR Manager), Kargbo and Jerry Williford (union manager/representative).[12] Kargbo informs Rabon that he was to return to work by January 26, 2021. Rabon said that he was sick and was experiencing symptoms from Covid. Karen Gentry-May then informed Rabon that he must return to work. (JA 523: ¶27, Rabon Aff.) Rabon informed Pepco that he will reach out to his physician and determine when he can return to work. (JA 523: ¶28, Rabon Aff.) Baptiste then said that Rabon had failed his test taken on September 15, 2020, and that this was another reason to terminate him. Rabon protested saying that no accommodations were provided to him on September 15. Additionally, Rabon reminded Baptiste that he (Baptiste) had already promised Rabon that he could take the test again with accommodations (JA 485) and so it was unclear to Rabon why the September 15, 2020, test results were now being used against him. (JA 524: ¶29, Rabon Aff.) Rabon also believed by agreeing to provide accommodations for the re-taking of the test, only for Pepco to now hold it against him, and deny him the accommodations, Pepco were retaliating against him for his protected activities and/or request for accommodations. (*Id*.)

[12] Pepco Answer and Admission ¶42

Karen Gentry-May closed the February 12, 2021, conference call, by informing Rabon, that he was on "Crisis Suspension", that Pepco would research and investigate further before coming to a final determination concerning his employment. (JA 524: ¶29, Rabon Aff.)

After the call, Rabon reaches out to his physician to determine when he can return to work. Dr. Rifino clears him to return to work as of February 15, 2021. (390-91; JA 524: ¶31, Rabon Aff.)

On February 18, 2021, Rabon emails, Pepco's Director of HR Marsha Byes and informs her that he is cleared to return to work as of February 15, 2021. He attaches the letter from his physician. This letter states: (JA 390-91; 523: ¶32, Rabon Aff.):



Message:

To whom it may concern:
Mr. Thomas Rabon has been under the care of Dr. Mary Rifino, M.D. form October 2020 through February 2021. Mr. Rabon may return to work full-time on Monday February 15, 2021. If you may have any questions or concerns you may contact the office at 667-234-8650.

The HR Director Byes in turn sends this note to Pepco's OHS. (JA 406: Byas Dep. 54:21; 55:1-6.)

There is another conference call on February 19, 2021. Rabon informs Pepco that he is ready, willing and able to return to work as of February 15, 2021. Pepco states that he has abandoned his job. Rabon says he never abandoned his job. He

was under his doctor's care and is now able to return to work. (JA 525: ¶33, Rabon Aff.)

Gentry-May, the HR manager, in her deposition also admitted that as of February 19, 2021, there was no decision made to terminate Rabon.

Page 59

Q. On February 19, 2021, there was no decision made to terminate Mr. Rabon; is that correct?
A. That's correct.
Q. In fact, I think the decision was not made until about March 2021. Is that fair to say?
A. That's correct.

(JA 515: Gentry-May Dep. 59)

Despite Rabon providing medical documentation of his illness and Rabon's willingness and ability return to work as of February 15, 2021, and Pepco's knowledge of this, Pepco, on March 16, 2021, sent Rabon a termination letter. This March 16, 2021, termination letter states that Rabon is being terminated for two reasons: (i) that Rabon failed the cable splicer test administered to him on September 15, 2020, and (ii) that Rabon failed to provide medical documentation for his absences (JA 488.)

When discussing Rabon's termination in February 2021 and March 2021, HR Director Byas also did not share with her HR team (Gentry-May) and Rabon's supervisors that Rabon was cleared to return to work as of February 15, 2021. (JA 480: Byas Dep. 61:17-21). This is also confirmed by Gentry-May, Byas'

subordinate and HR Manger, that Byas never told her that Rabon could return to work as of February 15, 2021 (JA 515: Gentry-May Dep. 60: 4-8.)

SUMMARY OF ARGUMENT

The Superior Court erred in five (5) ways.

(1) It took an overly narrow approach to the definition of disability when it concluded that Rabon, who had been diagnosed as Covid positive and long term Covid, is not a disabled person within the DHCRA. (2) It then compounded its error by concluding that his symptoms were a result of pre-existing conditions. Additionally, the Superior Court also (3) incorrectly held that Rabon did not rebut the employer's reasons for his termination. Pepco presented two reasons for Rabon's termination, both of which are false. Pepco first claimed that Rabon was terminated because he failed to provide medical documents to substantiate his medical condition (Covid) and that he had failed the cable splicer test. Rabon presented adequate medical documentation of his Covid diagnosis. This was also admitted by Pepco's Director of HR, who admitted that Rabon presented medical documentation justifying his medical absence. The same is the case for Pepco's assertion that Rabon failed his cable splicer test. Rabon only failed the cable splicer test on September 15, 2020, because no accommodation was provided to Rabon for taking this test. Subsequently, on September 25, 2020, Pepco also agreed to provide him with accommodations to take the cable splicer test a second

time, only for Pepco to use his request for accommodations (to take the test again) as grounds to terminate him. This is per se evidence of discrimination and retaliation. Never mind that also, under the mixed motive standard, this Court has repeatedly held that an employer violates the law when the decision to terminate is "partially based" on a discriminatory reason.

More so, when (4) a jury can conclude that Pepco retaliated against Rabon by terminating Rabon upon his return from medical leave. Rabon was cleared to return to work in February 2021. As soon as he was cleared to return to work, he also told Pepco (in his conference calls with them) that he was willing and able to return to work. His termination was finalized and approved in March 2021, or a month after he was cleared to return to work. The close causal connection raises an inference of retaliation. Rather than welcoming Rabon back to work, Pepco continued to barge forward with his termination in March 2021.

Finally, (5) the Superior Court incorrectly analyzed claims under the Coronavirus Support Emergency Amendments Act (CSEA) when it held that because Pepco allowed Rabon to quarantine for 14 days under the CSEA in October 2020, there was no evidence of retaliation when Pepco terminated Rabon in March 2021.

