

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GARRET MATEWSKI,)
)
 Plaintiff)
)
 v.) **Civil No. 02-233-P-C**
)
 ORKIN EXTERMINATING CO.,)
)
 Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Defendant Orkin Exterminating Company, Inc. (“Orkin”) moves for summary judgment as to all claims by former employee Garret Matewski in this action alleging that Orkin fired Matewski based on actual or perceived disability in violation of the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. §§ 4551-4634. Defendant’s Motion for Summary Judgment (Docket No. 15); Complaint, attached to Defendant’s Notice of Removal (“Notice of Removal”) (Docket No. 2).¹ For the reasons that follow, I recommend that the motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By

¹ Orkin removed the instant case from the Maine Superior Court (Cumberland County) on the basis of diversity of citizenship. *See (continued on next page)*

like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Context

The parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following facts relevant to this recommended decision:

Garret Matewski alleges that he has sleep apnea and narcolepsy with cataplexy. Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried (“Defendant’s SMF”) (Docket No. 17) ¶ 1; Plaintiff’s Response to Defendant’s Statement of Material Facts (“Plaintiff’s

generally Notice of Removal.

Opposing SMF”) (Docket No. 19) ¶ 1. “Sleep apnea,” in general terms, refers to problematic breathing at night, typically due to obstructions in, or the collapse of, a person’s airway. *Id.* ¶ 2. These mechanical obstructions cause arousals in a person’s sleep, which affect the quality of his or her sleep. Plaintiff’s Statement of Material Facts (“Plaintiff’s Additional SMF”) (Docket No. 18) ¶ 22; Defendant’s Response to Plaintiff’s Statement of Material Facts (“Defendant’s Reply SMF”) (Docket No. 22) ¶ 22. One suffering from sleep apnea generally will have poor quality sleep, will awake without feeling rested and will suffer from daytime sleepiness. *Id.* Sleep apnea generally is treated by use of a “CPAP,” a mask that goes over the nose and blows positive airway pressure to hold the airway open during sleep. Defendant’s SMF ¶ 3; Plaintiff’s Opposing SMF ¶ 3.

Narcolepsy is a neurological disorder with four major symptoms: excessive daytime sleepiness, which can vary from mild to severe; cataplexy, which involves sudden episodes of muscular weakness that result from strong emotions such as laughter or anger; hypnagogic hallucinations, which are dream-like hallucinations that occur at the onset of narcolepsy; and sleep paralysis, which occurs when a person awakes. *Id.* ¶ 4. It is rare that a person would have all four symptoms. *Id.* ¶ 5. Generally, people with more severe narcolepsy tend to have the full constellation of symptoms. Defendant’s SMF ¶ 6; Deposition of Doctor Thomas Scammell (“Scammell Dep.”), Tab 4 to Plaintiff’s Opposing SMF, at 33-34.²

One who suffers from narcolepsy generally will feel sleepy or drowsy in settings that potentially would cause drowsiness in anyone, such as long meetings, driving or other sustained periods of inactivity. Plaintiff’s Additional SMF ¶ 12; Scammell Dep. at 35-36.³ Real-life

² Matewski purports to dispute this statement as incomplete on the ground that it is “certainly not necessarily” true. *See* Plaintiff’s Opposing SMF ¶ 6. The statement is not defectively incomplete. The word “generally” implies that the statement is “certainly not necessarily” true.

³ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin notes among other things that in the context of discussing “sleep attacks” (or “sleep episodes”), which are the onset of unintentional sleep, plaintiff’s expert (*continued on next page*)

narcolepsy is not as it is portrayed in the movies – people do not suddenly fall asleep in the middle of physical activities. Plaintiff’s Additional SMF ¶ 13; Scammell Dep. at 35-36.⁴ Usually, for narcoleptics, some feeling of sleepiness precedes falling asleep. Plaintiff’s Additional SMF ¶ 14; Scammell Dep. at 34-35. Narcoleptics are encouraged to become aware of their symptoms, and usually sleep attacks can be avoided. Plaintiff’s Additional SMF ¶ 14; Scammell Dep. at 35.⁵

According to the expert witness report of Dr. Thomas Scammell, Matewski has definite hypnagogic hallucinations and sleep paralysis, as well as cataplexy and excessive daytime sleepiness. Defendant’s SMF ¶ 7; Plaintiff’s Opposing SMF ¶ 7. Matewski has suffered from approximately five to six cataplectic episodes since his first episode in 1988. Plaintiff’s Additional SMF ¶ 26; Deposition of Garret G. Matewski (“Matewski Dep.”), Tab 1 to Plaintiff’s Opposing SMF, at 140.⁶ Matewski loses muscle tone when experiencing strong emotions. Plaintiff’s Additional SMF ¶ 69; Defendant’s Reply SMF ¶ 69. Anger can do it; a good, hearty laugh almost always does it. *Id.* Since 1988, Matewski has become very good at keeping track of his feelings, emotions and thoughts in part by talking to himself during emotional situations. Plaintiff’s Additional SMF ¶ 71; Matewski Dep. at 158-59.⁷ If he starts feeling unhappy, angry or upset, he talks himself through it and tries to focus on

witness, Dr. Thomas Scammell, testified that “[n]arcoleptics may fall asleep quickly like anybody else with a propensity toward sleepiness. . . . When people are chronic narcoleptics, sometimes they may be less sensitive to their sleepiness, may sleep like sleep attacks when they doze off.” Defendant’s Reply SMF ¶ 12; Scammell Dep. at 34-35.

⁴ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin asserts among other things that Dr. Scammell testified that (i) “in the lay media and so forth, there is confusion between cataplexy that can occur in a very sudden abrupt fashion, as a fall in the street, and sleepiness,” and (ii) narcoleptics most likely would not have sleep attacks during physical activities. *See* Defendant’s Reply SMF ¶ 13; Scammell Dep. at 35-36.

⁵ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin observes that Dr. Scammell also testified that “[w]hen people are chronic narcoleptics, sometimes they may be less sensitive to their sleepiness, may sleep like sleep attacks when they doze off.” Defendant’s Reply SMF ¶ 14; Scammell Dep. at 35.

