

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

GARRY D. ZUELSDORF

Complainant

and

Complaint #9174
(AKR) B3092500 (25291) 102700
22A – A1 – 5080

AIRCRAFT BRAKING SYSTEMS

Respondent

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

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ALJ'S REPORT BY:

Denise M. Johnson
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INTRODUCTION AND PROCEDURAL HISTORY

Garry D. Zuelsdorf (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 27, 2000.

The Commission investigated the charge and found probable cause that Aircraft Braking Systems Corporation (Respondent) (ABS) 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 October 18, 2001. The Complaint alleged that Respondent refused to return Complainant to work and discharged him 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 24-25, 2002 at the Ocasek Government Building in Akron, Ohio.

The record consists of the previously described pleadings, a 301-page transcript of the hearing, exhibits admitted into evidence during the hearing, stipulated exhibits, and post-hearing briefs filed by the Commission on October 10, 2002; by Respondent on November 27, 2002; and the Commission's reply brief, filed on December 9, 2002.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before the ALJ who presided at the hearing. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. She considered whether a witness was evasive and whether testimony appeared to consist of subjective opinion rather than factual recitation. She 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 October 27, 2000.

2. The Commission determined on August 30, 2001 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 case by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation and an employer doing business in Akron, Ohio. Respondent manufactures wheels, brakes, and other landing gear components for aircraft. Respondent employs several hundred employees in various departments of its three plants located at one complex.¹

¹ Edward Searle, the Vice President of Human Resources, testified that Respondent employed approximately 850 to 900 employees in September 2000. (Tr. 226)

5. Complainant began his employment with Goodyear Aerospace in 1981. Complainant initially worked as a bench machinist. Approximately nine months after his hire, Complainant successfully bid on an all-around machinist position in the Wheel and Brake Division. Complainant worked in this position throughout the 1980s and continued to perform this job after the Wheel and Brake Division became ABS in 1989. (Tr. 96)

6. Complainant performed “precision machining operations” as an all-around machinist. (Comm.Ex. 39) He set up and operated the various machines in the division. This position also involved some heavy lifting. *Id.* For example, Complainant lifted carbon discs by the handful and, occasionally, an airplane wheel.² (Tr. 9)

7. In late May 1991, Complainant injured his lower back lifting carbon discs onto a cart. Complainant notified his supervisor of the injury and immediately went to a local hospital. Complainant subsequently went on medical leave and began physical therapy recommended by his treating physician, Dr. Paul Steurer. Complainant suffered a “recurrence” in early

² Complainant testified that “a handful” of carbon discs weighs 20 to 40 pounds. (Tr. 11)

August 1991. (Comm.Ex. 2) Complainant eventually returned to work in December 1991.

8. Complainant had “recurring problems” with his back in 1992. (Tr. 14) He went on medical leave from mid-February to mid-September, 1992. (Comm.Exs. 4, 5) He continued to undergo physical therapy for his back.

9. In November 1992, Respondent laid off Complainant as an all-around machinist. With his seniority Complainant bumped into the job of tool room operator. (Tr. 16, Comm.Ex. 6) Among other duties, Complainant issued equipment, pulled fixtures from racks, performed pre-set operations on all required tools, and assembled tools and fixtures for machine operations. (Tr. 16, Comm.Ex. 40)

10. In January 1993, Respondent laid off Complainant as a tool room operator. Complainant again exercised his seniority and bumped into set-up and machining operations. In this position, Complainant lifted parts for production jobs, operated a tow motor, and performed other set-up and

machining operations. (Tr. 17) This position required occasional heavy lifting. (Comm.Ex. 41)

11. In September 1993, Complainant went on medical leave because of his back. (Comm.Exs. 6, 38) This leave lasted approximately three months; Complainant returned to set-up and machining operations in December 1993.

12. In March 1994, Complainant went on medical leave after his back condition “worsened.” (Tr. 18, Comm.Exs. 6, 44) While on leave, Complainant attended the Walker Center (the Center), a state-operated rehabilitation center, and received “extensive” physical therapy on his back. (Tr. 18) Complainant also received training at the Center on how to deal with his back condition.