STANDARD OF REVIEW

This Court reviews grants of motions for summary judgment *de novo*. *See Hsieh v. Formosan Ass'n for Pub. Affairs*, 316 A.3d 448, 453 (D.C. 2024) ("We review an order granting summary judgment de novo, applying the same standard the trial court was required to apply when considering a motion for summary judgment.")

ARGUMENT

Part I. Discrimination

A. Rabon is a Disabled Person within the Meaning of the DCHRA and the ADA.

This was easy; this was not hard. We have no idea why the Superior Court decided to take out a protractor and a ruler to determine Rabon's disability status. As this Court knows since the 2008 Amendments to the ADA, disability is broadly defined. The 2008 Amendments after all were enacted to overrule a series of Supreme Court decisions that asked judges to take a protractor to determine an employee's disability status. This is no longer the standard. The Superior Court (at the direction of Pepco) also relied on pre-2008 ADA amendment cases to analyze Rabon's claims. All of these pre-2008 cases have been overruled by the ADA Amendments Act of 2008 (ADAAA).

This Court also looks at the American Disabilities Act (ADA) to interpret an employee's disability status under the DCHRA. *See Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) ("Our decisions under the DCHRA regarding

whether an employee was discriminated against because of a "disability" effectively incorporate judicial construction of related anti-discrimination provisions of the Americans with Disability Act (ADA), 42 U.S.C. § 12102 *et seq*.") (internal case cites omitted.) It also looks at the EEOC guidance in interpreting disability. *See Hsieh, supra*, 316 A.3d at 456 ("To be sure, this court has repeatedly stated—including in opinions issued after the effective date of the 2008 ADA amendments—that ADA case law and EEOC guidelines [] are persuasive authority for how we should interpret comparable provisions of the DCHRA.")

Under the 2008 Amendments, "disability" has broad and expansive coverage. And whether a person is "disabled" should not demand "extensive analysis." 29 C.F.R. §1630.1 (c)(4) (emphasis added). *See Martin v. District of Columbia*, 78 F. Supp. 3d 279, 298 (D.D.C. 2015) ("the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis, and that courts should instead focus on determining whether defendants [Pepco] "have complied with their obligations" under the ADA. ADAA, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008)") (emphasis added).

Thus, in *Martin, supra*, the court held that the plaintiff had the disability of "carpal tunnel syndrome" when she produced a "letter from her doctor advising her

against typing for three months […] her doctor instructed her to limit working hours to four hours per day and computer usage to one hour per day; to avoid grasping, pushing, and pulling; and to observe weight limits for lifting and time limits for standing, walking, sitting, and driving." *Id.* at 297-98.

On the issue of Covid, courts have held that Covid is a disability if the illness is not transitory or temporary. *See Brown v. Roanoke Rehab. & Healthcare Ctr.*, No. 3:21-CV-00590-RAH, 586 F. Supp. 3d 1171, 2022 U.S. Dist. LEXIS 30548, 2022 WL 532936, at *5-6 (M.D. Ala. Feb. 22, 2022) (finding that a plaintiff alleging serious COVID-19 related symptoms could maintain an ADA claim); *Matias v. Terrapin House, Inc.*, 21-cv-02288, 2021 U.S. Dist. LEXIS 176094, 2021 WL 4206759, at *4 (E.D. Pa. Sept. 16, 2021) (citing agency guidance to conclude that COVID-19 may be an ADA disability as it is not always transitory and is not minor); *see also Sharikov v. Philips Med. Sys. MR, Inc*., 659 F. Supp. 3d 264, 279 n.4 (N.D.N.Y. 2023) ("The Court notes that recently, in a Technical Assistance Questions and Answers regarding COVID-19 and the ADA, the EEOC noted that individuals infected with COVID-19 who exhibit "mild symptoms similar to the common cold or flu that resolve in a matter of weeks" are not disabled for the purposes of the ADA; however, "an individual with COVID-19 might have an actual disability" depending on "the specific facts involved in a particular employee's medical condition." EEOC, What You Should Know About

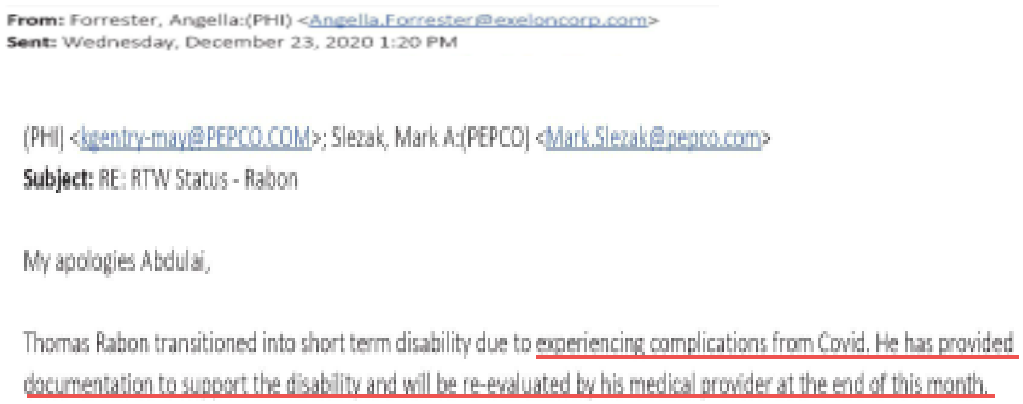
COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws).

Under the EEOC guidelines on Covid, a person who has shortness of breath that lasts for several months is "substantially limited in cardiovascular function." EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ("An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months. The individual is substantially limited in cardiovascular function and circulatory function, among others.").

The same is the case for a person with "shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months, is substantially limited in respiratory function, and possibly major life activities involving exertion, such as walking." *Id.*

Rabon's Covid status was also not transitory. He was diagnosed as Covid positive in October 2020 and continued to be under the care of his physician for Covid complications from October 2020 to February 2021, or four months.

On December 23, 2020, even Forrester (and Pepco) admitted that Rabon had complications from Covid and that he had provided medical documentation to "support the disability." (JA 496-97). That is to say, Pepco regarded Rabon as disabled.