⁶ Orkin denies this statement, *see* Defendant’s Reply SMF ¶ 26; however, I view the cognizable evidence in the light most favorable to Matewski.

⁷ Orkin denies the statements made in paragraph 71 of the Plaintiff’s Additional SMF and also objects to them as “self-serving.” *See* Defendant’s Reply SMF ¶ 71. Orkin’s objection goes to the statements’ weight rather than admissibility and hence is overruled. *See, e.g., St. Pierre v. Dyer*, 208 F.3d 394, 405 (2d Cir. 2000) (“[T]he self-serving nature of a witness’s statements goes not to their admissibility but to their weight.”). To the extent Orkin denies the statements, I view the cognizable evidence in the light most favorable to Matewski.

what is causing the emotion. Plaintiff's Additional SMF ¶ 71; Matewski Dep. at 159. On occasion, he will pull over and think it through rather than risk a cataplectic attack. *Id.* He has to worry about getting overly tired or overly excited. Plaintiff's Additional SMF ¶ 72; Defendant's Reply SMF ¶ 72.

There are times when Matewski's narcolepsy is activated by high amounts of stress and sometimes anger. *Id.* ¶ 73. The beginning of a cataplectic episode is like a very stressful headache with a tightening of the shoulders, a tightening of the neck and then a lightheaded feeling. *Id.* However, because Matewski can recognize the symptoms, he is able to pull over before having any kind of incident. Plaintiff's Additional SMF ¶ 73; Matewski Dep. at 141-42.⁸ During periods of excessive daytime sleepiness, he has to resort to short naps in order to maintain concentration. Plaintiff's Additional SMF ¶ 75; Defendant's Reply SMF ¶ 75.

According to Matewski, he can tell when a narcoleptic or cataplectic episode is coming on "most of the time." Defendant's SMF ¶ 9; Plaintiff's Opposing SMF ¶ 9. He also testified that he can stop such an attack or episode "[a]t certain points," but "[i]f it goes too far, no [he] can't." *Id.* Dr. Scammell testified that once a cataplectic attack begins, a person generally cannot stop it from occurring. *Id.* ¶ 10.

Persons with narcolepsy (or narcolepsy with cataplexy) generally are treated with different medicines, and most persons require stimulants. *Id.* ¶ 11. Sleep apnea and narcolepsy present safety concerns regarding a person's ability to stay alert and awake to drive a car properly. Defendant's SMF ¶ 12; Scammell Dep. at 48.⁹ Dr. Scammell testified that cataplexy is quite uncommon in someone driving. Defendant's SMF ¶ 13; Plaintiff's Opposing SMF ¶ 13. He testified that, in his clinical experience, he knew of only one person besides Matewski who experienced an episode of

⁸ Orkin denies this statement, *see* Defendant's Reply SMF ¶ 73; however, I view the cognizable evidence in the light most favorable to Matewski.

⁹ Matewski attempts to dispute this statement in part on the basis that the referenced page does not address whether narcolepsy (*continued on next page*)

cataplexy while driving. Defendant's SMF ¶ 14; Scammell Dep. at 46.¹⁰ Dr. Scammell, a physician board-certified in sleep medicine, also testified that people are unlikely to suffer cataplectic episodes when alone because the level of provoked emotion is less dramatic. Plaintiff's Additional SMF ¶ 30; Scammell Dep. at 14, 128-29.¹¹

Matewski applied for employment with Orkin on or about February 6, 1998. Defendant's SMF ¶ 15; Plaintiff's Opposing SMF ¶ 15. Orkin offered him employment as a pest control ("PC") technician, conditioned upon his satisfactory completion of a physical examination, motor vehicle records check, drug screen and criminal background check. *Id.* Matewski reviewed the PC technician job description at the time of his hire. *Id.* ¶ 16. On March 8, 1998 he completed an "ADA Application Certification" in which he certified that a copy of the job description for a PC technician (also known as a PC route manager) had been provided to him and that he was able to perform the essential functions of the job without accommodation. *Id.* ¶ 17. Driving is an essential function of the PC technician position. *Id.* ¶ 18.

Matewski began his employment in Orkin's Pittsfield, Massachusetts, branch as a PC technician on or about March 9, 1998. *Id.* ¶ 19. Approximately ten years earlier, in 1988, Matewski had been involved in an automobile accident outside of Gardner, Massachusetts. *Id.* ¶ 20. While driving, he began laughing at a joke and, as a result, lost control of his body from the neck down. *Id.* His automobile traveled across traffic and hit three trees. *Id.*

During the course of his interview with Orkin, Matewski notified the service manager in the Pittsfield office that he suffered from sleep apnea and that he had been in a car accident in 1988 in

presents safety concerns, *see* Plaintiff's Opposing SMF ¶ 12; however, it does.

¹⁰ In a partial denial that is more in the nature of a qualification, and hence is treated as such, Matewski asserts that Dr. Scammell was referring to someone who experienced cataplexy while driving alone. *See* Plaintiff's Opposing SMF ¶ 14; Scammell Dep. at 46-47.

¹¹ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin asserts that Dr. Scammell testified that his opinion as to what produces strong emotion was based upon his personal experience, not his professional (*continued on next page*)

which he lost control of the vehicle he was driving due to a loss of muscle tone. Plaintiff's Additional SMF ¶ 2; Defendant's Reply SMF ¶ 2.

Following the 1988 car accident, Matewski saw numerous physicians who did not agree on his diagnosis. Plaintiff's Additional SMF ¶ 28; Matewski Dep. at 53. He began using a CPAP machine to help with his sleep apnea in approximately 1989. Plaintiff's Additional SMF ¶ 29; Defendant's Reply SMF ¶ 29. When Matewski began working for Orkin, he had not yet been formally diagnosed with narcolepsy or cataplexy. Plaintiff's Additional SMF ¶ 1; Matewski Dep. at 44, 53.¹² He believed he could perform the essential functions of the PC technician job without accommodation. Plaintiff's Additional SMF ¶ 3; Matewski Dep. at 54.