13. Complainant returned to set-up and machining operations in December 1994 with work restrictions. Dr. Steurer recommended a “gradual return” to full-time employment; he restricted Complainant to four hours per day the first two weeks and six hours per day the following

two weeks. (Comm.Ex. 7) Dr. Steurer also restricted Complainant from repetitive lifting over fifty pounds and operating the Nadco machine.³

14. On March 17, 1995, Complainant was involved in an automobile accident where he was rear-ended by another vehicle. (Tr. 21) He provided a physician's statement stating that he needed to be off work from April 21-23, 1995. (Comm.Ex. 8)

15. Complainant did not return to work in the machinist position until May of 1995 because of carpal tunnel. (Tr. 22) Upon his return to work, Complainant presented a document to the hospital at work that contained work restrictions.⁴ (Comm.Ex. 9)

16. Complainant was off work from July 28, 1995 through August 6, 1995. Complainant was hospitalized from July 28, 1995 until July 30, 1995 due to "new onset diabetes mellitus with dehydration; acute prostatitis." (Comm.Ex. 10) Complainant returned to work on August 7, 1995 in the machinist position.

³ Complainant described the Nadco as a "machine you have to work at an awkward angle and load parts in by bending your back. It basically is not sound body mechanics so I was excused from running that machine." (Tr. 20)

⁴ "No lifting over 20 lbs, limited repetitive work right wrist, no grinding, no Natco".

17. Complainant was off work from January 3, 1996 until January 10, 1996 because he had carpal tunnel surgery. (Tr. 24) The Personnel Department's medical release record contained no restrictions. (Comm.Ex. 12)

18. Troy Trice, Department Manager, assigned Complainant to machines that he was restricted from using due to his previously-documented medical condition. Complainant objected to management about the lifting of the restrictions; as a result, the restrictions were reinstated. (Tr. 26)

19. Complainant next submitted to Respondent's Medical Department a "Disability-Release For Work" form signed by Dr. Steurer which was dated May 17, 1996. The release stated that Complainant was under the doctor's treatment for back injury and contained the following restrictions: "light duty; no grinder, no degreasing;⁵ no Natco for six months". (Comm.Ex. 13)

⁵ The degreaser "is an operation where you bend over and load some parts onto a crane and lift them up into a tank. The crane lifts them up and you walk on a platform and then you put the parts down in. Some of the parts you have to load manually." (Tr. 27)

20. Respondent honored Dr. Steurer's restrictions until Dr. Groh, Respondent's doctor, examined Complainant.

21. On May 24, 1996, Dr. Groh examined Complainant and indicated the following permanent work restrictions for him: no lifting over 20 pounds, no frequent bending at waist.

22. When Complainant went back to the department, he was restricted to operating the ream and radius machines.⁶

23. During 1998, Complainant was off work for two weeks from May 12-26, 1998 due to back pain. (Comm.Ex. 15) Complainant's back condition flared up; he experienced severe pain, even while sitting operating the ream and radius machines. (Tr. 32)

24. From June 28, 1998 until October 30, 1998, Complainant was off work because he had a heart attack and underwent quadruple bypass surgery. (Comm.Ex. 16)

⁶ Complainant testified that he could operate the ream and radius machines while seated and felt that it was a "suitable job" for him. (Tr. 30)

25. Complainant returned to work on October 31, 1998 to the position he held prior to his medical leave with the same restrictions.

26. On August 30, 1999, Complainant strained his right shoulder while at work. On September 8, 1999, he strained his back while at work. As a result of these injuries, Complainant was on medical leave from September 17, 1999 until October 31, 1999. (Comm.Ex. 18)

27. Complainant returned to work on November 1, 1999 with a work release from his doctor that contained no restrictions. Dr. Groh placed the same work restrictions on Complainant that were in effect prior to his last medical leave. (Tr. 36)

28. On January 10-11, 2000, Complainant was off work because he experienced chest pains and was hospitalized for testing. (Comm.Ex. 21)
Complainant returned to work on January 12, 2000.

29. Complainant was off work from January 17, 2000 until September 25, 2000. Complainant's injuries arose as a result of "straining injuries to back and neck" incurred while at work. (Comm.Ex. 22)

During the time that Complainant was on medical leave, he received therapy for his injuries. (Tr. 39)

30. Complainant received a release-for-work slip from Dr. Steurer, dated September 15, 2000, which indicated his return to work date as September 25, 2000.⁷ (Comm.Ex. 23).

