

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

BRENDA J. TYSON

Complainant

v.

CITY OF CLEVELAND

Respondent

Complaint No. 9208
(CLE) 24100900 (32684) 010501
220 – A1 – 0405

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

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INTRODUCTION AND PROCEDURAL HISTORY

Brenda J. Tyson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 5, 2001.

The Commission investigated the charge and found probable cause that the City of Cleveland, Police Department (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (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 November 29, 2001.

The Complaint alleged that Respondent failed and refused to provide reasonable accommodation to Complainant, and reinstate her, because of her disability.

Respondent filed an Answer to the Complaint on December 31, 2001. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on July 1, 2003 at the Lausche State Office Building, Room 205, 615 West Superior Avenue, Cleveland, Ohio.

The record consists of the previously described pleadings, pre-hearing motions, a transcript of the hearing consisting of 122 pages, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on October 2, 2003, and by Respondent on October 23, 2003, and a reply brief filed by the Commission on October 27, 2003.

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 her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her 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 January 5, 2001.

2. The Commission determined on October 18, 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 matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant was first employed by Respondent in 1974. In 1985 Complainant was placed in the position of traffic controller due to the phase out of her previous position, that of para/police.

5. Complainant's primary duty as a traffic controller was to direct traffic. She also towed cars and issued traffic tickets.

6. Her position required her to remain standing and walk in order to perform her duties over the period of an eight-hour shift, which at times included overtime.

7. In April of 1995, Complainant fell in a chuckhole in Respondent's parking garage where the scooter she used to perform her duties was stored.

8. Complainant was in a significant amount of pain and was granted time off from work. At that time Complainant saw Dr. Perryman, who referred her to Mt. Sinai Hospital for further treatment and evaluation.

9. Complainant also began receiving treatment from Dr. Castleberry.

10. It took Complainant's doctors several years to pin down an accurate diagnosis of her condition.

11. From July of 1995 through September of 1998 Complainant was unable to perform her duties as a traffic controller due to problems caused by her condition.

12. Complainant had pain in her neck, left side, back, both elbows and left ankle.

13. Complainant's medical and treatment history was evaluated by Dr. Sanford, an independent medical examiner, who determined that Complainant suffered from spondylosis and degenerative disc disease.¹

14. These conditions involve the degeneration of both the spinal discs and the joints between those discs. The discs dehydrate, bulge and may crack open into fissures. As the discs and the joints between the discs degenerate, pain can occur in the back and neck areas. Also, this degeneration can compress nerves that cause pain in the arms and the legs.

15. Degeneration in discs and joints occurs over a long period of time, and someone may be asymptomatic for a number of years. Once the compression reaches a significant state or the nerve fibers in the discs begin to be irritated, then pain can develop.

16. Dr. Sanford determined that Complainant became symptomatic in 1995 when she fell.

¹ Evidentiary deposition of Dr. Sanford, Comm. Ex. 2, Independent Medical Examination, dated October 3, 2002.

17. Complainant's condition caused pain to radiate down her neck, back, right arm and right leg, with the degree of pain increasing over time.

18. As a result Complainant could not lift more than twenty (20) pounds, and her walking and standing were limited to three to four hours in an eight-hour period.

19. Consequently, these limitations affected Complainant's ability to perform household chores, such as getting clothes out of a washer, vacuuming, and cleaning.

20. Additionally, Complainant's limitations with regard to working affected her ability to stand, sit, and walk for extended periods of time. Complainant needed a job that would allow her to alternate between standing, sitting, and walking at least every two to three hours.

21. Respondent's procedure for returning employees to work after an injury first required an employee to see the Medical Director of the Safety Forces for the City of Cleveland who, at all times relevant to this case, was Dr. Edweana Robinson.

22. The employee is required to bring a return-to-work slip from a physician to the Medical Director who reviews the completed form.

23. If the employee's physician requests an accommodation for the employee, the employee then applies to the City of Cleveland's Accommodation Review Committee (the Committee) for an assignment within his or her physical abilities.

24. The Committee reviews requests for accommodations made by employees to determine if those requests should be granted. The Committee will not grant a request for an accommodation unless it concludes that the particular restrictions that brought about the need for the accommodation are permanent.

25. Further, the Committee will only approve a request for an accommodation if it concludes that the employee suffers from a condition that meets the definition of disability under the American with Disabilities Act [of 1990] (ADA).

26. After approval the Committee first attempts to find something within the division that the employee is in when the request is made. If the division is unable to place the person in a position, the Committee expands its search to other divisions of the City.

27. In October of 1996 Complainant underwent a vocational evaluation by Dr. Yi. He determined that Complainant was capable of performing the jobs of general office clerk, file clerk, truck routing clerk, and rehabilitation clerk.

28. On December 9, 1996, Complainant applied to the Committee for an assignment within her physical abilities. Complainant received the application from Dr. Robinson.