While Matewski was employed at the Pittsfield branch, he averaged about sixty-eight miles of driving per day and worked approximately forty-five hours per week. Plaintiff's Additional SMF ¶ 32; Defendant's Reply SMF ¶ 32. During that time, he "probably" experienced shakes while driving either his personal or company vehicle, and "may have" experienced problems with his head turning involuntarily to the right. Defendant's SMF ¶ 21; Plaintiff's Opposing SMF ¶ 21.¹³

On or about January 24, 2000 Matewski submitted an application for a Massachusetts driver's license in which he answered "no" to the following question: "Do you have any physical, mental, or other condition that may affect your ability to safely operate a motor vehicle?" *Id.* ¶ 22.¹⁴ At that time,

experience. *See* Defendant's Reply SMF ¶ 30; Scammell Dep. at 129.

¹² Orkin denies this, *see* Defendant's Reply SMF ¶ 1; however, I view the cognizable evidence in the light most favorable to Matewski.

¹³ Matewski denies this statement in part on the basis that he has no specific recollection of involuntary head-turning problems. *See* Plaintiff's Opposing SMF ¶ 21; Matewski Dep. at 109. However, this purported denial is more in the nature of a qualification, and I have treated it as such.

¹⁴ Matewski objects to this statement, and others, on the basis that they constitute after-acquired evidence that is irrelevant to the liability portion of this proceeding. *See* Plaintiff's Opposing SMF ¶ 22; Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("S/J Opposition") (Docket No. 20) at 15-17; *see also, e.g., Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997). The objection is overruled. As Orkin suggests, the prohibition on after-acquired evidence addresses the evil of offering after-the-fact rationales for adverse employment actions. *See* Reply Brief in Support of Defendant's Motion for Summary Judgment ("S/J Reply") (Docket No. 21) at 2 n.1 & 3; *see also, e.g., McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 359-60 (1995) ("McKennon's misconduct was not discovered until after she had been fired. The employer could not have been motivated by

(continued on next page)

Matewski was taking Amitriptyline for cataplexy and was using a CPAP machine at night for his sleep apnea. *Id.* ¶ 23. Matewski has never reported any medical condition to the Massachusetts Registry of Motor Vehicles. *Id.* ¶ 25.¹⁵

Matewski sought a transfer to Orkin’s Portland, Maine branch in early 2000, and was hired by that branch beginning in April 2000. *Id.* ¶ 26. Initially, Matewski was employed in the Portland branch as a so-called “start” PC technician, and the company paid for him to live in a hotel. *Id.* ¶ 27.¹⁶

Initially, the new position in Maine was very stressful inasmuch as Matewski did not know his way around. Plaintiff’s Additional SMF ¶ 103; Defendant’s Reply SMF ¶ 103.

In late April or early May 2000, Matewski had to pull his company vehicle off the road because he felt the onset of a cataplectic episode. Defendant’s SMF ¶ 28; Plaintiff’s Opposing SMF ¶ 28. In May 2000 he again had to pull his company vehicle off the road because he felt the onset of a narcoleptic episode. *Id.* ¶ 29. Matewski described these incidents as “very scary” and he “felt [he] was – [he] would have been – [he] could have gotten into a cataplexy at that time.” *Id.* ¶ 30. Matewski never told anyone at Orkin of either of these incidents at the time. *Id.* ¶ 32. In approximately June or July 2000 Matewski found an apartment in the Lewiston, Maine area and was assigned a regular route in that area. *Id.* ¶ 33.

knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.”). No such problem arises in considering “after-acquired” evidence for the purpose of assessing whether, as a threshold matter, an employee is (or was at the time of the adverse action) a “qualified individual with a disability,” an issue as to which the plaintiff bears the burden of proof. *See, e.g., Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1281 (10th Cir. 1999) (“Defendants were permitted to litigate whether Plaintiff was qualified for a pharmacist position, and they were entitled to submit evidence about Plaintiff’s qualifications in this regard. In short, *McKennon*’s discussion on after-acquired evidence does not apply to this case and the evidence to which Plaintiff objects was nonetheless admissible to show that Plaintiff’s prima facie case was not supported by a preponderance of the evidence.”); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 620-21 (3d Cir. 1996), *abrogated on other grounds, Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (distinguishing between impermissible use of after-acquired evidence to meet a defendant’s burden of demonstrating legitimate reason for adverse action and permissible use to challenge plaintiff’s *prima facie* case that he or she was “qualified individual with a disability”); *EEOC v. Fargo Assembly Co.*, 142 F. Supp.2d 1160, 1164-65 (D.N.D. 2000) (same). I have considered Orkin’s after-acquired evidence solely for the latter, permissible purpose.

¹⁵ Matewski again objects to this statement on the ground that it references irrelevant after-acquired evidence. *See* Plaintiff’s Opposing SMF ¶ 25. For the same reasons as discussed above, the objection is overruled.

¹⁶ A “start” technician performs start-up applications for new clients. *See* Plaintiff’s Additional SMF ¶ 34; Defendant’s Reply SMF ¶ (continued on next page)

Prior to being hired in the Portland branch, Matewski had not mentioned his sleep apnea or narcolepsy with cataplexy to the branch manager, Bob Rosborough. Defendant's SMF ¶ 34; Matewski Dep. at 117.¹⁷ However, sometime prior to October 2000, Matewski notified both Rosborough and the service manager, Scott Kennedy, about the specifics of the 1988 accident, including his loss of motor skills, as well as his use of the CPAP machine and the medication Amitriptyline. Plaintiff's Additional SMF ¶ 33; Matewski Dep. at 124-25, 127, 132-33.¹⁸ Matewski discussed his condition with Kennedy, who wanted him to get a medical authorization from his doctor to continue driving. Plaintiff's Additional SMF ¶ 39; Matewski Dep. at 128-29.¹⁹

On or about October 13, 2000 Matewski presented himself to the Veterans Administration ("VA") Hospital in Togus, Maine, where he was seen by Salman A. Malik, M.D. Defendant's SMF ¶ 36; Plaintiff's Opposing SMF ¶ 36. He had not been seen by Dr. Malik before. *Id.* During this visit Matewski told Dr. Malik, among other things, that he would wake up tired even though he was using his CPAP at night; that that he would lose muscle tone when he experienced strong emotions such as anger or laughter; and this his head would involuntarily move to the right on occasion. *Id.* ¶ 37. He does not recall what he told Dr. Malik about his job. *Id.*

Rosborough testified that on or about Monday, November 27, 2000, Matewski provided him with a copy of a letter from Dr. Malik dated October 16, 2000 that read as follows:

TO WHOM IT MAY CONCERN

This letter is being written specifically at the request of Mr. Garrett [sic] Matewski, date of birth 01/27/1953, who has recently been seen in the Neurology Clinic. He has

34.