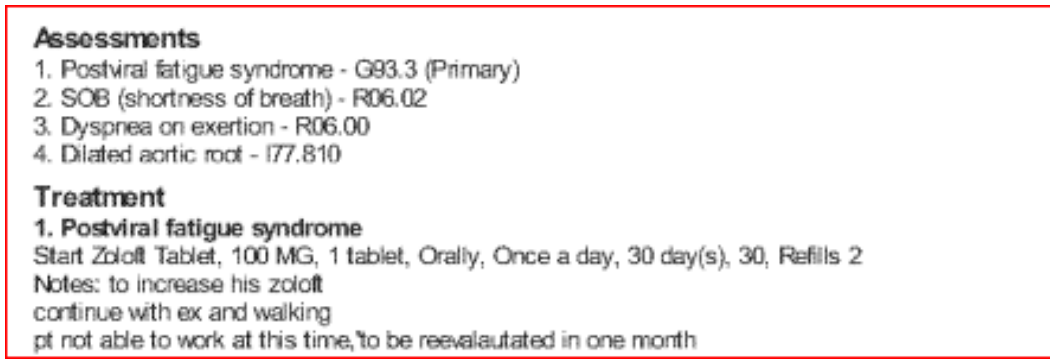
From: Forrester, Angella:(PHI) <Angella.Forrester@exeloncorp.com>
Sent: Wednesday, December 23, 2020 1:20 PM

(PHI) <kgentry-may@PEPCO.COM>; Slezak, Mark A:(PEPCO) <Mark.Slezak@pepco.com>
Subject: RE: RTW Status - Rabon

My apologies Abdulai,

Thomas Rabon transitioned into short term disability due to experiencing complications from Covid. He has provided documentation to support the disability and will be re-evaluated by his medical provider at the end of this month.

In the medical note dated January 13, 2021, Dr. Rifino states that Rabon has "postviral fatigue syndrome." (JA 378.) Again, on January 27, 2021, Dr. Rabino's assessment of Rabon states that Rabon has "Postviral fatigue syndrome," shortness of breath," and dyspnea on exertion. (JA 374). Dr. Rifino also states that "**pt not able to work at this time, to be reevaluated in one month**." (emphasis added)



Assessments
1. Postviral fatigue syndrome - G93.3 (Primary)
2. SOB (shortness of breath) - R06.02
3. Dyspnea on exertion - R06.00
4. Dilated aortic root - I77.810

Treatment
1. Postviral fatigue syndrome
Start Zoloft Tablet, 100 MG, 1 tablet, Orally, Once a day, 30 day(s), 30, Refills 2
Notes: to increase his zoloft
continue with ex and walking
pt not able to work at this time, to be reevalautated in one month

Under the EEOC guidelines, any or all of the above, is a substantial limitation on Rabon's respiratory or cardiovascular functions and affect the major life activity of walking and breathing. *See also Brown, supra,* 2022 U.S. Dist. LEXIS 30548 at *9-10 ("[Covid] symptoms included severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes. These symptoms could substantially limit major life activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. And while the Defendants argue that the Amended Complaint is devoid of any allegations about how her symptoms affected a major life activity, the Amended Complaint makes clear that these symptoms impacted her ability to breath, concentrate, and work, all of which are statutorily recognized major life activities.").

Notwithstanding that the EEOC has deemed Rabon a disabled person, the Superior Court on page 15 of the opinion, brushed aside Rabon's disability on the grounds of his "pre-existing conditions." We are unaware of any language in the DCHRA and the ADA Amendments Act of 2008, 42 U.S.C §12111 et seq., deeming that an employee is not disabled because of pre-existing conditions. This also flies against the conclusions reached by Congress, under the 2008 Amendments, which held that disability has broad and expansive coverage. 29

C.F.R. §1630.1 (c)(4) ("Broad Coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.") (emphasis added).

The Superior Court then compounded its errors by stating that because Rabon's vitals and blood oxygen levels remained normal at the time of his examination, he is not disabled. There are patients at the Intensive Care Unit (ICU) or ER with normal vitals; that does not mean they are not disabled or suffering a serious illness or injury. That also does not mean that if their vitals are normal at 9:25 am, it will also be the case at 10:30 am. There are also Cancer or Parkinson's patients reporting to work with normal vitals, that does not mean they

are not disabled, or for that matter do not have symptoms of Parkinson's affecting their major life activities.[13]

This was also confirmed by Rabon's physician Dr. Rifino using asthma as an example.

Q Okay. Let's talk about his COVID status. In this case, when Mr. Rabon had tested COVID positive - and it seems that in some of the examinations, he was also not experiencing any kind of respiratory distress. Is that normal?
MS. MAGUIRE: Objection. Go ahead.
A Yeah. I mean, people can have asthma and be, you know, really have tight symptoms, and they're not experiencing it then. But they are experiencing them outside.
So, you go by, you know, acute distress does not mean they don't have symptoms.

(JA 444: Rifino pg. 136)

In short, taking into account Rabon's medical file, medical documents, his physician's assessments of his diagnosis and symptoms, the ADA amendments broadly defining disability, Forrester's admission that he is disabled with Covid (JA 496-97), and the EEOC's guidelines on Covid, Rabon is a disabled person.

B. Rabon is a Qualified Person with a Disability

The Superior Court also incorrectly held that Rabon was not a qualified individual. The court reached this conclusion because Rabon failed the cable splicer test on September 15, 2020.

[13] This Court dealt with a Parkinson patient's disability matter in *Rose v. United General Contractors*, 285 A.3d 186 (D.C. 2022).

Rabon admits that he failed the test. The issue is *why* did Rabon fail the test? Rabon failed the test because Pepco did not accommodate Rabon's learning disabilities. This test needs to be placed in context. Rabon was first told to take the cable splicer test on September 15, 2020. Rabon failed this written test. (JA 367: Tyler Dep. 11:1-6.) Rabon failed this test because ADA accommodation was not provided to Rabon. Pepco provided this accommodation on September 25, 2020. (JA 485-86)[14] Rabon was given an extra 30-60 minutes to take this test again, this time with accommodations. This is captured in the email below.