29. The Committee approved Complainant for alternative placement in February of 1997.

30. On July 7, 1997, Complainant was allowed to work in the Traffic Bureau, filing and signing accident reports.

31. After a few days of working with the accident reports, Complainant was told that she was not authorized to return to work and was sent home.

32. Again, in December of 1997, Complainant provided Dr. Robinson with documentation from her physician and was given a Return to Duty order which stated that Complainant could perform light-duty work.

33. Complainant worked in the impound lot for only a half day. She was again told that she was not authorized to work and was sent home.

34. By June of 1998 Complainant had not heard from Respondent and she decided to apply for disability retirement with the Public Employees Retirement System (PERS).

35. Complainant's application was approved and she went on disability retirement and remained under that status until May of 2000.

36. From the time that Complainant went on disability retirement until she was taken off, her condition worsened. Although Complainant

appealed PERS's determination to remove her from disability retirement status in May 2000, her appeal was denied by the PERS Board.

37. After being taken off disability retirement, Complainant contacted Respondent and asked what she should do to report to work.

38. Respondent told Complainant to go to the Personnel Department.

39. When she went to the Personnel Department she provided a copy of the PERS letter of determination and was told by the Personnel Department that she would hear back from them within a week.

40. When she did not hear back within a week, as she was told by the Personnel Department, she gave them a call.

41. She was told by Personnel to go to the Medical Unit in order to get cleared to return to work.

42. On September 28, 2000, Dr. Robinson provided Complainant with a Return to Duty order stating that she was to remain on restricted duty, performing office work. The date for Complainant to report to work was October 9, 2000. Dr. Robinson also provided Complainant with another application for the Committee and told her to complete the application by June 2001, the date of Complainant's next appointment with Dr. Robinson.

43. Complainant took the Return to Duty order to Personnel as instructed by Dr. Robinson.

44. When Complainant had not heard from Respondent by October 9, 2000, she reported to the Traffic Bureau.

45. Complainant spoke with the traffic commissioner who told her he had no knowledge and no paperwork regarding her returning to work. He directed her to report to Personnel.

46. Complainant went to Personnel and spoke with Lt. McCartney. He explained that there was no light duty for traffic controllers and that she would not be allowed to return to work.

47. Complainant questioned why she would not be allowed to return to work in a light-duty capacity.

48. Lt. McCartney told her that they did not need any more traffic controllers on light duty.

49. Lt. McCartney also handed Complainant a copy of a document that contained the recommendation that Complainant not be allowed to return to work until such time as she was physically fit for full duty. Deputy Chief Bounds and Chief Flash agreed with this recommendation.

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.²

1. The Commission alleged in the Complaint that Respondent failed and refused to provide reasonable accommodation to Complainant, and reinstate her, because of her disability.

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. These allegations, if proven, would constitute violations of R.C. Chapter 4112 and the Commission's rules embodied in the Ohio Administrative Code (O.A.C.). 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.

The Commission's rules require an employer to reasonably accommodate an employee's disability unless the employer demonstrates that such accommodation would impose an undue hardship on the employer's business. O.A.C. 4112-5-08(E)(1); *See also Greater Cleveland Regional Transit Authority v. Ohio Civ. Rights Comm.*, 55 FEP Cases 826 (Cuyahoga Cty. 1993) (the employer bears the burden of showing undue hardship).

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 or the Rehabilitation Act of 1973.

5. 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:

- (1) Complainant was 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.

McGlone, supra at 571 (citation omitted).

6. 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.³

7. The Commission presented testimony about Complainant's condition from Dr. Sanford, an independent medical examiner. Dr. Sanford testified that Complainant suffered from spondylosis and degenerative disc disease.

8. Although Complainant has a physical impairment, the first part of R.C. 4112.01(A)(13) requires the Commission to show that Complainant has an actual disability. The Commission must prove that Complainant's medical condition substantially limits one or more major activities.

³ 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.

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. 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*, 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).

10. 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).

11. Additionally, the court in *Albertsons, Inc. v. Kirvingburg*, 119 S. Ct. 2162 (1999), [*citing Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999)], held that mitigating measures such as medication and assistive devices, and “the body’s own systems“ are to be considered on a case-by-case basis in the analysis of whether or not an individual is disabled.

12. Generally, "[s]omething more than the self-serving testimony of the person claiming the handicap might be needed to demonstrate an otherwise hidden disability." *Babcock & Wilcock Company v. Ohio Civ. Rights Comm.*, 510 N.E. 2d 368, 369-370 (Ohio 1987) (Judge George's concurrence).

13. Dr. Sanford testified that Complainant's condition affected her ability to walk and stand because Complainant is only able to do either activity three to four hours in an eight-hour period.

14. Dr. Sanford also testified that Complainant could not lift more than twenty (20) pounds.

15. Complainant testified that her limitations affected her ability to perform household chores, such as getting clothes out of a washer, vacuuming, and cleaning.

16. During some of the time that Complainant was attempting to return to work for Respondent, she was unable to afford medications that would reduce the pain caused by her condition.⁴

17. Respondent argues that Complainant is not a handicapped individual because she is not substantially limited in the area of walking, caring for herself and working.

