

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

SANDY L. LEASURE

Complainant

and

**STATE OF OHIO,
REHAB SERVICES COMMISSION**

Respondent

Complaint #8864

(COL) B1071999 (27000) 100599
22A – A0 – 3007

HEARING EXAMINER'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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INTRODUCTION AND PROCEDURAL HISTORY

Sandy L. Leasure (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 5, 1999.

The Commission investigated and found probable cause that the State of Ohio, Rehab Services Commission (Respondent) (RSC) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on August 10, 2000. The Complaint alleged that Complainant was denied a reasonable accommodation and was forced to go on medical leave because of her disability.

Respondent filed a timely Answer to the Complaint, admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on March 12, 2001 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 283 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on August 1, 2001 and by Respondent on September 21, 2001. The Commission filed a reply brief on October 2, 2001.

FINDINGS OF FACT

The following findings 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 further considered the opportunity each witness had to observe and know the things discussed; each

witness's strength of memory; frankness or the 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 October 5, 1999.

2. The Commission determined on June 8, 2000 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a state agency doing business in Ohio and an employer.

5. Complainant was first employed by Respondent in 1974. In 1999 she was a Disability Claims Specialist 2. Her primary duty consists of conducting hearings to determine if recipients of Social Security benefits are still disabled.

6. Complainant was diagnosed with bronchial asthma in 1994. Her asthma is triggered by allergens in the air: dust mites, molds, trees, grass, ragweed, and weed pollens. (Comm.Ex. 3) In the fall of 1998, Complainant's asthma was out of control. She was continuously wheezing and short of breath. Her asthma was so severe that she was unable to breathe, talk, or walk normally. (Tr. 21)

7. In order to minimize her exposure to allergens at the work site that were exacerbating her asthma, Complainant requested Respondent to allow her to work at home, where she could have more control over her environment. She submitted a written request on March 31, 1999. In a letter dated April 13, 1999, Respondent asked for more detailed information. Respondent inquired how Complainant's condition prevented her from performing her essential job functions.

8. Complainant replied on April 21, 1999 through a letter from her physician, Dr. Abner H. Bagenstose. Dr. Bagenstose is Board certified and specializes in allergic diseases and asthma. In his letter he recommended that Respondent either modify Complainant's office area by providing Complainant an office with carpeting on a ventilated floor, apply pesticides to the carpeting in Complainant's office to reduce dust mites, or allow Complainant to remain in her current building in an office without carpeting. At Complainant's request he also added a post script suggesting that Complainant be permitted to perform the bulk of her duties from her home office.

9. When Complainant did not receive a response from Respondent to the April 21 letter, she obtained another physician's letter on May 19, 1999. This letter was from her primary care physician. He suggested Complainant would have less problems with her asthma if she was allowed to work at home where she could avoid exposure to many of the allergens that she was sensitive to. (Comm.Ex. 4) Complainant also sent Respondent a letter on May 20, 1999 detailing some work-related problems caused by her asthma.

(Comm.Ex. 5) Respondent acknowledged receipt of these documents in writing one month later. (Comm.Ex. 6)

10. On July 14, 1999, Respondent's representatives met with Complainant. Complainant was informed that her condition did not substantially limit a major life activity. (Tr. 173) This was followed up with a written memorandum on July 19, 1999, where Respondent re-stated that Complainant's request for reasonable accommodation would not be considered because she had not provided documentation that showed her asthmatic condition substantially limited a major life activity.

11. When Respondent denied Complainant's request for a reasonable accommodation, Complainant felt compelled to apply for disability leave. Her request was approved, effective July 28, 1999.

12. On January 11, 2000, Complainant's treating physician advised Respondent that her condition had significantly improved. He requested that Respondent provide her with an air cleaner and released her to return to work part-time, effective February 1, 2000. Respondent requested more

information about Complainant's restrictions. Complainant responded on January 26, 2000 with a letter detailing what she believed was the nature and extent of her asthma and how it impacted her. (Comm.Ex. 16)

13. On January 26, 2000, Respondent agreed to put an Alpine air purifier in Complainant's work area. This was in anticipation of Complainant returning to work on February 1, 2000.

14. Complainant intended to return to work on February 1, 2000, but was ordered not to return by Respondent until additional information was submitted by her doctor about her condition. This information was submitted on February 9, 2000. Complainant returned to work part-time on February 15, 2000 and full-time on April 19, 2000.

15. On March 10, 2000, RSC asked Complainant for more information from her physician, attaching a questionnaire for him to fill out. The doctor filled out the questionnaire. After Respondent received the questionnaire, Respondent decided Complainant was disabled and reasonably accommodated Complainant by temporarily moving her to an enclosed room where

she had some control over the environment. Seven months later Respondent provided Complainant with an office which has an air filter, laminated wall panels, and vinyl flooring.