From: Forrester, Angella:(PHI)
To: Gentry-May, Karen Y:(PHI); Merkel, Dane G:(PHI); Thompson, Kathleen B:(PHI)
Cc: Jonjo, Samuel M:(BSC); Kargbo, Abdulai H:(PEPCO)
Subject: RE: Request for Test Accommodation
Date: Friday, September 25, 2020 8:50:00 AM

Good morning,

The request is an educational intervention that would have been used while Mr. Rabon was in a primary or secondary educational institution. Ii would be in the best interest of the employee to accommodate him. Usually the allotted extra time is from 30-60 minutes.

(JA 485)

On September 25, 2020, Rabon however was not able to take the test. This was because Rabon called in sick for September 24-25, 2020. He was diagnosed with Covid three days later, on September 28, 2020. Rabon was also on approved short-term disability (STD) from September 28, 2020 until January 26, 2021. Even

[14] Pepco Answer and admission to ¶23.

Pepco's HR Director admits that Rabon could not take the test when he was out on sick leave or approved STD.

> Q. And do you know *why* he was not able to return to work to take a test a second time?
> **A**. He was out.
> Q. It's fair to say when an employee is out, the employee is not able to take a test, correct?
> **A**. That's correct.
> Q. Do you know why he was out?
> **A**. He was out on approved short-term disability

(Byas Dep. 42:8-21).

Rabon was cleared to return to work on February 15, 2021.

But perhaps the greater issue of concern is, why did Pepco <u>not provide</u> Rabon with the opportunity to take the cable splicer test <u>after</u> Rabon's doctor had cleared Rabon to return to work as of February 15, 2021? That is to say, what prevented Pepco from asking Rabon to take the test *after* February 15, 2021? Rabon was not terminated until March 16, 2021. A jury can conclude that Pepco did not provide Rabon the opportunity to take the test when he was cleared to return to work in February 2021 because of his protected activities or supposed stereotypes or animus concerning his Covid or disability status.

It is understandable why Rabon did not take the test when he was out on approved STD leave (it was because Rabon was on approved STD leave[15]), but

[15] This seems to have been lost on the Superior Court.

what were Pepco's reasons for not allowing Rabon to take the test when he was cleared to return to work on February 15, 2021? Rabon has no control over the employer's testing schedules, instructors, proctors, or facilities; almost no employee does. So why did Pepco not inform Rabon that he could take the test with accommodations upon his return? A jury can also find that Pepco did not do so because of discrimination and/or retaliation.

Pepco's decision to terminate him was also not finalized until March 16, 2021, or about a *month after* he was cleared to return to work in February. Clearly Pepco had the time, resources, and the opportunity to allow Rabon to take the test again–per their promises made to Rabon on September 25, 2020. And yet Pepco failed to do so. In fact, not only did they fail to provide him the opportunity to take the test, they also used it as a basis to terminate him, which is a per se violation of the DCHRA. *See Terry v. Helfgott,* 2016 D.C. Super. LEXIS 2, *7 (D.C. Superior Court. February 8, 2016.) ("Nor may an employer "[t]ake an adverse action against an employee who requests or uses a reasonable accommodation in regard to the employee's conditions or privileges of employment[.]")[16]

[16] The Superior Court on page 16 of its opinion got this standard backwards. It blamed Rabon after he was cleared to return to work on February 15, 2021, for not taking the test. This assumes two things, both of which are false. (i) It assumes that the responsibility to re-take an employer's test is entirely within Rabon's control. This is false. In fact, the emails produced by Pepco show that it is only Pepco that has exclusive control to schedule the test (JA 485). (ii) After Rabon was cleared to return to work on February 15, 2021, he was fighting to keep his

And yet this is exactly what Pepco did. Pepco justified Rabon's termination because of his accommodation request, which even Pepco's Director of HR admitted was illegal.

> Q. I take it as part of your knowledge of Title VII and the American Disabilities Act, if an employee is disabled, and if an employee makes a request for accommodations because of his or her disability, it's fair to say you cannot use his or her disability or his request for accommodations as a basis to terminate the employee. Would you agree with me on that?
> **A**. I agree. (JA 398-399: Byas Dep. 24:18-21; 25: 1-10).

A jury can also conclude that Pepco did not allow Rabon to re-take the test upon his return to work because Pepco retaliated against him or engaged in stereotypes concerning his disabilities. *See Rose infra.*

C. Rabon's Termination was an Adverse Action

Rabon was cleared to return to work by his physician on February 15, 2021 (JA 390-91). A month later, on March 16, 2021, Pepco terminated Rabon (JA 488). A termination is always an adverse action. *See Rose v. United General Contractors,* 285 A.3d 186 (D.C 2022).

---

job. Pepco was clearly not interested in having Rabon return to work. Pepco kept falsely accusing Rabon of abandoning his job. (JA 522-26: Rabon affidavit ¶¶20-36.)

D. Pepco's Reasons for Rabon's Termination are Pre-Textual. Additionally, under the Mixed Motive Standard, it was also Partially Motivated by an Impermissible Reason.

As we have said at various points throughout this brief, Pepco, in their March 16, 2021 termination letter to Rabon, provided two reasons for his termination. The first reason was that he failed his cable splicer test administered to him on September 15, 2020. The second reason was that Rabon did not provide "appropriate documentation" to support his absence after January 26, 2021. (JA 488)[17]

Rabon's termination a month after being cleared to return to work can be analyzed under the three-part burden shifting test under *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), or the mixed motive test. *See Rose, supra.*[18]

[17] There is a typo on the termination letter. It says that he was to report to work on January 2020. We believe Pepco meant to say January 26, 2021.

[18] At the Superior Court stage, we skipped the prima facie analysis and immediately rebutted the employer's reasons for his termination. *See Furline v. Morrison*, 953 A.2d 344, 353 (D.C. 2008) ("because Howard University produced evidence that it suspended Morrison for a legitimate, non-discriminatory reason, we need not pause to analyze whether she made out a prima facie case of retaliation at trial or of age discrimination in opposing summary judgment."); *see also Cain v. Reinoso*, 43 A.3d 302, 307 n.13 (D.C. 2012) (citing to *Furline*); *Ukwuani v. District of Columbia*, 241 A.3d 529, 542 (D.C. 2020) ("Thus, where an employer has produced evidence of a non-discriminatory reason for its actions, we need not pause to analyze whether appellant made out a prima facie case of discrimination in opposing summary judgment.") The Superior Court said we were wrong to do this. Clarification from this Court on this would be appreciated.