31. On September 21, 2000, Dr. Groh examined Complainant. Dr. Groh did not make a recommendation about Complainant's employability or a return-to-work date after the examination based upon a request by Pat Harness, Respondent's Assistant Director of Human Resources. (Comm.Ex. 24)

32. Complainant met with Ms. Harness on September 25, 2000. At that time she informed Complainant of Respondent's decision to terminate his employment based on his unsuitability for work at ABS. This decision occurred as a result of a meeting in March of 2000. (Tr. 44)

⁷ The return-to-work slip contained no restrictions. "It was a trial return to work to see whether I could get by without the restrictions." Complainant's reason for no restrictions was to be able to position himself to move into a position to "get off of" his repetitive-motion job. (Tr. 40)

33. Ms. Harness further communicated to Complainant that Respondent had reached its conclusion based upon Complainant's inability to work without sustaining injuries, and his other injuries and illnesses. The decision further took into account the last job that Complainant performed as a result of his work restrictions and other jobs within ABS.

34. Complainant received a certified letter dated September 26, 2000, memorializing the September 25, 2000 termination meeting. (Comm.Ex. 25)

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 herein, 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 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.

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 been medically diagnosed as having the following conditions: back pain, diabetes, prostates, and carpal tunnel.

6. The aforementioned conditions fall within the scope of R.C. 4112.01(A)(16)(a)(i) and (iii) as examples of "physical or mental impairment[s]." This listing does not establish that Complainant is disabled under the statute; the Commission must prove that Complainant's back pain 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. 1630 App., § 1630.2(j).

7. In its brief, the Commission argues that Complainant is protected under the statute because Respondent perceived him to be disabled.

8. 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).⁸ *McGlone, supra* at 572. 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.

9. 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 more 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.⁹ *Id.*, at 490. (“An employer runs afoul of the

⁸ 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 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”).

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”).

10. 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. 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).

11. 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) and (B)).

12. Respondent testified that she and the other decision-makers did not feel that there was any job within the factory setting that Complainant could perform without injuring himself. As Respondent put it, “Complainant is not suited for working a job in a factory setting.”

13. Respondent’s testimony also satisfies the Commission’s proof requirement that Respondent regarded Complainant as precluded from working in *either* a “substantial class” *or* a “broad range” of jobs. In the instant case, the testimony of Respondent that Complainant could not work at any job in a “factory setting” was not specific to the jobs at

Respondent's facilities, but was general and referenced any factory job. See *Beason v. United 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).

14. Although the Commission concedes that Complainant's impairments did not rise to the level of disability, there is evidence in the record that Respondent's doctor recommended to management that Complainant be given permanent work restrictions. (Comm.Ex. 14) Management accommodated the request, and Complainant worked with permanent restrictions.

15. Establishing that the employer perceived the employee as disabled is not the end inquiry.

16. In order to be a qualified disabled individual, the next level of inquiry is whether the individual can safely and substantially perform the essential functions of the job, with or without accommodation.

17. In the instant case, the employer attempted to accommodate Complainant's back condition by giving him first temporary restrictions and then permanent restrictions.

18. Each time Respondent attempted to accommodate Complainant's impairment with light duty and/or restrictions, Complainant's condition "flared up", and he required extended periods of leave from work.

19. Under the ADA an employer may assert an affirmative defense to continuing the employment of a disabled person. The "safety defense" has recently been interpreted to extend to denying employment to a disabled individual where the individual's disability poses a direct threat of harm to the individual. *Chevron v. Mario Echazabal*, 536 U.S. 73, 122 S.Ct. 2045, 152 L.Ed. 2d 82 (2002).

20. The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job, reached after considering,

among other things, the imminence of the risk and the severity of the harm portended. 29 C.F.R. § 1630.2(R)(2001). The *Chevron* court further stated that:

. . . EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, *even if the employee would take his chances for the sake of getting a job.*

Id. at 94. (Emphasis added.)