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 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

¹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in its Complaint that Respondent denied Complainant a reasonable accommodation and forced her to go on medical leave because of her disability.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which 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. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means

evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

5. The Commission's administrative rules also apply. Administrative Code 4112-5-08(E) provides that Respondent has an affirmative duty to provide a disabled employee with a reasonable accommodation.

6. In order to apply this section to Respondent, the Commission must first prove Complainant is disabled. 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.² (Emphasis added.)

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

The term "disability" means, with respect to an individual —

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

7. R.C. 4112.01(A)(16) provides that any physical condition affecting the respiratory system is a physical impairment. Therefore, asthma is a physical impairment.

8. However, not all physical impairments rise to the level of disabilities.

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual.

Interpretive Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance), 29 C.F.R. pt. 1630 App., § 1630.2(j).

9. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment; and

- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

This determination, which must be made on a case-by-case basis, requires comparison with the abilities of the average person.

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the . . . [three factors], does not amount to a significant restriction when compared with the abilities of the average person.

EEOC Interpretive Guidance, at § 1630.2(j).

10. Based on the foregoing discussion and the evidence in this case, Complainant's asthma substantially limited the major life activities of breathing, speaking, and walking. Complainant testified, and her doctor affirmed, that her asthma was severe. (Resp.Ex. E)³ She could not walk two blocks without getting out of breath. (Resp.Ex. G) She could not speak a full sentence without pausing for breath. (Resp.Ex. H)

³ In its brief Respondent argued the letters from Complainant's physicians were not credible evidence. (Resp.Br. 5) This argument is not well taken. See *The State Medical Board v. Sun*, 1981 WL 3668 (Ohio App. 10th Dist.), citing *Richardson v. Perales*, (1971) 402 U.S. 389 (physician's written reports are substantial evidence and can be used to support findings).

11. Complainant's asthma was also chronic. The evidence showed she has suffered from asthma for seven years. It was not a temporary condition.

12. The evidence also showed that Respondent eventually acknowledged that Complainant was disabled. (Comm.Ex. 21) They agreed to provide her with a filter and an office that did not have carpeting or fabric-covered walls.

13. There can be no dispute that although Complainant was disabled, she was qualified to perform her job duties with reasonable accommodation. Respondent's argument that she was not qualified because she applied and was granted disability benefits is not dispositive of that issue. The disability determination process does not take into consideration the possibility of reasonable accommodation.

14. Therefore, under the facts and circumstances in this case, Complainant's application for disability benefits was not evidence that she was not qualified to perform the essential functions of her job. *Cf. Cleveland v.*

Policy Mgt. Sys. Corp., 526 U.S. 795 (1999) (applicant for Social Security disability insurance benefits can still be a qualified individual with a disability within the meaning of the ADA).

15. The Commission having proven that Complainant was disabled and able to perform the essential functions of her position with accommodation, Respondent had a duty to provide a reasonable accommodation for Complainant. However, an employer is not required to accommodate an employee in the manner requested or provide the employee with the “best” accommodation.⁴ *Vande Zande v. Wis. Dept. of Admin.*, 2 AD Cases 1846 (W.D. Wisc. 1994), *quoting EEOC Interpretive Guidance*, at § 1630.9. Employers are only required to provide an accommodation that is reasonable.

See Kerno v. Sandoz Pharmaceuticals, 4 AD Cases 1196, 1200 (N.D. Ill. 1994) (“the bottom line is . . . simply that the employer must offer the employee a reasonable accommodation”).

⁴ Although the preference of the disabled person should be considered, the *EEOC Interpretive Guidance* provides that:

. . . the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less

16. Thus, Respondent did not have to provide Complainant the option of working at home as a reasonable accommodation. However, other reasonable accommodations were requested on Complainant's behalf. (See Findings of Fact, ¶ 8)⁵ Ultimately, Respondent provided Complainant with a combination of these requested accommodations.

17. Was the accommodation timely? An accommodation that is made in an untimely fashion is not reasonable. *James v. Frank*, 772 F.Supp. 984, 2 A.D. Cases 815 (S.D. Ohio 1991).

18. In this case, the accommodation was not timely. Respondent had a four-month period from the first request for accommodation to engage in the interactive process with Complainant and her physicians to determine if Complainant had a disability and if the disability could be reasonably accommodated. See *Beck v. University of Wisc. Bd. of Regents*, 5 AD Cases 304 (7th Cir. 1996) (employer must make a reasonable effort to determine appropriate accommodation in an interactive process that requires

expensive accommodation or the accommodation that is easier for it to provide. *Id.*, at § 1630.9.