McDonell-Douglas Burden Shifting

Rabon admits that he failed the cable splicer test on September 15, 2020. The reason he failed the test was because Pepco never provided Rabon with accommodations to take the test. Rabon has a learning disability and has been on an individualized education plan (IEP) since high school. Maryland classified him as a category I: "most significant disability," person. (JA 354.) Rabon even provided this IEP to Pepco at the time he was offered his employment at Pepco. Pepco's own emails on this matter also show that he was granted accommodations to take his tests at the time he began his employment. (JA 486.)

<akargbo@pepco.com>
Cc: Jonjo, Samuel M:(BSC) <smjonjo@pepco.com>
Subject: Request for Test Accommodation

Hi Dane,

Thomas Rabon (Helper Cable Splicer Mechanic) is scheduled to take a progression test tomorrow. He contacted Bonnie yesterday and requested a testing accommodation for tomorrow, which apparently, he was granted prior to employment for the CASS test. Normally, we ask OHS to review requests for accommodations for employees. I have asked Angella Forester to look into this but I'm also wondering if you've ever run into this issue. Mr. Rabon is asking for extra time to test and a quiet space away from other students.

Karen

When Rabon first took the test on September 15, 2020, accommodations were not provided. Naturally, Rabon failed the test. Rabon then went back to Pepco asking Pepco for an additional 30-60 minutes to take the test. This accommodation was also approved by Pepco on September 25, 2020. (JA 485)

From: Forrester, Angella:(PHI)
To: Gentry-May, Karen Y:(PHI); Merkel, Dane G:(PHI); Thompson, Kathleen B:(PHI)
Cc: Jonjo, Samuel M:(BSC); Kargbo, Abdulai H:(PEPCO)
Subject: RE: Request for Test Accommodation
Date: Friday, September 25, 2020 8:50:00 AM

Good morning,

The request is an educational intervention that would have been used while Mr. Rabon was in a primary or secondary educational institution. Ii would be in the best interest of the employee to accommodate him. Usually the allotted extra time is from 30-60 minutes.

From: Gentry-May, Karen Y:(PHI) <kgentry-may@PEPCO.COM>
Sent: Thursday, September 24, 2020 4:21 PM
To: Merkel, Dane G:(PHI) <dgmerkel@pepco.com>; Thompson, Kathleen B:(PHI) <Kathleen.Thompson@exeloncorp.com>; Forrester, Angella:(PHI) <Angella.Forrester@exeloncorp.com>
Cc: Jonjo, Samuel M:(BSC) <smjonjo@pepco.com>; Kargbo, Abdulai H:(PEPCO) <akargbo@pepco.com>
Subject: RE: Request for Test Accommodation

Seems like this is a new issue for all of us. I am also in support of an accommodation but I don't want to step outside of any process used to review such requests. Given that the test is scheduled for tomorrow, maybe we move forward. Did he say how much extra time he needs?

Kathleen/Angella – any guidance you can give is appreciated.

On September 25, 2020, Rabon however never took the test. Why? This was because he was on sick or medical leave from September 25-26, 2020. Rabon was also on Pepco approved STD from September 28, 2020, until January 26, 2021. Even Pepco's own HR Director Marsha Byas admitted that Rabon lacked the ability to take the test when he is on Pepco approved leave.

> Q. And do you know *why* he was not able to return to work to take a test a second time?
> **A**. He was out.
> Q. It's fair to say when an employee is out, the employee is not able to take a test, correct?
> **A**. That's correct.
> Q. Do you know why he was out?

> **A**. He was out on approved short-term disability (JA 403: Byas Dep. 42:8-21)

The bigger concern for this Court is that after approving Rabon's ADA request to take the test a second time on September 25, 2020, Pepco used it as a basis to terminate Rabon in March 2021, because Rabon had failed the test. This is per se evidence of retaliation. Even Byas, the Director of HR, who rated herself a "10" on her knowledge of the ADA (JA 398: Byas Dep. 24:5-16), deemed this to be in violation of the ADA.

> Q. I take it as part of your knowledge of Title VII and the American Disabilities Act, if an employee is disabled, and if an employee makes a request for accommodations because of his or her disability, it's fair to say you cannot use his or her disability or his request for accommodations as a basis to terminate the employee. Would you agree with me on that?
> **A**. I agree (JA 398-99: Byas Dep. 24:18-21; 25: 1-10)

Byas' admission that Pepco is in violation of the ADA is also supported by the EEOC. The EEOC in its compliance manual states that an employer penalizing an employee for a request for accommodation is an act of retaliation. The EEOC used an employee's "leave request" as an example to emphasize this point.

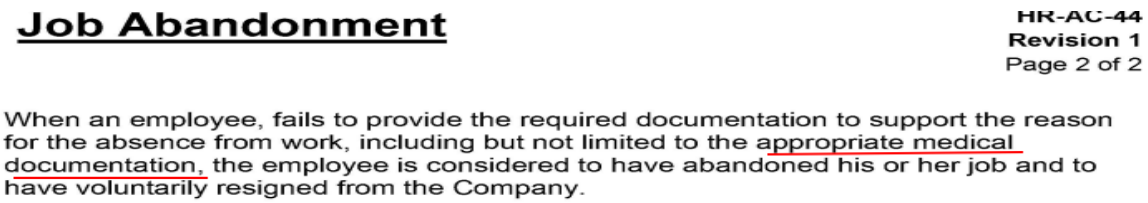
> "Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation? **No. To do so would be retaliation** for the employee's use of a reasonable accommodation to which s/he is entitled under the law. Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation."
> https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_50_
> (emphasis added).

