

INTRODUCTION AND PROCEDURAL HISTORY

Simon D. Williams (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 26, 1999.

The Commission investigated the charges and found probable cause that Seagate Roofing Company engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued a Complaint on December 16, 1999.

The Complaint alleged Respondent discharged Complainant because of a perceived disability.

Respondent filed an Answer to the Complaint. Respondent denied all procedural and substantive allegations in the Complaint. Respondent pled affirmative defenses.

On October 30, 2000, the Commission filed a Motion to Amend Complaint. The Commission moved to amend the Complaint to name Burbank, Inc. d/b/a Seagate Roofing (Respondent) as the respondent. The Hearing Examiner granted the motion, which was unopposed, on November 1, 2000.

The Commission issued the Amended Complaint on November 6, 2000. Respondent filed an Amended Answer at the public hearing on November 9, 2000.

The first day of public hearing was held at the DiSalle Government Center in Toledo, Ohio. The public hearing reconvened on November 20, 2000 at the Owens Illinois Building in Toledo, Ohio.

The record consists of the previously described pleadings, a 295-page transcript of the hearing, stipulated exhibits, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on January 24, 2001 and by Respondent on March 5, 2001, and a reply brief filed by the Commission on March 23, 2001.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on March 26, 1999.

2. The Commission determined on November 18, 1999 that it was probable that Seagate Roofing Company engaged in unlawful discrimination in violation of R.C. 4112.02(A).¹

3. Respondent is a general contractor doing business in Toledo, Ohio. Respondent's primary business is roofing and basement waterproofing. Thomas Elder is Respondent's current owner and president.²

4. Respondent is an employer. Respondent employs approximately 10 to 15 employees depending on the season.

5. Respondent's business is seasonal; the winter months, particularly January and February, are slow. Respondent requires its employees who

¹ Respondent denied, both in its Answer and Amended Answer, that the Commission attempted to conciliate this matter prior to issuing the Complaint. Neither the Commission nor Respondent presented any evidence on this issue. Thus, the Hearing Examiner cannot make any factual findings on this issue at this time.

² Elder and Bonnie Fruchey were co-owners of the business in March 1999. Fruchey was the president. She performed most of the administrative functions. Elder was the vice president. He spent more time making sales calls and visiting job sites. Elder and Fruchey usually consulted each other on employee discharges and made such decisions jointly. They "rarely" discharged employees; most employees left on their own accord. (Tr. 195)

work in the field to report to work daily for their job assignments. If no contract jobs are available, Respondent assigns these employees other tasks or sends them home. Once a crew starts a job, they report to the job site unless otherwise directed. If a job is not finished on Friday, the crew is expected to complete the job on Saturday. (Tr. 137, 216)

6. Respondent hired Complainant in 1996. Complainant performed roofing duties for the first six months and later worked as a basement waterproofer. Complainant worked with Jay Boose and Ken Kern. Boose was the crew leader.

7. Complainant's attendance was poor throughout his employment with Respondent. (R.Exs. 2, 3, 13-15) Although Complainant did miss work for other reasons, he usually cited "illness" for reporting off work or leaving early. (R.Ex. 13) Complainant often complained to his coworkers about stomach pain and vomited at work on occasion.

8. When Complainant missed work or left early, Boose and Kern had to complete jobs by themselves. At some point, Boose complained to

management about having to complete jobs “with just two people.”³
(Tr. 144)

9. In early September 1998, Elder issued Complainant a written warning for excessive absenteeism. The warning indicated that Complainant’s “excessive absenteeism [was] causing the company to rearrange the schedule several times.” (R.Ex. 3)

10. Complainant’s attendance problems became worse in the early part of 1999. (R.Ex. 15, Tr. 157, 199) Complainant continued to have stomach pain and episodes of vomiting during that period. Complainant sought medical attention for these symptoms in early to mid-February of that year. (Joint Ex. 1)

11. On March 1, 1999, Complainant underwent a blood test. The blood test revealed that Complainant has hepatitis C. *Id.* Complainant was notified of the test results on Tuesday, March 9, 1999. *Id.*

³ Complainant and Boose are friends. Boose visits Complainant’s house on holidays and was a member of his wedding party.