¹⁷ Matewski's purported partial denial of this statement is more in the nature of a qualification and is treated as such: that he had notified Orkin of his condition while he worked in the Pittsfield branch office. *See* Plaintiff's Opposing SMF ¶ 34; Matewski Dep. at 45-46.

¹⁸ Orkin denies this statement, *see* Defendant's Reply SMF ¶ 33; however, I view the cognizable evidence in the light most favorable to Matewski.

¹⁹ Orkin denies this statement, *see* Defendant's Reply SMF ¶ 39; however, I view the cognizable evidence in the light most favorable to Matewski.

transferred his care from Northampton VAMC, Massachusetts to this facility. His clinical diagnosis is that of narcolepsy with cataplexy, and he has an established diagnosis of obstructive sleep apnea, made elsewhere. Both these conditions predispose the sufferer to excessive daytime sleepiness and unpredictable emotionally and stress triggered loss of body tone. Insofar as the nature of the illness, it is advisable that he drive no more than 6-8 hours during the day, and as much as is possible plan his trips ahead of time to ensure safe operation of his automobile.

He is currently undergoing further workshop [sic] and evaluation to assess his problem and advise him according to Maine Bureau of Motor Vehicles bylaws about operating automobiles as stated in the FAP-II Road Rules criteria (published by the Maine Bureau of Motor Vehicles). Mr. Matewski states that he intends to use this letter at his workplace as a letter of medical advice.

Id. ¶ 38. Rosborough testified that, on the same day, Matewski also provided him with certain documents from the Maine Bureau of Motor Vehicles (“BMV”) regarding driving in the state of Maine.

Id. ¶ 42. The Maine BMV materials provide, in part:

Driving is a privilege engendered in the process of licensure, which places on each driver the responsibility of driving in a safe and prudent manner. **Drivers who become aware of any changes in their health which may affect their ability to drive are personally responsible to report persisting health changes to the Secretary of State, and in cases of uncertainty, a physician should be consulted.**

Neurologic disorders have a significant impact on driving safety. . . .

The common element in most of these is the disturbance of sensory, motor, cognitive, and/or coordinating functions sufficient to affect driving. Some of these, if stable, can be compatible with ability to operate a motor vehicle, if a driving test shows adequate performance in the type of vehicle to be driven. Other conditions, however, that have not yet stabilized or have a probability of progression or need for medication may require a medical report initially or at intervals.

Id. ¶¶ 44-45 (boldface in original). After specifically addressing epilepsy, the Maine BMV materials state that “[o]ther disorders, which also can affect consciousness or control such as . . . cataplexy [or] narcolepsy . . . need also to be considered in a similar fashion.” *Id.* ¶ 46 (underlining in original).²⁰

²⁰ Someone underlined the words “consciousness,” “cataplexy” and “narcolepsy” in this portion of the BMV materials; Matewski testified that the underlining could have been his or Dr. Malik’s. Defendant’s SMF ¶ 46; Plaintiff’s Opposing SMF ¶ 46.

Matewski read the materials from the Maine BMV and did not have any problem understanding them. *Id.* ¶ 47.

Rosborough has no medical education or training. *Id.* ¶ 48. At the time Matewski gave him Dr. Malik's October 16, 2000 letter, he did not know what narcolepsy or cataplexy were and had no idea if they were conditions warranting taking Matewski off the road. *Id.* ¶ 49. That same day, Rosborough faxed Dr. Malik's letter and the attachments to his supervisor, Bill Siegel. *Id.* ¶ 50. Matewski told Rosborough that he (Matewski) was going to Massachusetts for a couple of days to a sleep clinic and was not going to work the rest of that day or the next day. *Id.* ¶ 51. While driving to the sleep clinic, Matewski almost fell asleep (although he did not lose consciousness) and drove off the road. *Id.* ¶ 52. In November 2000, he indicated that he wanted to stop driving for a period of time. Plaintiff's Additional SMF ¶ 44; Matewski Dep. at 255.²¹

On November 28, 2000 Siegel faxed Dr. Malik's letter and its attachments to Carolyn Jones of the company's Human Resources Department. Defendant's SMF ¶ 54; Declaration of William Siegel, Tab 6 to Defendant's SMF, ¶ 3. Following Jones' receipt of the letter, she contacted Dr. Stephen Dawkins, who contracts with Orkin principally to perform post-offer examinations of applicants for employment but whose advice is also sought, on occasion, with regard to current employees' qualifications to work. Defendant's SMF ¶ 55; Plaintiff's Opposing SMF ¶ 55.

Dr. Dawkins subsequently spoke with Dr. Malik, and they agreed that Matewski should not be on the road because his narcolepsy was not properly controlled. *Id.* ¶ 56.²² On November 30, 2000 Jones told Rosborough to take Matewski off of the road, and Rosborough did so the same day.

²¹ Orkin denies this statement, *see* Defendant's Reply SMF ¶ 44; however, I view the cognizable record in the light most favorable to Matewski.

²² Matewski's purported partial denial of this statement is more in the nature of a qualification and will be treated as such: that the conversation took place in early December 2000. *See* Plaintiff's Opposing SMF ¶ 56; Matewski Dep. at 203-04.