18. Following is the evidence presented by the Commission regarding the affect that Complainant's condition had on her ability to walk and care for herself:⁵

⁴ Complainant testified that she could not afford the pain medications after she was taken off of disability retirement. (Tr. 37-38)

⁵ Whether Complainant's impairment constitutes a significant barrier to employment depends on a number of factors.

While the [EEOC] regulations define a major life activity to include working, this does not necessarily mean working at the job of one's choice. The proper inquiry is whether the particular impairment constitutes for the particular person a significant barrier to employment. Relevant to the inquiry are the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training.

Williams v. City of Charlotte, 4 AD Cases 1675, 1678 (W.D.N.C. 1995), quoting *Jasany v. U.S.P.S.*, 1 AD Cases 706 (6th Cir. 1985).

There is scant/insufficient evidence in the record to support a finding that Complainant was limited in the major life activity of working.

1. Even when the pain did not prevent her from walking, the dizziness caused by her condition confined her walking to an absolute minimum. (Tr. 38)
2. Complainant was rarely able to walk enough to leave her house, could not walk sufficiently to cook, shop for groceries, care for her children or perform other household tasks. (Tr. 38-39)
3. Complainant even required assistance from her mother and her friends to travel to the city to explore what was happening with her efforts to return to work. (Tr. 49-50)
4. Dr. Sanford testified that Complainant's condition became symptomatic when she fell in 1995. From 1995 through the date of the hearing Complainant experienced pain while walking, standing, doing household tasks, and caring for her children.

19. Respondent offered no evidence that Complainant had access to mitigating measures, such as pain medication, during the entire period that Complainant sought to return to work.

20. Complainant's economic circumstances prevented her from securing medical services, let alone medications, during the time that she sought to be reinstated.

21. Respondent argues in the alternative that Complainant did not request an accommodation.

22. The question of what constitutes reasonable accommodation requires a “fact-specific, case-by-case” analysis. *Eckles v. Consolidated Rail*, 4 AD Cases 1134, 1141 (S.D. Ind. 1995) (legislative citation omitted).

23. The employee has the burden “to timely alert the employer” to the claimed disability and, thus, afford the employer an opportunity to make a reasonable accommodation. *Fussell, supra* at 1239 (citations omitted).

24. While employers are not required to reassign disabled persons to occupied positions or create new positions to accommodate them, employers cannot deny a disabled employee “alternate employment opportunities reasonably available under the employer’s existing policies.” *School Board of Nassau Co. v. Airline*, 480 U.S. 273, 289, 1 AD Cases 1026, 1032 n.19 (1987).

25. Although Complainant was unable to perform the job duties of traffic controller because of her disability, Respondent had a process to consider alternative light-duty job placement for employees who follow Respondent's internal procedures regarding requests for light duty.

26. It is, without doubt, a prudent business practice for employers to engage in an interactive process with disabled employees to find a reasonable accommodation. However, like their federal counterparts, neither R.C. Chapter 4112 nor the Commission's rules create independent liability for an employer's failure to do so. *See Barnett v. U.S. Air, Inc.*, 8 AD Cases 1073,1079 (9th Cir. 1998) ("The ADA and its regulations do not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation.") The Commission's inability to show that a reasonable accommodation existed renders Respondent's efforts to find one irrelevant.

The ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.

Willis v. Conopco, Inc., 6 AD Cases 806, 808 (11th Cir. 1997).

27. Consequently, 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.

28. Respondent makes circuitous arguments regarding the employer's and employee's responsibilities in the process of determining whether or not a reasonable accommodation can be made for Complainant.⁶

29. Respondent's policies place the responsibility upon the Committee for finding alternative employment for employees approved by the Committee for light-duty positions.

30. Although Dr. Robinson testified that it sometimes takes a long time to find an alternative light-duty position for Committee-approved employees, the Commission introduced uncontroverted evidence that a light-duty position, consistent with the Dr. Robinson's Return to Work order, was available in September of 2000,⁷ and it was not offered to Complainant.

⁶ Resp's Brief, p. 7.

⁷ Tr. 87.

31. A vacancy does not necessarily have to exist at the time the employee requests reassignment as a reasonable accommodation. If a vacancy exists within a “reasonable amount of time”, an employer should reassign the individual to the position when it becomes available. *EEOC Interpretive Guidance, supra* at § 1630.2(o). The EEOC Guidelines, in Section 1630.2(o), state that this time period should be determined in light of the totality of the circumstances. For example,

[S]uppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

32. The evidence supports the determination that a position was available in September of 2000 in which Complainant could have been placed. Based on Dr. Robinson’s statement regarding the amount of time that it takes to find light-duty positions, the open position available in September of 2000 would not have been “an unreasonable amount of time”.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9208 that:

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

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for an alternative light-duty position. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed in an alternative light-duty position from September 2000 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount that Complainant would have earned had she been employed in an alternative light-duty position in September 2000 and continued to be so

employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.⁸

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 31, 2004

⁸ Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.