12. Complainant informed coworkers that he has hepatitis C later that week. Two employees, Kenneth Currier and Catherine Williams, expressed concern about being exposed to hepatitis C.⁴ Fruchey informed Currier that she believed hepatitis C was “a blood borne disease” and not transmitted through casual contact. (Tr. 202) Fruchey indicated that she was not “a medical expert” and advised Currier to call his physician. *Id.*

13. On Friday, March 12, 1999, Complainant’s crew did not finish a job that they had been working on that week. Upon the crew’s return to the office, Boose informed Elder and Fruchey about not completing the job.

14. Elder and Fruchey met late Friday afternoon to discuss business matters.⁵ Among other things, they discussed Complainant’s recent absenteeism, the latest report that Complainant has hepatitis C, and

⁴ Currier is a repairman in the warehouse. Currier was concerned because he had smoked marijuana with Complainant. Williams is an office assistant. Williams was concerned because she did not want to transmit any diseases to her elderly mother who lived with her.

⁵ This meeting was scheduled because of Fruchey’s vacation the following week. Elder assumed Fruchey’s administrative duties in her absence.

employees' concerns about possible exposure to the disease.⁶ They discussed requiring Complainant to submit a physician's statement that released him to work, but no decision was made at that time.

15. On Saturday, March 13, 1999, Complainant reported off work. Complainant left a message with Respondent's answering service that he did not "feel well." (R.Ex. 15, Tr. 174) Boose and Kern reported to the job site and worked 10 hours that day, but they were unable to complete the job. Later that day, Boose informed Elder about Complainant's absence and the crew's failure to complete the job on Saturday. Elder decided on Sunday to require Complainant to submit a physician's statement releasing him to work.

16. Complainant reported for work on Monday, March 15, 1999.⁷ Shortly after his arrival, Complainant met with Elder in Fruchey's office. Elder told Complainant that he would not be permitted to work until he provided a physician's statement releasing him to do so. Complainant

⁶ Elder and Fruchey had received previous reports from Complainant and other employees that Complainant had ulcers, cancer, and cirrhosis.

⁷ Complainant acknowledged that he was not sick on Saturday. A few weeks earlier, Complainant had scheduled to have a home security system installed on March 13. Complainant testified that the company who installed the system required "the whole family" to be present to watch a movie about how to operate it. (Tr. 104)

became upset; he objected to not being allowed to work without a physician's statement. Complainant indicated that his physician had not restricted him from working. Elder asked Complainant whether he could guarantee that he would not become sick on the job. As the conversation became "heated", Elder told Complainant that if he was too sick to work that maybe he should collect disability compensation. (Tr. 106, 275, Elder Dep. 41) Complainant left the premises shortly after talking to Elder.

17. Complainant made several telephone calls once he returned home that day.⁸ Complainant called the Ohio Bureau of Employment Services (OBES) and filed a claim for unemployment compensation benefits. (R.Ex. 5, Tr. 23, 104-05) Complainant also called his physician and made an appointment for the following day.

18. Complainant visited his physician on March 16, 1999. Complainant's physician examined him and discussed the results from his blood test in detail. (Joint Ex. 1) Complainant requested a medical

⁸ Complainant testified that he called the Commission on either March 15 or March 16 and scheduled an appointment to talk to a representative about filing a charge of discrimination.

statement that released him to work. Based on this request, the physician provided Complainant the following statement:

Simon's medical condition is not contagious by casual work related contact. It is transmitted through blood to blood contact. He is ok for work.

(Comm.Ex. A, Joint Ex. 1)

19. Complainant called Respondent's office later that day. Williams answered the phone. She told Complainant that Elder was at a job site. She gave Complainant Elder's cell phone number. (Tr. 184-85)

20. Complainant immediately called Elder at the job site. (Tr. 19, 77, 114) Complainant read the physician's statement to Elder over the telephone. Elder told Complainant that he did not "have time to talk about it right now." (Tr. 19) Elder instructed Complainant to call Williams at the office and tell her the physician's name and telephone number.