Defendant's SMF ¶ 58; Declaration of Robert Alan Rosborough, Tab 5 to Defendant's SMF, ¶ 4.²³ Matewski did not disagree with Orkin's decision to take him off of the road on November 30, 2000. Defendant's SMF ¶ 59; Plaintiff's Opposing SMF ¶ 59. He admitted that his driving ability was affected and that he could not operate a motor vehicle safely on that day. *Id.* He admitted that his narcolepsy was not under control on November 30, 2000 and that his cataplexy was not under control in December 2000. *Id.* ¶ 60.

Matewski did not work during December 2000 but, instead, was permitted to use all of his banked sick leave and other available leave during that month. *Id.* ¶ 61. In January 2001 he underwent a sleep study, began taking Clomipramine to block his cataplexy symptoms, was placed on a new CPAP machine with a new setting and a new type of mask and was taken off Amitriptyline. Plaintiff's Additional SMF ¶¶ 48-49; Matewski Dep. at 184, 186-87, 204.²⁴ He testified that he believes his narcolepsy came under control "later in January" 2001. Defendant's SMF ¶ 62; Plaintiff's Opposing SMF ¶ 62. He has no medical education or training other than CPR and first aid. *Id.* With the new medication, the new CPAP machine and discontinuation of Amitriptyline, Matewski felt better than he had in fifteen or sixteen years. Plaintiff's Additional SMF ¶ 54; Defendant's Reply SMF ¶ 54.²⁵

Matewski began working in the Portland branch again in January 2001. Defendant's SMF ¶ 63; Plaintiff's Opposing SMF ¶ 63. He performed some data entry, scheduling and clerical tasks. *Id.* ¶ 64. Orkin paid him his \$346-a-week PC technician's draw while he performed these tasks. *Id.*

²³ Matewski's purported denial of this statement is more in the nature of a qualification and will be treated as such: that he voluntarily requested to be taken off the road. *See* Plaintiff's Opposing SMF ¶ 58; Matewski Dep. at 255. Such a request is not inconsistent with a subsequent decision by Orkin to remove him from the road.

²⁴ Matewski's further statements that these measures "combined to reduce his daytime sleepiness," Plaintiff's Additional SMF ¶ 48, and that he has not had a single cataplectic episode since January 2001, *see id.* ¶ 51, are disregarded inasmuch as they are neither admitted nor supported by the record citations given.

²⁵ Two of Matewski's statements of additional fact are numbered paragraph 54. This is the second of the two. Orkin's objection to this statement on the ground that Matewski's subjective beliefs as to how he felt are irrelevant and immaterial, *see* Defendant's Reply (*continued on next page*)

Thereafter, on occasion, Matewski rode with and helped train newly hired PC technicians, but did not do any driving. *Id.* ¶ 65. Orkin continued to pay him his weekly draw while he performed these duties, plus any commissions to which a PC technician otherwise would have been entitled. *Id.* He was also paid for any days that he had doctor's appointments even when he did not have any available leave. *Id.* ¶ 66. He was paid his weekly draw during the entire period of time from December 1, 2000 through April 23, 2001. *Id.* ¶ 67.

Matewski followed up with Dr. Malik in March 2001 and expressed his interest in returning to his previous position. Plaintiff's Additional SMF ¶ 55; Defendant's Reply SMF ¶ 55. At that time, after discussing Matewski's condition, Dr. Malik indicated he would be happy to recommend that Matewski return to work. Plaintiff's Additional SMF ¶ 56; Tab 4(B) to Plaintiff's Opposing SMF.

On March 23, 2001 Dr. Malik's office faxed Rosborough a letter dated March 21, 2001 that read:

TO WHOM IT MAY CONCERN:

This letter is being written on the request and on behalf of Mr. Garret Matewski . . . who I have seen in the Neurology Clinic since 10/13/2000. Clinically and by polysomnography, he carries the diagnosis of Obstructive Sleep Apnea and also Narcolepsy with Cataplexy. He is on medication and his symptoms are relatively well controlled.

Based on my recent examination and office visit, and conversations with the veteran, I have advised him to resume his duties with his employer Orkin Industries Inc., and preferably spend no more than 6-8 hours on the road as before. This may be advanced as his clinical condition further improves with improved sleep hygiene and medication effects.

He was last examined by me in clinic on 3/2/2001.

SMF ¶ 54, is overruled.

Defendant's SMF ¶ 75; Plaintiff's Opposing SMF ¶ 75.²⁶ Matewski had not seen Dr. Malik between the October 13, 2000 and March 2, 2001 visits. *Id.* ¶ 76.²⁷

Rosborough, Kennedy and Matewski had numerous conversations about how to structure a shorter route for Matewski to fall within the six- to eight-hour restriction. Plaintiff's Additional SMF ¶ 58; Matewski Dep. at 212-13, 215-16. Possibilities included cutting off a portion of his previous route, moving him to a Portland route or even returning him to Pittsfield for a shorter route. *Id.*²⁸

Rosborough believed that the March 21, 2001 note from Dr. Malik authorized Matewski to return to work. Plaintiff's Additional SMF ¶ 59; Rosborough Dep. at 31-32.²⁹