Additionally, the fact that Pepco used his accommodation request to terminate him also shows that Rabon's disability or accommodation request was on Pepco's mind and that his disability and/or request for accommodations were directly impacting Pepco's decision making process. *See Rose supra,* 285 A.3d at 197 (Employer's "continual emphasis on supposed concerns regarding appellant's limitations imposed on …his ability to work demonstrates…that animus is directly on their mind and that appellant's Parkinson's disease was directly impacting their decision making process.").

A jury can also conclude that because Pepco terminated Rabon in March 2021, they did so in order to not provide Rabon with accommodations to take the test again, which itself would also be a claim for discrimination. *See Rose, supra,* 285 A.3d at 197 ("We can imagine a scenario where offering appellant a position change would be consistent with discrimination. For example, appellees might have offered appellant the project manager position to avoid providing him with reasonable accommodations that would allow him to keep his position, as the law required them to do.") (emphasis added).

Regarding Pepco's second reason for his termination that Rabon did not provide "adequate documentation" justifying his Covid absences, this is also false. Pepco, in their termination letter, deemed this absence of medical documentation as evidence of "job abandonment."

Under Pepco's polices, "job abandonment" is defined as failing to provide "appropriate medical documentation."



Job Abandonment

HR-AC-44
Revision 1
Page 2 of 2

When an employee, fails to provide the required documentation to support the reason for the absence from work, including but not limited to the appropriate medical documentation, the employee is considered to have abandoned his or her job and to have voluntarily resigned from the Company.

(JA 491)

All of Rabon's "appropriate medical documentation" justifying his absence from work is marked as JA372-89;390-91.[19] Even the February 11, 2021, note from Dr. Rifino states that Rabon has been under her care from October 2020 to February 2021 (JA 390).[20] Previously, on December 23, 2020, Forrester and Pepco had concluded that Rabon was suffering complications from Covid and that he had provided documentation to support his absence. (JA 496-97.) Pepco regarded him as disabled.

We are unsure what additional medical documentation Pepco is seeking. Pepco's own HR manager, Gentry May, called baloney on Pepco's reasons, when she admitted that Rabon provided medical documentation for his absences.

> Q. [Y]ou will agree with me that Mr. Rabon provided medical documentation to Pepco?

[19] His medical notes for his Covid diagnosis and treatment for 2020 are at JA 256-86.

[20] Pepco too as part of their facts not in dispute, in ¶15 admit that Rabon was in regular contact with Pepco's OHS from October 2020 to February 2021 (JA 30)

A. Okay. He provided documentation. (JA 516: Gentry-May Dep. 64:1-10)

As this Court knows, one of the ways we can show pre-text is by showing that the employer's reasons for the termination is false. *See Aka v. Wash. Hosp. Ctr*., 156 F.3d 1284, 1292 (D.C Cir. 1998) ("when the plaintiff rebuts the employer's own explanation of its challenged acts, this eliminates the principal non-discriminatory explanation for the employer's actions. Events have causes; if the only explanations set forth in the record have been rebutted, the jury is permitted to search for others, and may in appropriate circumstances draw an inference of discrimination.").

Here, Pepco's reasons for his termination are false because Pepco has admitted that he provided the medical documentation to Pepco.

Assuming *arguendo* that Rabon was not performing because he failed the test on September 15, 2020, it is still not grounds to grant Pepco's R.56 motion. This issue was tackled head on by this Court in *Rose v. United Gen. Contractors*, 285 A.3d 186 (D.C. 2022).

Rose, supra, involved an employee with Parkinson's disease. The employer justified the employee's termination because of the employee's history of poor performance. This Court still held that the employer had discriminated against the employee due to his disabilities. This Court held:

> "[T]here is ample evidence in the record demonstrating that appellant's performance at the Marie Reed project declined," *Id*. at 195 […]. "Important here, the [DCHRA] statute provides that it is unlawful to terminate an employee even *partially* for a discriminatory reason. D.C. Code § 2-1402.11(a)(1). The employee may prevail by proving that the employer's action was motivated partially by a discriminatory reason, even if it also was motivated by permissible reasons not, in themselves, pretextual. [internal citation omitted.] In this case, a mixed motive analysis is appropriate." *Id*. at 195-96 […]. Based on the statutory text and intent, the statute is violated if an employer took the action with **one** discriminatory motive, even if the employer had other lawful motives. *Id*. at 197 (emphasis added).[21]

In short, under the standard articulated by this Court in *Rose, supra,* and Pepco's own admissions, admitting that Rabon's accommodation request cannot be a basis to terminate him and that Rabon provided adequate medical documentation to Pepco, Rabon has made a claim for discrimination. Count I must be heard by a jury.

[21] *Accord Muldrow v. City of St. Louis*, 144 S.Ct. 967, 974 (2024) (To make out a discrimination claim, the employee must show "some harm." The harm need not be significant or substantial. Substantial factor does not mean that the protected characteristic was the sole factor in the decision, or that the "harm incurred was significant, or serious, or substantial or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.").

Part II. Retaliation

In order to sustain a claim for retaliation, Rabon needs to show that he engaged in protected activity, there was an adverse employment action and that there was a causal connection. *See McFarland v. George Washington University*, 935 A.2d 337, 356 (D.C. 2007)

A. Pepco Retaliated Against Rabon when he was Terminated a Month after Being Cleared to Return to Work

Rabon was on sick leave or STD leave from September 2020 to February 15, 2021. His doctor cleared Rabon to return to work on February 15, 2021 (JA 391).

Being on medical leave is protected activity under the ADA. *See Guinup v. Petr-All Petroleum Corp.*, 786 F. Supp. 2d 501, 514 (N.D.N.Y. 2011) ("[T]aking medical leave is a protected activity within the meaning of the ADA."); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004) (holding that a request for medical leave is a protected activity under the ADA); *Dove v. Cmty. Educ. Ctrs., Inc.*, No. 12-4384, 2013 U.S. Dist. LEXIS 170081, at *63 (E.D. Pa. Dec. 2, 2013) ("[N]umerous courts have recognized that a request for and taking a leave of absence for medical treatment may constitute a request for a reasonable accommodation under the ADA and thus constitutes a protected activity.").

