

## **INTRODUCTION AND PROCEDURAL HISTORY**

Jeanne M. Rockhold (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on November 15, 2000.

The Commission investigated the charge and found probable cause that Hardin County Council on Aging, Inc. (Respondent) 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 August 30, 2001. The Complaint alleged Respondent discharged Complainant because of a perceived disability.

Respondent filed an Answer to the Complaint. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on June 4, 2002 at the Hardin County Courthouse in Kenton, Ohio.

The record consists of the previously described pleadings, a 75-page transcript of the hearing, exhibits admitted into evidence during the hearing, an affidavit from Kay Eibling, post-hearing briefs filed by the Commission on July 18, 2002 and by Respondent on August 8, 2002, and a reply brief filed by the Commission on August 19, 2002.

### **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the Administrative Law Judge's assessment of the credibility of the witnesses who testified before him in this matter. The Administrative Law Judge (ALJ) 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 lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ 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 November 15, 2000.

2. The Commission determined on May 17, 2001 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. Respondent is a non-profit agency that provides transportation, meals, housekeeping, and other services to elderly and disabled persons in Hardin County, Ohio. Respondent hired Complainant in 1990 as a part-time homemaker. Complainant became a full-time homemaker the following year. In 1993, Complainant applied for and received a full-time van driver position.

4. As a van driver, Complainant transported elderly and disabled persons to and from meal sites, doctors' appointments, grocery stores, and other locations. Complainant was also responsible for the inspection,

service, and maintenance of the vans that she drove. Kay Eibling, the Transportation Coordinator, was Complainant's immediate supervisor.

5. In 1997, Hannah Derr became Respondent's Executive Director. During the year, Complainant was diagnosed as having non-insulin dependent diabetes and high blood pressure (hypertension). Complainant's physician placed her on medication and a diet for these conditions.

6. Complainant had difficulty managing her health conditions after her diagnoses. Complainant was occasionally "flushed", dizzy, and trembling at work. Complainant informed Eibling and Derr when she did not feel well; they brought her food from the kitchen in the office.

7. Complainant sought medical advice about her diabetes from Derr, a registered nurse.<sup>1</sup> Complainant also asked Derr to take her blood pressure at work. Derr gave Complainant advice on how to manage her health problems. Complainant continued to have periodic episodes of dizziness and other symptoms related to her medical conditions.

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<sup>1</sup> Derr was the Assistant Director of Hardin Home Health, a home health care agency, for approximately 10 years. During her tenure, she researched diabetes and developed informational packets for home use by diabetics. Derr has also assisted her mother in managing her diabetes for several years.

8. In June 1999, Derr completed a work performance evaluation for Complainant. Derr rated Complainant's overall work performance as "good" with a score of 6.8 on a scale of 10. (Comm.Ex. B) Derr noted in the evaluation that Complainant was "working to improve her health[,] which will make her feel better on and off the job." *Id.*

9. Complainant's health problems became worse in January and February 2000. Complainant felt dizzy, flushed, and was trembling more often. Complainant left work early on several occasions because she felt ill.<sup>2</sup> On two occasions, Complainant's physician sent Complainant to the hospital where she was admitted.

10. During this period, Complainant informed Derr and Eibling when she felt ill; they observed her trembling and being flushed. Complainant also informed them about her hospitalizations and problems managing her medical conditions, e.g., accidentally taking two doses of medication or not eating properly. Derr and Eibling brought Complainant food from the kitchen and talked to Complainant about the need to properly manage her

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<sup>2</sup> Complainant also missed approximately three weeks of work after she had a tumor removed on February 23, 2000.

medical conditions. Derr and a registered nurse in Adult Daycare took Complainant's blood pressure at her request.