²⁶ Although Orkin itself puts this statement in evidence, it objects to its use by Matewski for purposes of proving the truth of the matter asserted (*i.e.*, that Matewski was capable of returning to the PC technician job). See Defendant's Reply SMF ¶¶ 55-57; S/J Reply at 4-6. The objection is sustained. As offered to prove that Matewski was capable of performing the PC technician job, the Malik medical record is hearsay. Two possible hearsay exceptions obtain: Fed. R. Evid. 803(6) (covering business records) and Fed. R. Evid. 807 (the residual exception). However, in this case, neither exception works. To be admissible pursuant to Rule 803(6), a medical record must, *inter alia*, have been kept in the regular course of business "as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). The Malik record is unauthenticated, *see* Tab 5(A) to Plaintiff's Opposing SMF, and thus is inadmissible pursuant to Rule 803(6), *see, e.g., Belber v. Lipson*, 905 F.2d 549, 552 (1st Cir. 1990) ("Admission as a business record [pursuant to Rule 803(6)] requires the testimony of the custodian or other qualified witness. This testimony is essential. Without such a witness the writing must be excluded.") (citations and internal quotation marks omitted). Nor do the statements in issue possess the requisite "circumstantial guarantees of trustworthiness" to be admissible pursuant to Rule 807. For purposes of Rule 807, trustworthiness is measured, *inter alia*, by "whether the statement was under oath" and "an ad hoc assessment of reliability based upon the totality of the surrounding circumstances including an assessment of credibility of the out of court declarant, considered in light of the class-type exceptions to the hearsay rule supposed to demonstrate such characteristics." 30B Michael H. Graham, *Federal Practice and Procedure* § 7095 at 732-33, 737 (interim ed. 2000) (footnotes omitted). As an initial matter, Matewski himself makes no argument in support of the admission of the Malik statements pursuant to Rule 807. See generally S/J Opposition. Nor do I find them sufficiently reliable, given that they (i) were not made under oath, (ii) are ambiguous and conclusory (for example, Dr. Malik's statement that Matewski's condition was "relatively well controlled"), (iii) were given without the benefit of two diagnostic tests that Dr. Scammell testified he would have performed under the circumstances, *see* Defendant's SMF ¶¶ 79, 82; Plaintiff's Opposing SMF ¶¶ 79, 82, and (iv) conflict with Dr. Scammell's assessment that, while "optimal management" of Matewski's sleepiness and cataplexy would permit him to drive safely, Matewski's doctors never achieved "optimal management" of those conditions, *see id.* ¶¶ 83-85.

²⁷ Matewski qualifies this statement, noting that he had seen other physicians during that time. See Plaintiff's Opposing SMF ¶ 76; Matewski Dep. at 187.

²⁸ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin asserts among other things that Matewski indicated a few times in March or April 2001 that he should maybe return to Pittsfield, but Rosborough told him that until Orkin got medical clearance for Matewski to go back on the road, it did not matter where he was. See Defendant's Reply SMF ¶ 58; Deposition of Robert A. Rosborough ("Rosborough Dep."), Tab 3 to Plaintiff's Opposing SMF, at 34-35.

²⁹ In a qualified admission/denial that is more in the nature of a qualification, and hence is treated as such, Orkin notes, *inter alia*, that although Rosborough believed the letter was the doctor's authorization to get Matewski back in the field at least part of the time, he did not then know what cataplexy was or that it was a disorder that could affect consciousness. See Defendant's Reply SMF ¶ 59; Rosborough Dep. at 31-32, 44-45.

Rosborough forwarded Dr. Malik's March 21, 2001 letter to Siegel on March 23, 2001, and Siegel in turn forwarded the letter to Jones in Atlanta that day. Defendant's SMF ¶ 88; Plaintiff's Opposing SMF ¶ 88. Jones was unclear as to the meaning of "relatively well controlled" and whether the time limitations in the letter related strictly to driving time or time at work. *Id.* ¶ 89. Shortly after receiving Siegel's fax, Jones asked Siegel or Rosborough to provide her with a copy of Matewski's driver's license. *Id.* ¶ 90. Rosborough faxed a copy to Jones on March 28, 2001. *Id.* ¶ 91. On March 30, 2001 Jones sent Siegel an e-mail informing him that the Massachusetts license that Rosborough had faxed to her had come back "no record." *Id.* ¶ 92. She asked that Siegel send her a copy of Matewski's Maine driver's license. *Id.*

When Rosborough asked Matewski for a copy of his Maine driver's license, Matewski told him he did not have one. *Id.* ¶ 93. Rosborough told Matewski that the company's Human Resources Department wanted him to have one. *Id.* ¶ 94. Matewski applied for a driver's license at the Maine BMV on April 3, 2001. *Id.* ¶ 95. Question number 2 on the application asked: "Have you developed any of the following medical conditions [including "other disability"] or have any changes occurred in your present medical condition since your last renewal?" *Id.* ¶ 96. Matewski answered "no." *Id.* ¶ 97. Matewski did not provide the Maine BMV with any medical documents. *Id.* ¶ 98. Matewski testified that it was his doctor's responsibility to report his medical condition to the Maine BMV. *Id.* ¶ 99. Matewski did not see Dr. Malik after March 2, 2001 and acknowledged that Dr. Malik "probably" did not know that he was at the Maine BMV or applying for a license. *Id.* ¶ 100.

On April 4, 2001 Rosborough faxed a copy of Matewski's Maine driver's license to Jones. *Id.* ¶ 101. Matewski's employment was terminated on April 23, 2001. *Id.* ¶ 102. At the time of Matewski's termination, Rosborough completed an employee profile indicating that Matewski was involuntarily terminated but was otherwise eligible for rehire. *Id.* ¶ 106. The same day, Rosborough

completed a State of Maine Corporate Notice of Separation indicating in the “Reason for Termination” section: “medical problem – company would not grant permission to drive.” *Id.* ¶ 107 (underlining in original). Rosborough underlined the word “company” on the termination documentation because it was not his decision, it came from somebody else, and he wanted to emphasize that he was not the one who would not give Matewski permission to drive. Plaintiff’s Additional SMF ¶ 64; Rosborough Dep. at 41.³⁰ Rosborough was willing to try to work within Matewski’s hour restrictions and believed that something workable could be established. Plaintiff’s Additional SMF ¶ 102; Rosborough Dep. at 33-34.³¹

Orkin did not feel comfortable with Matewski in a driving position. Plaintiff’s Additional SMF ¶ 65; Rosborough Dep. at 37.³² Kennedy believes that Matewski was fired because of his inability to drive a motor vehicle. Plaintiff’s Additional SMF ¶ 66; Deposition of Scott R. Kennedy, Tab 2 to Plaintiff’s Opposing SMF, at 22.³³ At the time the termination decision was made, no one from Orkin reviewed Matewski’s driving records from the state of Maine or the commonwealth of Massachusetts. Plaintiff’s Additional SMF ¶¶ 99-100; Defendant’s Reply SMF ¶¶ 99-100.