21. Complainant called Respondent's office on March 17, 1999. Complainant talked with Elder who was in his office. Elder told Complainant that he wanted to talk to his physician about his

condition. Complainant provided Elder the physician's name and telephone number. (R.Ex.12, Tr. 247)

22. Elder immediately called Complainant's physician and left him a message. The physician returned Elder's call promptly. Elder asked the physician whether Complainant's condition is contagious. The physician advised Elder that hepatitis C is not contagious; it is not spread through casual contact. The physician did caution Elder that "any bleeding can definitely increase the risk of spreading the infection." (Joint Ex. 1)

23. On March 18, 1999, Complainant filed a claim for public assistance with the Lucas County Department of Human Services (Lucas County DHS). (R.Ex. 4) Complainant also mailed the physician's statement to Respondent's business address on that day. (R.Ex. 7) Respondent received the statement the following day.

24. Fruchey returned from vacation on Monday, March 22, 1999. In the stack of mail on her desk, Fruchey saw the physician's statement mailed by Complainant, a request from OBES for "Separation Information" regarding Complainant's alleged discharge, and a similar request from

Lucas County DHS for discharge information pertaining to Complainant. (Comm.Ex. A, R.Ex. 17) Fruchey responded to these requests during her first week back to work.⁹

25. During the end of that week, Fruchey also instructed Currier to pick up Complainant's pager and company property that he had signed out for personal use. Currier traveled to Complainant's residence on Friday, March 26, 1999 and retrieved company property from Complainant. (Tr. 21, 22, 208)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have

⁹ In answering both requests, Fruchey denied that Respondent had, in fact, discharged Complainant.

been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleges in the Complaint that Respondent discharged Complainant because of a perceived disability.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02 provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the . . . disability, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving that:

- (1) Complainant is disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

Columbus Civ. Serv. Comm. v. McGlone (1998), 82 Ohio St.3d 569.

5. R.C. 4112.01(A)(13) defines "Disability" as:

. . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

6. In this case, the Commission concedes that Complainant's condition "does not rise to the level of an actual disability." (Comm.Br. 9) The Commission argues that Complainant is protected under the statute because Respondent perceived him to be disabled.

7. To determine whether Respondent perceived Complainant to be disabled, it is appropriate to refer to relevant case law under analogous federal statutes such as the Americans with Disabilities Act of 1990 (ADA).¹⁰ *McGlone, supra*. Likewise, it is appropriate to refer to the regulations and guidelines of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of the ADA.

8. EEOC regulations identify three scenarios where an individual is “regarded as” or perceived to be disabled:

- (1) Ha[ving] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Ha[ving] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; and
- (3) Ha[ving] . . . [no physical or mental impairment] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R.1630.2(l).

¹⁰ The ADA’s definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13).

9. The Commission's allegations in this case fit more neatly into the second scenario where a substantial limitation only exists because of the attitudes of others toward the individual's impairment. The perceived section of the definition of disability is "designed to protect against erroneous stereotypes some employers hold regarding certain physical or mental impairments that are not substantially limiting in fact." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

The thesis of the [ADA] is simply this: That people with disabilities should not be judged nor discriminated against based on unfounded fear, prejudices, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have.

Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000) (citations and quotation marks omitted).

10. In analyzing claims of perceived disability, federal courts have required employees to show that their employers perceived or treated them as having an impairment that substantially limits one or more major life activities. *Sullivan v. River Valley School Dist.*, 197 F.3d 804 (6th Cir. 1999); *Gordon v. E.L. Hamm & Assoc.*, 100 F.3d 907 (11th Cir. 1996), *cert. denied*, 522 U.S. 1030 (1997). Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." *Interpretive Guidance of Title I of the Americans*

with Disabilities Act (EEOC Interpretive Guidance), 29 C.F.R. pt. 1630 App., at § 1630.2(i). Such activities include, but are not limited to, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, and reaching.” *Id.*, (legislative citations omitted); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (1998) (“As the use of the term ‘such as’ confirms, the list is illustrative, not exhaustive”).

11. If an employee is not substantially limited with respect to any other major life activity, then the employee’s ability to perform the major life activity of working should be considered. *EEOC Interpretive Guidance, supra* at 1630.2(j). An employer does not necessarily perceive an employee as substantially limited in the major life activity of working by finding the employee unsuitable for a particular job. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996). The Commission must prove that Complainant’s condition was perceived as significantly restricting his ability “to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.” 29 C.F.R. § 1630(j)(3)(i).