11. Beginning in March 2000, Complainant and the other van drivers underwent mandatory physical examinations required by state law. Respondent selected Dr. Sivaram Kollengode, an occupational health physician, to perform the examinations. In his report, Dr. Kollengode released Complainant to work without restrictions. (Comm.Ex. E) Dr. Kollengode also recommended that Complainant's medical condition be re-evaluated every three months. *Id.*

12. In mid-June 2000, Derr completed Complainant's yearly work performance evaluation. Derr and Complainant discussed the evaluation on June 23, 2000. Derr rated Complainant's overall work performance as "good" with a score of 7 on a scale of 10. (Comm.Ex. C) Derr noted in the evaluation that Complainant has "multiple health problems[,] which, at times, keep[s] her from being able to perform her job well." *Id.*

13. Derr informed Complainant that she was discharged after they discussed her evaluation. Derr told Complainant that Dr. Kollengode was

concerned about Complainant driving Respondent's vans. (Tr. 14) Derr then provided Complainant written notice of her discharge. (Comm.Ex. D)

Derr wrote the following in the discharge notice:

. . . I have many concerns about your ability to perform your job as a van driver safely, especially considering that we transport elderly and disabled clients . . . I must consider the health and safety of our clients as well as your health. Therefore, your employment with the Hardin County Council on Aging is terminated immediately.

*Id.*

## **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. The Commission alleged in the Complaint that Respondent discharged Complainant because of a perceived disability. 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.

2. 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).

3. 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.

4. 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.

5. It is undisputed in this case that Complainant has diabetes and hypertension. Diabetes is listed under R.C. 4112.01(A)(16)(a)(iii) as an example of a "physical or mental impairment." This listing does not establish that Complainant is disabled under the statute; the Commission must prove that Complainant's diabetes or other impairments, either individually or collectively, substantially limited a major life activity. *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002), 534 U.S. 184; See also *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298 (whether plaintiff's cancer substantially limited major life activity must be decided on case-by-case basis even though cancer was included as physical or mental impairment under R.C. 4112.01(A)(16)(a)(iii)).

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).

6. In its brief, the Commission concedes that Complainant's impairments do not "rise to the level of an actual disability." (Comm.Br. 6) The Commission argues that Complainant is protected under the statute because Respondent perceived her 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).<sup>3</sup> *McGlone, supra* at 572. Likewise, it is appropriate to refer to the regulations and guidelines of the Equal Employment Opportunity

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<sup>3</sup> The ADA's definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13).

Commission (EEOC), the federal agency charged with enforcement of the ADA.

8. The Supreme Court has recognized two scenarios where an individual may be “regarded as” or perceived to be disabled:

- (1) A covered entity mistakenly believes that a person has a physical [or mental] impairment that substantially limits one or major life activities; or
- (2) A covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

*Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 489.

In either event, employees must prove that their employers perceived or treated them as having an impairment that substantially limits one or more major life activities.<sup>4</sup> *Id.*, at 490 (“An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity”).

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<sup>4</sup> Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty.” *EEOC Interpretive Guidance, supra* 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* (1998), 524 U.S. 624, 638-39 (“As the use of the term ‘such as’ confirms, the list is illustrative, not exhaustive”).

9. In this case, the Commission does not contend that Respondent perceived Complainant to be substantially limited in a major life activity outside of the workplace.<sup>5</sup> Instead, the Commission argues that Respondent regarded Complainant as substantially limited in the major life activity of working. An employer does not perceive an employee to be substantially limited in working by finding the employee unsuitable for a particular job. *Murphy v. United Parcel Service* (1999), 527 U.S. 516, 523. The statutory phrase “substantially limits” requires the Commission to show that Respondent regarded Complainant as unable to work in a “substantial class” or a “broad range” of jobs:

To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skill (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

*Sutton, supra* at 492; *See also McGlone, supra* (plaintiff who failed city’s visual acuity standard for firefighters was required to show that city perceived his nearsightedness as foreclosing him from a class of jobs).