Matewski was always a very good employee. *Id.* ¶ 6. Occasionally, customers would complain about his being late. *Id.* ¶ 8. However, this was not unusual as other start technicians were also routinely late. *Id.* Thus, he was not written up for lateness. *Id.* Sometimes Matewski stayed on jobs longer than expected because he was doing a good job, and went above and beyond what was expected. *Id.* ¶ 9.

³⁰ Orkin qualifies and partially denies this statement, noting, *inter alia*, that Rosborough agreed with the decision. *See* Defendant’s Reply SMF ¶ 64; Rosborough Dep. at 41.

³¹ Orkin denies this statement, *see* Defendant’s Reply SMF ¶ 102; however, I view the cognizable evidence in the light most favorable to Matewski.

³² In a qualified admission/denial that is more in the nature of a qualification, and is treated as such, Orkin asserts, *inter alia*, that Rosborough testified: “it was determined that based on what we had that we didn’t have anything saying that . . . the danger of him either killing himself or someone else was – it was kind of our obligation to make sure that that didn’t happen. And they just didn’t feel comfortable with him in a driving position.” Defendant’s Reply SMF ¶ 65; Rosborough Dep. at 37.

A report prepared by Matewski’s expert witness, Dr. Scammell, volunteered that “one [could] debate whether [Matewski] was alert enough to drive when he was fired from Orkin.” Defendant’s SMF ¶ 78; Plaintiff’s Opposing SMF ¶ 78.³⁴ Dr. Scammell testified that “alert enough to drive” encompassed not just Matewski’s ability to stay awake but also his ability “to pay attention in [his] environment to drive safely.” *Id.* Dr. Scammell’s expert-witness report indicated that from Matewski’s “clinic notes, it is difficult to gauge the severity of his sleepiness, and unfortunately he apparently never had any objective testing with a Multiple Sleep Latency Test (“MSLT”) or a Maintenance of Wakefulness Test (“MWT”).” *Id.* ¶ 79. Dr. Scammell testified that “severity of sleepiness” referred to Matewski’s “propensity to fall asleep.” *Id.* He added:

And the reason I say it is difficult to gauge the severity of the sleepiness is because the description of his sleepiness varies over the course of [his] medical records. In some records, one gets improved, it’s severe in others, and it seems quite mild. That actually made it very difficult to come to a firm commitment of how functionally impaired this guy is, based upon his sleepiness.

That’s the situation where the [MLST] and the [MWT] gives you an objective handle.

Id. Neither an MSLT nor an MWT was ever conducted by Dr. Malik or Matewski’s other doctors in 2000 or at any time thereafter. *Id.*

Dr. Scammell testified that “considering from what I understand [Matewski’s] job involves, a considerable amount of driving, so for somebody where their sleepiness has a big impact on their safety and other people’s safety, I would have done a MWT” and an MSLT. *Id.* ¶ 82. Dr. Scammell’s expert report indicated that most patients with narcolepsy can drive safely with appropriate treatment. Plaintiff’s Additional SMF ¶ 101; Tab 4(A) to Plaintiff’s Opposing SMF, at 3. In addition, according to Dr. Scammell, “optimal management of [Matewski’s] sleepiness and cataplexy could allow him to

³³ Although Orkin purports to deny this statement, *see* Defendant’s Reply SMF ¶ 66, the material it quotes largely corroborates it.

³⁴ Matewski attempts to qualify this statement, *see* Plaintiff’s Opposing SMF ¶ 78; however, his statement is disregarded inasmuch as it is not supported by the citation given.

be a safe and alert driver.” Defendant’s SMF ¶ 83; Plaintiff’s Opposing SMF ¶ 83. The report adds that “[a]t the time concerns were raised about [Matewski’s] sleepiness, [he] should have been treated with stimulants” and “more aggressive treatment of his cataplexy may also have been helpful.” *Id.* Dr. Scammell “felt there was a lot of room for improvement” in Matewski’s doctors’ treatment of him. *Id.*

Dr. Scammell’s report noted that “[o]ptimizing [Matewski’s] treatment could have taken a few months,” although this depends on the person. *Id.* ¶ 84. Dr. Scammell would have recommended that Matewski not be given any driving duties during this optimizing period. *Id.* ¶ 85. Dr. Scammell testified that Matewski’s doctors never achieved “optimal management of [his] sleepiness and cataplexy.” *Id.* He testified that he “was little impressed with . . . how inconsistent[ly] and inadequately his sleepiness seemed to have been treated.” *Id.*

Dr. Scammell testified that Matewski’s reported bizarre head movements were not attributable to either sleep apnea or narcolepsy with cataplexy. *Id.* ¶ 86. He testified that Matewski’s doctors appeared to be concerned that these movements were “an unusual seizure,” and Dr. Scammell agreed that, generally, “we recommend [persons] don’t drive until they’re evaluated and properly treated.” *Id.* Dr. Scammell noted that because Matewski’s bizarre head movements did not respond to anti-seizure treatment, he was of the opinion the movements were not seizures. *Id.* ¶ 87. However, he had “no idea” what they were; “it remains a mystery.” *Id.* Moreover, he testified that Matewski’s physicians never resolved whether the head movements were indicative of seizures or not. *Id.*

III. Analysis

Matewski contends in his complaint that Orkin wrongfully discriminated against him in violation of the MHRA on the basis of actual (Count I) or perceived (Count II) disability by refusing to make reasonable accommodations and terminating his employment despite his doctor’s clearance for

him to return to work. *See generally* Complaint. Orkin seeks summary judgment on the bases that (i) as to Count I, Matewski should be judicially estopped from contending that he has an actual disability in view of his denial, in applying for a Maine driver's license, that he suffered from a medical condition; (ii) as to both counts, he cannot show that he was "qualified" for the PC technician position; (iii) as to both counts, he cannot show that he was terminated on the basis of actual or perceived disability; and (iv) as to both counts, Orkin cannot be held liable inasmuch as Matewski posed a "direct threat" to himself and others. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (Docket No. 16) at 10-20. I find Orkin's second argument dispositive and, hence, do not reach its others.