21. Complainant went off from work in January of 2000 because his neck “was giving him extreme pain”. (Tr.38)

22. The event that triggered Complainant’s record of 50% absenteeism from 1997-2000 began with a work-related back injury. (See *Chart.*)

23. In September 2000, Complainant testified about his ability to return to work after his release by his physician, Dr. Steurer. (Tr. 40)

24. Complainant did not want to return to work with restrictions. Although his doctor agreed with him, Complainant stated that, "it was a trial return to work to see whether I could get by without the restrictions." (Tr. 40)

25. Complainant's hope was that if he could return to work with no restrictions, he could possibly move into another job and get off of the repetitive motion job that he was on which he described as "difficult for me at that time". (Tr. 40)

26. Complainant testified that his condition worsened, and he was placed on medical restrictions in September 2001.

27. During cross-examination, Complainant stated that in his job applications made out in 2002 he was looking for employment as a "light duty machinist". (Tr. 67)

28. A reasonable inference can be drawn from the foregoing evidence that Complainant is the type of employee referred to in the *Chevron* decision as one "who in the face of known risks to his own health and safety, would take the risk for the sake of a job."

29. Although Ms. Harness testified that she is aware that other ABS employees were terminated due to excessive absenteeism, those employees were not deemed to be unsuitable for work in a factory environment due to an inability to work without sustaining injuries.

CONCLUSION

30. After a careful review of the entire record, the evidence supports a finding that Respondent terminated Complainant from employment based on Complainant's inability to safely and substantially perform the essential functions of the job in question, with or without accommodation.

RECOMMENDATION

For all of the foregoing reasons, the Administrative Law Judge recommends that the Commission issue a Dismissal Order in Complaint #9174.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 1, 2003

MEDICAL LEAVE OF GARRY ZUELSDORF

1991 - 1995

YEAR	POSITION	DUTIES	MEDICAL LEAVE – WORK – RELATED INJURIES	MEDICAL LEAVE	RETURN TO WORK
1981	Bench Machinist	Set Up – operated various machines, required some heavy lifting			
1991			May 1991 – injured lower back lifting carbon disc onto cart		December 1991
1992	November 1992 laid off - bumped into Set Up and Tool Room Operations	Among other things, issued equipment, pulled fixtures from racks, performed pre-set operations, assembled tools	February 1992 – recurring problems with back		September 1992
1993	January 1993 – laid off – bumped into Set Up and Machine Operations	Lifted parts for production jobs, operated a tow motor and performed other Set Up machine operations, required occasional heavy lifting	September 1993 – problems with back		December 1993
1994			March 1994 – back condition worsened		December 1994 – with restrictions
1995				March 1995 – auto accident - carpal tunnel July 28, 1995 – diabetes melitas with dehydration, acute prostates	May 1995 – with restrictions August 6, 1995

MEDICAL LEAVE OF GARRY ZUELSDORF

1996 - 2000

YEAR	POSITION	DUTIES	MEDICAL LEAVE – WORK – RELATED INJURIES	MEDICAL LEAVE	RETURN TO WORK
1996			<p style="text-align: center;">May 17, 1996 – Complainant underwent treatment for back injuries and Complainant’s doctor requested 6 months’ restrictions. Respondent’s doctor examined Complainant and indicated permanent restrictions: Restricted to operating ream and radius machine, no lifting over 20 pounds, no frequent bending at waist</p>	<p style="text-align: center;">January 3, 1996 – carpal tunnel surgery</p>	<p style="text-align: center;">January 10, 1996 No restrictions – Complainant objected to lifting of restrictions; management reinstated restrictions</p>
1998			<p style="text-align: center;">May 12, 1998 – Back pain condition flared up while sitting and operating ream and radius machine</p>	<p style="text-align: center;">June 28, 1998 Heart attack, Quadruple bypass surgery</p>	<p style="text-align: center;">Returned in two weeks October 30, 1998</p>
1999			<p style="text-align: center;">September 17, 1999 shoulder and back strain</p>		<p style="text-align: center;">October 31, 1999 Complainant returned with no restrictions. Respondent’s doctor placed same work restrictions that were in effect prior to last medical leave.</p>
2000			<p style="text-align: center;">January 17, 2000 Straining injury to neck and back</p>	<p style="text-align: center;">January 10-11, 2000 chest pains – hospitalized</p>	<p style="text-align: center;">September 25, 2000 No restrictions from Complainant’s doctor Terminated from work</p>