Never mind also, insofar as Rabon was diagnosed with Covid, he had a subjective good faith belief that he was disabled. This was also confirmed by Pepco's nurse Forrester, who said that Rabon had complications from Covid. (JA

496-97.) *See Grant v. May Department Stores Co.,* 786 A.2d 580, 586 (D.C 2001) ("The conclusion that Grant does not suffer a disability falling under the protections of the DCHRA is not dispositive. The trial court did not consider whether Grant had a reasonable good faith belief that the practice she opposed was unlawful under the [DCHRA] as distinguished from whether it actually violated the Act. Having applied an erroneous legal test, the trial court erred in granting summary judgment on the retaliation claim.").

Also, "[c]ourts have found that employees can establish a case of retaliation under the ADA when there is evidence that an employee was terminated immediately after returning from medical leave." *Belk v. Branch Banking & Tr. Co.*, No. 16-80496-CIV-MARRA, 2016 U.S. Dist. LEXIS 105644, at *12 (S.D. Fla. Aug. 9, 2016) (internal citations omitted).

Here, Pepco terminated Rabon a month after he was cleared to return to work. Rabon was cleared to return to work on February 15, 2021. In a conference call with Pepco on February 19, 2021, Rabon also informed Pepco that he is ready, willing and able to return to work as of February 15, 2021. (JA 525: ¶33, Rabon Aff.)

Gentry-May, the HR manager, in her deposition also admitted that as of February 19, 2021, there was no decision made to terminate Rabon.

Page 59

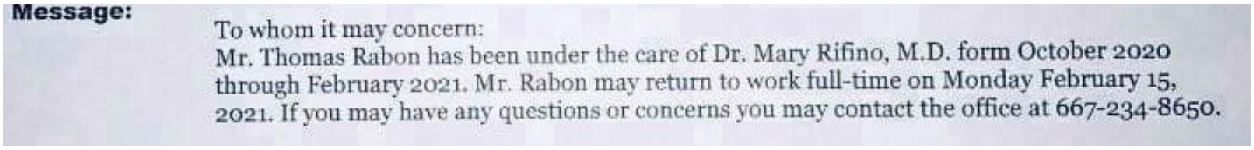
Q. On February 19, 2021, there was no decision made to terminate Mr. Rabon; is that correct?
A. That's correct.
Q. In fact, I think the decision was not made until about March 2021. Is that fair to say?
A. That's correct.

(JA 515: Gentry-May Dep. 59)

Despite Rabon providing medical documentation of his illness and Rabon's willingness and ability return to work as of February 15, 2021, and Pepco's knowledge of this, Pepco, on March 16, 2021, sent Rabon a termination letter.

His termination was finalized on March 16, 2021. A jury will have no issue finding that Pepco retaliated against Rabon by terminating his employment. Pepco's reasons for his termination as we stated above is also pre-textual, if not completely false. We incorporate those arguments here.

The Superior Court took all the facts on this issue and viewed them in a light most favorable to Pepco in contravention of Rule 56. It first held that Rabon's medical absence was not justified post-January 26, 2021. It failed to consider Dr. Rabon's medical note which informed Pepco that Rabon was under her care from October 2020 until February 2021. And that he is cleared to return to work on February 15, 2021. (JA 391)


Message:

To whom it may concern:
Mr. Thomas Rabon has been under the care of Dr. Mary Rifino, M.D. form October 2020 through February 2021. Mr. Rabon may return to work full-time on Monday February 15, 2021. If you may have any questions or concerns you may contact the office at 667-234-8650.

It then compounded its errors, like the Superior Court did in *Rose*, *supra*, when it held that Rabon failed to take the test in September 2020 and as a result, Pepco was within their rights to terminate Rabon in March 2021. It failed to consider this Court's precedent and the EEOC guidelines, which have held that terminating an employee because of his request for accommodation is both evidence of discrimination and retaliation. *See Rose, supra.*

Finally, the Superior Court was also wrong when it held that Pepco had a good faith belief that Rabon violated company policy by not reporting to work. We would argue that Pepco acted in **bad faith**. Their own policy states that job abandonment is conditioned upon the absence of medical records. Their own HR department also admitted that Rabon provided his medical documentation justifying his absence. Numerous courts have held that a company's intentional violation of its own polices is evidence of discrimination and retaliation.[22] *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 229 (Tex. App. Corpus Christi 2001) (The court of appeals affirmed a verdict for the plaintiff of more than

[22] This is not difficult to grasp. When a police officer violates their internal polices, he murders a civilian. This was the case in the George Floyd verdicts where all the police officers were guilty of violating their internal arrest policies. When corporations violate their safety or internal policies, like in the case of Boeing, doors fly off from planes. In this case, Rabon was terminated.

$1,00,000.00, and stated that "[t]he jury heard evidence relating to Southwestern Bell's inexplicable failure to adhere to its own documented policies."); *Johnson v. Lehman,* 679 F.2d 918, 922 (D.C. Cir. 1982) (departure from procedure "may [be] deem[ed] probative . . .."); *Brennan v. GTE Gof't Sys. Corp.*, 150 F.3d 21, 29 (1st Cir. 1998) (noting that deviation from policy may be evidence of pretext).

Pepco also had notice on February 15, 2021 that Rabon was cleared to return to work by Dr. Rifino. Despite express knowledge of this, Pepco continued to press forward with his termination on March 16, 2021. Additionally, Pepco also penalized Rabon for requesting an accommodation to re-take his test only to use it as a basis to terminate him on March 16, 2021.

Nevermind also the Sixth Circuit in *Smith v. Chrysler Corporation*, 155 F.3d 799, 806 (6th Cir. 1998) held that the "honest belief" or "good faith" belief defense was incompatible for actions under the disability laws since it obliterates the purpose of the ADA (and by extension the DCHRA).