Pursuant to the MHRA, a "covered entity may not discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 5 M.R.S.A. § 4572(2). A "qualified individual with a disability" is defined, for this purpose, as "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." *Id.* § 4553(8-D). "Reasonable accommodation" in this context "may include, but is not limited to . . . [j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities." *Id.* § 4553(9-A)(B).

Parallel provisions of the federal Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, are nearly identically worded. *See id.* §§ 12111(8) (defining "qualified individual

with a disability”), 12111(9) (defining “reasonable accommodation”), 12112(a) (proscribing employment discrimination against qualified individuals with disabilities). Thus, recourse to caselaw construing the ADA is appropriate in construing the MHRA. *See, e.g., Kvorjak v. Maine*, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (noting that the standards applicable to the ADA, the Rehabilitation Act and the MHRA “have been viewed as essentially the same”); *Doyle v. Department of Human Servs.*, No. KEN-02-479, 2003 WL 1956192, at *3 n.7 (Me. Apr. 28, 2003) (“Because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA.”) (citation and internal punctuation omitted).

Regardless of whether a plaintiff adduces direct or indirect evidence of disability discrimination (Matewski claims to adduce direct evidence, *see* S/J Opposition at 12-14), a plaintiff carries the burden of demonstrating that he or she is “qualified” for the job in question. *See, e.g., EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) (“We hold that, in a Title I ADA case, it is the plaintiff’s burden to show that he or she can perform the essential functions of the job, and is therefore ‘qualified.’ Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.”); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (“[W]hen the plaintiff has direct evidence of discrimination based on his or her disability, there is no need for a *McDonnell Douglas* type burden shift and traditional burdens of proof will apply. . . . Nonetheless, the disabled individual always bears the burden of proving that he or she is ‘otherwise qualified’ for the position in question, absent the challenged job function or with the proposed accommodation.”); *Ridge v. Cape Elizabeth Sch. Dep’t*, 77 F. Supp.2d 149, 155-56 (D. Me.), *on recon.*, 101 F. Supp.2d 16 (D. Me. 1999) (ADA plaintiff must prove three elements, including that “she was able to perform

the meaningful functions of her job, either with or without reasonable accommodation”; may make out case directly or indirectly using *McDonnell Douglas* burden-shifting method).

“An employer has no duty to modify an essential function of a job.” *Calef v. Gillette Co.*, 322 F.3d 75, 86 n.8 (1st Cir. 2003). “If the plaintiff, with or without reasonable accommodation, cannot perform an essential function of the job, then he is not a qualified individual and there is no duty to accommodate.” *Id.*

There is no dispute that driving is essential to the Orkin PC technician job. Nor is it disputed that, as of November 2000, Matewski himself agreed with Orkin’s decision to take him off the road temporarily. Indeed, according to his version of events, he requested a reprieve from driving duty at that time. The crux of the dispute is whether, as of the time Matewski was fired on April 23, 2001, he could safely drive. In my view, no reasonable fact-finder could resolve this question in his favor, even viewing the cognizable evidence in the light most hospitable to him.

As of April 23, 2001, Matewski held a Maine driver’s license; however, that is in no sense probative of his ability to drive safely inasmuch as he failed to disclose on his Maine BMV application that he suffered from sleep apnea or narcolepsy with cataplexy (as he likewise had omitted to do in earlier applying for a Massachusetts driver’s license). Matewski’s physician, Dr. Malik, had written an equivocal note (dated March 21, 2001) endorsing his return to restricted driving duty; however, for the reasons discussed above, that evidence is inadmissible to prove the truth of that matter. Per Matewski’s own account, he had developed coping mechanisms over the years to ward off the onset of a narcoleptic or cataplectic attack and, following changes in his treatment regimen in January 2001, felt better than he had in years. In addition, Rosborough – understandably sympathetic to the plight of his hard-working employee – was willing (and indeed was actively attempting) to carve out a modified schedule for Matewski to accommodate his medical conditions.

Nonetheless, neither Matewski nor Rosborough is a medical expert. Critically, the person whom Matewski did hire as his medical expert – Dr. Thomas Scammell, a physician who is board-certified in sleep medicine – testified that while “optimal management” of Matewski’s sleepiness and cataplexy could allow him to be a “safe and alert” driver, Matewski’s doctors never achieved optimal management of those conditions. Further, according to Dr. Scammell’s undisputed testimony, optimizing Matewski’s treatment could have taken a few months, during which time Dr. Scammell would have recommended that Matewski not be given any driving duties. Finally, Dr. Scammell testified (again, with no contradiction of record) that none of Matewski’s physicians had solved the “mystery” of his bizarre head movements, which might or might not be seizures, and that it is generally recommended that a person so afflicted not drive until the etiology of that condition is discovered and a proper treatment prescribed.

In 1988, Matewski had a frightful accident as a result of his cataplexy. Subsequently, he had several frightening near misses while driving, some during the time he worked for Orkin. Perhaps due in part to the extraordinary self-control measures he has taken to cope with his unfortunate condition, he has, from all that appears, avoided harming himself or others while behind the wheel since his accident in 1988. However, one can only reasonably conclude from the cognizable evidence that, had Orkin permitted Matewski to resume his driving duties (even on a modified basis) in or about April 2001, it would have risked potentially catastrophic consequences not only to its employee but also to other motorists or pedestrians who might have found themselves in harm’s way.

Simply put, Matewski has failed to carry his burden of demonstrating that he could perform an essential function of the PC technician job – driving, which necessarily implicates the safety of others – in a way that would not endanger others as of the time of his termination in April 2001. *See Amego*, 110 F.3d at 144. Thus, he creates no trialworthy issue as to whether he was “qualified” for the PC

technician job. Orkin accordingly is entitled to summary judgment as to both of the MHRA claims against it.

IV. Conclusion

For the foregoing reasons, I recommend that Orkin's motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of July, 2003.

David M. Cohen
United States Magistrate Judge

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