⁵ The *EEOC Interpretive Guidance* provides that a health professional may request a reasonable accommodation on behalf of an individual with a disability. See, 29 C.F.R. 1630.

participation by both parties). The employer who fails to foster an interactive process or otherwise search for a reasonable accommodation risks later liability if such accommodation was possible for the disabled employee. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000).

19. Respondent appropriately initiated the process, but failed to act after Complainant had submitted sufficient information that would cause a reasonable person to conclude that Complainant was entitled to a reasonable accommodation. There were a number of reasonable accommodations that Respondent could have easily made during the four-month period preceding Complainant's disability leave.⁶

20. If Respondent believed that any of the information Complainant provided was untrue, then Respondent had an obligation to send Complainant to another physician to evaluate her condition. If Respondent believed the picture was not complete, then Respondent had an obligation to follow-up and

⁶ Respondent's argument that Complainant rejected the other options is not supported by the evidence. They were never offered. (At the most there were vague references to "administrative adjustments.") Much later, when they were offered, Complainant embraced them and abandoned her request that she be allowed to work at home.

complete the picture in a timely manner. The questionnaire that was sent to Complainant's treating physician in March 2000 should have been provided in June 1999, nine months earlier.

21. The Commission proved that Complainant was disabled. She requested a reasonable accommodation for her disability. Respondent did not provide a reasonable accommodation in a timely manner. Therefore, the Commission is entitled to relief.

RELIEF

22. When the Commission makes a finding of unlawful discrimination, the victims of such behavior are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89.

23. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 10 FEP Cases 1181, 1187 (1975).

The attainment of this objective requires that:

. . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 12 FEP Cases 549, 555 (1976) (footnotes omitted).

24. Normally the issue of relief evolves from some adverse employment decision. In this case, arguably the adverse employment decision was the failure to accommodate. If the failure to accommodate is the adverse employment action, then Complainant is not entitled to any monetary relief since Respondent has accommodated her disability and the issue of accommodation is moot. Instead, the Commission claims that Complainant was forced to go on disability leave because Respondent did not accommodate her in a timely manner. This is akin to a constructive discharge.

25. The issue of constructive discharge that arises from a failure to accommodate appears to be a case of first impression in Ohio. Likewise, there are few federal cases on the issue. There is one that provides some guidance. *Hurley-Bardige v. Brown*, 900 F.Supp. 567 (D. Mass. 1995).

26. According to *Hurley-Bardige*, the failure to accommodate, in itself, is not sufficient evidence of constructive discharge, except in cases where the employer failed to make any accommodation at all. Such behavior by an employer would be strong circumstantial evidence that the employer had a “deliberate intent” to discharge the employee.

27. In this case, Complainant testified that she was told, “. . . if you’re sick, you should leave.” (Tr. 43) If this were true, there would be no question that Respondent intended to force Complainant to leave her employment. Complainant also testified she believed that if she continued working in the office environment, her condition could become life-threatening. Thus, she felt compelled to go on disability leave.

28. Respondent's witnesses had a different version of what was said and the context of the conversation. They testified Complainant said that the only way she could get her asthma under control would be if she was allowed to work at home. Respondent's representative replied (since working at home was not an option) that if Complainant needed to be at home, then disability leave would be an option she would want to consider. (Tr. 259-260)

29. Based on the foregoing discussion, the evidence supports the conclusion that Complainant objectively and subjectively believed that her health would be endangered if she continued to work in the existing office environment. The evidence also supports the conclusion that Respondent did not offer any reasonable accommodation in July 1999 and encouraged Complainant to go on disability leave. Therefore, Complainant is entitled to damages that resulted from her disability leave status.

30. The parties stipulated to damages. The damages included the following:

- \$6,446.89 in wages;
- 151.45 hours of vacation time;
- 15.47 hours of sick time;
- 17.06 hours of personal time;
- .05 hours of compensatory time (probably .50 hours of compensatory time); and
- 128.52 hours of vacation time that Complainant failed to accrue because she could not accrue vacation time while on disability leave.

RECOMMENDATIONS

For all the foregoing reasons, it is recommended in Complaint #8864 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;

2. The Commission order Respondent to credit Complainant for all of the hours of vacation time, sick time, and personal time she used, and hours she failed to accrue, as a result of being on disability leave; and

3. The Commission order Respondent to pay Complainant \$6,446.89 for lost wages, plus interest at the maximum rate allowed by law.⁷

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

December 12, 2001

⁷ As an alternative, the parties may consider cashing out the leave time that can be cashed out. Interest would not accrue on cashed-out leave time.