> [F]or the [honest belief] rule to apply, the employer need only provide an honest reason for firing the employee, even if that reason had no factual support. [citing to] *Pollard v REA Magnet Wire*, 824 F.2d at 559 (7th Cir. 1987) (noting that "if you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a pretext"). We find such an abstract application of the rule to be at odds with the **underlying purpose** behind the [American Disabilities] Act--*i.e.*, that employment actions taken regarding an individual with a disability be grounded on fact and not "on unfounded fear, prejudice, ignorance, or mythologies." 136 Cong. Rec. S 7422-03, 7437 (daily ed. June 6, 1990) (statement of Sen. Harkin). (emphasis added).

Finally, Pepco pressured Rabon to return to work. Rabon's physician had still not cleared Rabon to return to work in January 2021. Dr. Rifino cleared Rabon to return to work on February 15, 2021 (JA 391.) Being pressured to return to work while sick can also sustain a retaliation claim under the disability laws. *See Turner v. District of Columbia*, 383 F. Supp. 2d 157, 178-79 (D.D.C. 2005) (R.56 motion on the ADA retaliation claim denied when the employer pressured the employee to return to work). Finally, this Court should be very concerned, that Pepco's Director of HR, Byas, despite being on notice that Rabon was cleared to return to work as of February 15, 2021, shared none of this information with her HR colleagues and/or Rabon's supervisors. A jury can conclude that Byas "hid" this information from her colleagues to press forward with Rabon's illegal termination. Count II must proceed to the jury.

Part III. Retaliation Under the Coronavirus Support Emergency Act (CSEA)

A copy of the DC Office of Human Rights (OHR) Enforcement Guidance under the CSEA is part of JA 492-95.[23] The CSEA amended the DCFMLA to allow for job protected leave. Under the CSEA, Rabon can use 16 weeks (or 4-months) to care for himself, quarantine, or isolate if he is at high risk of contracting Covid. Rabon contracted Covid in October 2020. His 16-weeks would have expired in February 2021. The CSEA also prevents Pepco from retaliating against

[23] This Court has relied on OHR's enforcement guidance to interpret employment laws. *See Helfgott, supra,* 2016 D.C. Super. LEXIS 2, *10.

Rabon for using leave under the CSEA.[24] (JA 495: No. 10: Can an employer retaliate against an employee for requesting or using COVID-19 leave? No. See D.C. Code § 32-507.)

The Superior Court on page 21 of its opinion held that there was no violation of the CSEA because Pepco allowed Rabon to quarantine for 14-days. The issue is not about his 14-day quarantine. The issue is his termination on March 16, 2021, a month after Rabon returned from medical leave. Even under the DCFMLA, this is evidence of retaliation. *See Teru Chang v. Inst. for Pub.-Private P'ships, Inc.*, 846 A.2d 318, 329 (D.C. 2004) ("Moreover, the DCFMLA's guarantee that an employee who takes protected leave will be restored to the same or an "equivalent" position upon returning to work arguably supports a cause of action for retaliation if an employee is fired for taking medical leave. *See* D.C. Code § 36-1305 (d) (1997), recodified at D.C. Code § 32-505 (d) (2001). Therefore, we hold that under the DCFMLA it is unlawful to terminate an employee because that employee has taken protected family or medical leave.") The Superior Court also held that Rabon lacked the medical documentation for his absence. We incorporate the arguments

[24] In ¶73 of our First Amended Complaint, under Count III for the CSEA, we state, "An employer cannot retaliate against an employee for using Covid leave." We are using the CSEA to prosecute a retaliation claim.

for pre-text under Counts I and II here, to show that this reason is false and pre-textual. Count III must be reversed.

CONCLUSION

During the Covid pandemic, approximately 3.4 million people died.[25] The United States had the most causalities at 1.1 million dead.[26] At the height of the pandemic from 2019-2020, officers shut down, courts closed and the nation and its citizens were told to quarantine. Fear had gripped the nation. Immediately the good citizens of the District of Columbia enacted laws preventing employers, like Pepco, from engaging in stereotypes about persons with Covid, and to prevent Pepco from willy-nilly terminating employees like Rabon who had taken time off for their illness. Rabon was an early patient to have been diagnosed with Covid in 2020 during the height of the pandemic. As Dr. Rifino testified in her deposition, a vaccine had not been developed when Rabon was diagnosed with Covid. Rabon continued to diligently communicate with Pepco about his medical status and provide Pepco with his medical documentation supporting his claims for Covid. Pepco, in multiple acts of callousness, ignored these medical reports, thought they were a joke, or worse, engaged in stereotypes about persons with disabilities by the

[25]World Health Organization, "The true death toll of COVID-19: estimating global excess mortality." https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality (last visited 11/14/2024).
[26] John Hopkins University of Medicine, "Coronavirus Resource Center." https://coronavirus.jhu.edu/data/mortality (last visited 11/15/2024)

absurd assertion that because he walked two miles, he is fine. There are Cancer patients who can walk two miles. This does not mean they do not have Cancer, or for that matter are not disabled.

When Rabon was finally cleared to return to work on February 15, 2021, by Dr. Rifino, Pepco thwarted his efforts to return to work. Despite Rabon also telling Pepco on their February 18, 2021, conference call that he was "ready, able and willing" to return to work, Pepco still went ahead and terminated Rabon on March 16, 2021.

Pepco then lied that Rabon did not provide them with medical documentation justifying his medical absence when he did. Pepco's own HR called baloney on this. Additionally, after granting Rabon the request for test accommodations on September 25, 2020, Pepco, at the time of his termination in March 2021, decided to hold it against him by using it as additional grounds to terminate him. Pepco's HR Director Byas admitted this is prohibited. A jury can agree with Pepco's Director of HR. All three counts must be remanded for trial.

Respectfully submitted,

/s/ AJ Dhali
Dhali PC
(202) 556-1285
ajdhali@dhalilaw.com
Attorney for Plaintiff-Appellant Thomas Rabon
Sunday November 17, 2024.

Certificate of Service

A copy of the foregoing was filed via the Court's, Appellate E-Filing System," with copies sent to Pepco on 11/18/2024

/s/ A.J Dhali

Certificate of Compliance

This brief complies with Local Rule 32 it is in 14 point Times New Roman font types on Microsoft 365.

/s/A.J Dhali