12. The Commission argues that Respondent considered Complainant's condition "to be contagious and a health threat to his coworkers." (Comm.Br. 9) Since most jobs involve some contact with others, the Commission argues that Respondent, in considering Complainant's condition to be contagious, regarded him as substantially limited in the major life activity of working. See *Rollf v. Interim Personnel, Inc.*, 10 A.D. Cases 1656 (E.D.Mo. 1999) (court denied summary judgment because employee with hepatitis C adequately alleged that his employer regarded him as disabled based on belief that his mere presence posed a health threat to coworkers).

13. The Commission relies on several passages in Fruchey's letter to OBES and Respondent's position statement provided to the Commission during the investigation. Fruchey wrote in the letter to OBES:

Simon was not discharged. Due to excessive absenteeism he was told to bring in a physician's release to work, as Simon had given us several different versions as to what his medical condition really was. His latest explanation was that he had been diagnosed with a contagious disease. Simon's position required him to work inside of our customer (sic) homes and we did not want our customers or our other employees exposed to a potentially hazardous condition.

(R.Ex. 18)

14. Fruchey wrote the following passages in the position statement dated April 16, 1999:

Firstly, Simon Williams was not terminated. This assertion is a complete falsehood. As indicated by the enclosed attendance records, Simon has a history of excessive absenteeism. In addition, Simon had verbally given us several various diagnoses (sic) regarding his medical condition, which apparently was the reason behind his many days off. This, of course, does not include the days Simon was absent for personal reasons nor does this include the times Simon did not show up for work without any notification whatsoever.

Simon's position requires him to work along-side other employees, and this work is performed inside our customer's residences. Due to the nature of this latest disease, naturally we were highly concerned with exposing our employees and customers to a potentially hazardous condition. In addition, our employees expressed a hesitation to work with Simon as they also did not want this exposure.

Simon's work required the use of hand tools as well as electric and pneumatic tools, which presents a potential for harm if not used properly. Enclosed you will find instances where Simon was wounded in the course of his duties. This would expose other employees and customers to a perilous situation.

(R.Ex. 19)

15. In reviewing these correspondences, it is important to note that Fruchey stated from the outset in both that Respondent did not discharge Complainant. With this posture in mind, these correspondences are not explanations for why Respondent discharged Complainant or

otherwise refused to allow him to work. Instead, they offer reasons why Respondent requested that Complainant provide a physician's statement releasing him to work.

16. These correspondences express not only a concern that Complainant's "latest" condition might expose employees and customers to "a potentially hazardous condition", but also exhibit concerns about Complainant's excessive absenteeism and varying reports about his medical condition. Although the correspondences do not indicate whether a particular concern was more influential than others, the evidence shows that Complainant's absence on Saturday, March 13, 1999 precipitated Elder's decision to require him to provide a physician's statement releasing him to work.¹¹ Elder and Fruchey had discussed the matter on the previous Friday, but no decision was made then.

17. The evidence also shows that any concerns that Elder or Complainant's coworkers had about his condition being contagious

¹¹ Complainant's testimony that he was not required to work on that Saturday is not credible. Respondent provided credible testimony from Boose and others that employees who worked in the field were expected to complete a job on Saturday if they failed to finish on Friday. The evidence also shows that Complainant reported off work on that Saturday because he had previously scheduled to have a home security system installed that required his presence. If Complainant did not have to work that day, why did he call off?

were short-lived. Currier and Williams testified that their initial fear of contracting hepatitis C from Complainant were allayed upon receipt of medical advice from their physicians. Similarly, Elder testified that he felt “comfortable” with Complainant’s ability to work with others after talking with Complainant’s physician about the matter. (Tr. 265) Fruchey testified that even before she read the statement from Complainant’s physician she believed that hepatitis C was “a blood borne disease”, which was not transmitted through casual contact. (Tr. 202)

18. Respondent argues that Elder’s mere request for a physician’s statement that released Complainant to work “does not equate with a finding of a perceived disability.” (R.Br. 27) This argument is well-taken. Federal courts have refused to infer a perception of disability from an employer’s request that an employee undergo a mental or physical examination to determine fitness for a particular job. *Sullivan, supra*; *Cody v. Cigna Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998).