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<sup>5</sup> The Commission does not argue that driving, by itself, is a major life activity. Federal courts, which have addressed this issue, have held that driving is not a major life activity. *Colwell v. Suffolk County Police Dept.* (C.A. 2, 1998), 158 F.3d 635, 643; *Wyland v. Boddie-Noell Enterprises, Inc.* (Nov. 17, 1998), C.A. 4 No. 98-1163, (1998 U.S. App. LEXIS 29355); *Kealy v. Consolidated Edison Co.* (July 16, 2002), S.D.N.Y. No. 98 Civ. 2210, 2002 U.S. Dist. LEXIS 12780.

10. The issue of whether an impairment substantially limits the major life activity of working “depends primarily on the availability of jobs for which the impaired person qualifies.” *Duncan v. Washington Metro. Area Trans. Auth.* (C.A. D.C., 2001), 240 F.3d 1110, 1114. This individualized inquiry requires consideration of “the geographical area to which the individual has reasonable access and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified.” *Sutton, supra* at 491-92 (citing and quoting EEOC Guidelines, § 1630.2(j)(3)(ii)(A), (B)).

11. The Commission argues that “the perceived exclusion was broader than the job at issue.” (Comm.Rep.Br. 3) This argument is well taken. Derr testified that she considered Complainant for other jobs with Respondent, but Complainant did not have the “skills” for any of the positions available at the time. (Tr. 59) Derr further testified that if there had been a vacant homemaker position, she would have had “the same concerns about . . . [Complainant’s] driving.” *Id.* This testimony suggests that Derr perceived Complainant to be unable to safely perform not only the van driver position, but also other jobs that require driving.

12. The inquiry does not end here, however. The Commission must prove that Derr, in holding this perception, regarded Complainant as precluded from working in *either* a “substantial class” or a “broad range” of jobs.<sup>6</sup> This burden is not onerous, but it requires in this case that the Commission present evidence about the specific job market in Kenton and the surrounding areas that Complainant had reasonable access to, and the number of jobs that require driving in that geographical area.<sup>7</sup> *Duncan, supra* (ADA requires plaintiffs to produce evidence of the number and types of jobs in the local employment market in order to show disqualification from a substantial class or broad range of jobs). The Commission failed to present any evidence on these issues. Without such evidence, the ALJ cannot reasonably infer that Derr’s belief that Complainant was unable to drive safely due to her inability to manage her health conditions was tantamount to a perception that Complainant was substantially limited in her ability to work. See *Beason v. United*

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<sup>6</sup> Since driving is not a class of jobs, the Commission argues that Derr perceived Complainant “unfit for a broad range of jobs in various classes.” (Comm.Rep.Br. 3)

<sup>7</sup> This evidentiary requirement is consistent with the *EEOC Interpretive Guidance*. These guidelines indicate that the terms “number and types of jobs” require evidence of the “general employment demographics and/or of recognized classifications that indicate the approximate number of jobs (e.g., “few”, “many”, “most”) from which an individual would be excluded because of an impairment.” *EEOC Interpretive Guidance, supra* at § 1630.2(j).

*Technologies Corp.* (March 15, 2002), D. Conn. No. 3:97 CV 2654, 2002 U.S. Dist. LEXIS 6078 (plaintiff failed to present evidence of specific job market in local geographical area allowing reasonable jury to conclude that he was perceived to be substantially limited in his ability to perform a broad range or a class of jobs).

## **CONCLUSION**

After a careful review of the entire record, there is insufficient evidence to conclude that Respondent perceived Complainant as having an impairment that substantially limited her ability to work or perform other major life activities. Therefore, the Complaint must be dismissed because the Commission failed to prove that Complainant falls within the definition of disability under R.C. 4112.01(A)(13).

## **RECOMMENDATION**

For all of the foregoing reasons, the Administrative Law Judge recommends that the Commission issue a Dismissal Order in Complaint #9143.

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**TODD W. EVANS  
ADMINISTRATIVE LAW JUDGE**

October 18, 2002