A request that an employee obtain a medical exam may signal that an employee’s job performance is suffering, but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee’s major life activities.

Sullivan, supra at 811.

19. In analyzing these cases, federal courts have reasoned that employers must remain free to use reasonable means to ascertain the cause of an employee's poor work performance or aberrant behavior in the workplace. Elder's request for a physician's statement was not unfounded in light of Complainant's excessive absenteeism in 1999 and the varying reports about his medical status—the latest being that he has hepatitis C. Elder testified that he was not educated about hepatitis C and was not even sure that Complainant had it. (Tr. 265) His request for a physician's statement was consistent with the ADA's mandate of an "individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question." *Holiday, supra* at 643.

20. Assuming for purposes of argument that Respondent perceived Complainant to be disabled, the Commission failed to prove that Respondent discharged Complainant or took any other adverse employment action against him. The Commission cannot prove a *prima facie* case of disability discrimination in this case without such evidence.

21. Complainant acknowledged that neither Fruchey nor Elder told him that he was discharged or should not return to work. Neither sent Complainant any written correspondence to that effect. Complainant unreasonably assumed that his employment was terminated from his March 15 conversation with Elder.¹² Complainant jumped to this conclusion even though Elder told him that he could return to work if he obtained a physician's statement releasing him to do so.

22. Even if Respondent's retrieval of company property from Complainant's residence signaled the end of his employment, Complainant had already filed claims for unemployment compensation benefits and public assistance several days earlier. The evidence shows that Currier traveled to Complainant's residence and picked up company property on

¹² Complainant testified about when *he concluded* that Respondent had discharged him:

Q: Mr. Williams did there come a time when you concluded that your employment had been terminated?

A: I concluded that my employment was terminated. Basically I kind of had that impression the first day I spoke with Tom when he sent me to get the doctor's excuse. It then further was confirmed to me when Ken came and picked up the company tools and stuff . . . And you come pick up the pager and the tools, that's telling me you don't have employment no more.

(Tr. 23)

Friday, March 26, 1999—11 days after he filed with OBES and 8 days after he filed with Lucas County DHS.¹³ By that time, Fruchey had already received these claims and responded to them.

23. The Commission argues that Respondent should have called Complainant for work upon its receipt of the physician's statement. Both Elder and Fruchey offered credible explanations for not calling Complainant. Elder testified that he was "out of the loop" once Fruchey returned because she handled the administrative functions of the company. (Tr. 257) Elder further testified that he was "out in the field at the time" and "was not going to chase Simon to come to work" because of his poor attendance record. (*Id.*, Elder Dep. 39)

24. Elder's testimony demonstrates that he did not feel compelled to make a special effort to contact Complainant because his excessive absenteeism caused more work for the other members of his crew and hampered their ability to complete jobs in a timely manner. (Tr. 273)

¹³ Complainant testified that Currier picked up the company property on Friday, March 19, 1999. This testimony lacks factual support. The evidence shows that Fruchey instructed Currier to retrieve the property, and she did not return to work from vacation until March 22, 1999. Currier testified that Fruchey gave him this instruction "a week or two" *after* she returned from vacation. (Tr. 164)

Elder's indifference toward Complainant's return to work was more likely caused by his poor attendance rather than a concern about his condition being contagious.

25. Fruchey testified that the March 16 physician's statement and Complainant's claims for unemployment compensation benefits and public assistance were in the stack of mail on her desk when she returned to work on March 22, 1999. Fruchey testified these claims led her to believe that Complainant had quit his employment and "was not coming back." (Tr. 208) This belief, which was based on Complainant's actions, was reasonable under the circumstances.

CONCLUSIONS

26. After a careful review of the entire record, there is insufficient evidence to conclude that Respondent perceived Complainant as having an impairment that substantially limits his ability to work or perform other major life activities. Respondent's mere request for a physician's statement that released Complainant to work does not establish such a perception.

27. The Commission also failed to establish that Respondent discharged Complainant or took any other adverse employment action against him. Respondent has consistently maintained that Complainant was not discharged; the substantial weight of the evidence supports this contention. Complainant's actions caused Respondent to reasonably believe that he quit his employment.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8679.

TODD W. EVANS
HEARING EXAMINER

July 16, 2001