Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: July 10, 2012

Re: *Carl Chalmer Caldwell v. Bellisio Foods, Inc. f/k/a Michelina's, Inc.*

(CIN) B5 (32705) 05142007 22A-2007-05333C

Complaint No. 07-EMP-CIN-32705

CONSIDERATION OF ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS CEASE AND DESIST ORDER

Report issued: July 10, 2012

Report mailed: July 10, 2012

**** Objections due: August 3, 2012**

DMJ:tg

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

CARL CHALMER CALDWELL

Complainant

v.

BELLISIO FOODS, IND. F/K/A/ MICHELINA'S, INC.

Respondent

Complaint No. 07–EMP–CIN–32705
(CIN) B5 (32705) 05142007
22A–2007–05333C

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

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Carl Chalmer Caldwell (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) May 14, 2007.

The Commission investigated the charges and found probable cause that Michelina's, Inc.[1] (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 October 4, 2007.

The Complaint alleged that Respondent refused to hire Complainant because of his disability. Additionally, the Complaint alleged that Respondent made no attempts to accommodate

[1] Respondent underwent a name change prior to the public hearing. Respondent's name is Bellisio Foods, Inc.

Complainant or determine whether a reasonable accommodation would even be necessary for Complainant to perform the essential functions of the job.

Respondent filed an Answer to the Complaint on November 19, 2007. Respondent admitted certain procedural allegations, but denied it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on October 30-31, 2008 at the Jackson County Commissioner's Office in Jackson, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 237 pages; exhibits and stipulated facts admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 20, 2009; by Respondent on December 22, 2009; and a reply brief filed by the Commission on January 8, 2010.

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 May 14, 2007.

2. The Commission notified Respondent by letter dated September 13, 2007 it was probable Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

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

4. Respondent operates a food production facility in Jackson, Ohio.

5. Respondent produces frozen food entrees sold under the brand name Michelina's.

6. The Jackson facility houses three (3) production areas and contained within those areas are twenty (20) production lines.

7. The production lines are where the frozen entrees are assembled, packaged, and boxed for shipping. (Tr. 44)

8. Forklifts and pallet jacks are used throughout the plant to transport ingredients, materials, and finished product. (Tr. 46)

9. On February 10, 2007, Complainant applied for an opening as a General Utility Employee (GUE). (Tr. 20-21, Comm. Ex. 6)

10. The GUE is an entry-level position and does not require any prior experience.[2] (Tr. 19, 21)

11. The minimum qualifications for a GUE include: standing for eight to ten (8 to 10) hours a day, repetitive bending and lifting throughout the day, lifting a minimum of thirty-five (35) pounds, moving repetitively at 120 rotations per minute, and working overtime on weekends. (Tr. 21)

12. GUEs are trained on the job. (Tr. 21)

13. Complainant met the minimum qualifications for the position and was, therefore, scheduled for an interview. (Tr. 21)

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[2] Respondent employs approximately 550 GUEs. (Tr. 39)

14. On February 13, 2007, Human Resources Assistant Sarah Williams (Williams) interviewed Complainant.

15. Complainant is deaf and uses sign language to communicate. In order to facilitate communication Complainant brought an interpreter to the interview. (Tr. 22)

16. Williams determined Complainant met the minimum qualifications and indicated on Complainant's Interview Evaluation Form (IEF) that he should be hired. (Tr. 27, Comm. Ex. 5)

17. After the interview Williams went directly to Safety Manager Jim Harris' (Harris) office.

18. Williams had a five (5) minute conversation with Harris wherein she informed him that Complainant is deaf. (Tr. 25)

19. Harris looked at Complainant's application and then told Williams that Respondent would not hire Complainant because he is deaf. (Tr. 25)

20. Harris then directed Williams to change the IEF to reflect a "do not hire" determination. (Tr. 27)

21. Larry Sprague (Sprague), Vice President for Human Resources, called Complainant's father to inform him that Respondent would not hire Complainant because he is deaf. (Tr. 130)

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.[3]

[3] 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 that Respondent did not hire Complainant because he is deaf and that Respondent made no attempts to accommodate Complainant or determine whether a reasonable accommodation would even be necessary for him to perform the essential functions of the job.

2. These allegations, if proven, would constitute violations of R.C. Chapter 4112.02 (A) which provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> For any employer, because of the ... disability, ... of any person, ..., 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), 4112.06(E). The employer bears the burden of showing that the proposed accommodation would cause an undue hardship. *Miami Univ. v. Ohio Civ. Rights Comm.*, (1999), 133 Ohio App. 3d 28, 42 citing

Greater Cleveland Regional Transit Authority v. Ohio Civ. Rights Comm., 50 Ohio App. 3d 20, 24 (Cuyahoga Cty. 1989).

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 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.

Id. at 571 (citation omitted).

6. There is no dispute that Complainant was disabled under R.C. 4112.01(A)(13) or that Respondent refused to hire Complainant because of his disability.

7. Respondent disputes that Complainant could safely and substantially perform the essential functions of the job of GUE with, or without, accommodation.

> Accommodations for handicapped employees are unreasonable only if they place an undue hardship on the employer and the burden of showing undue hardship is on the employer.
>
> *Martinez v. Ohio Dept. of Admin. Serv.*, (1997), 118 Ohio App. 3d 687, 693 N.E. 2d 1152.

8. Specifically, Respondent asserts there is no reasonable accommodation that would: (1) decrease the safety risks to Complainant from the motorized vehicles which have audible signals that are used to transport product within the facility and, (2) enable Complainant to know when production lines need to be halted because the signals are audible.

9. When an accommodation is requested, O.A.C. 4112-5-08 (E)(2) gives examples of what types of accommodations are to be considered by the employer:

> Accommodations may take the form, for example, of providing access to the job, *job restructuring, acquisition or modification of equipment or devices, or a combination of any of these.* Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules. (...)

10. Complainant came to the interview with an interpreter. On his application he wrote the following: "Would like a chance to be employed. I'm deaf/But I hope your company can find a job for me. Thanks for taking time to read & view this." (Jt. Ex. 6)

11. Complainant did not identify the specific type of accommodation that would help him perform a job within Respondent's facility. He indicated that he is deaf and hoped that the employer would be able to find a job for him.

12. A reasonable inference can be drawn from Complainant's presence with an interpreter, and his hope that Respondent can find a job for him, that he was requesting Respondent provide a reasonable accommodation for his deafness in order to work as a GUE.

13. The Commission alleges Respondent failed to engage in an interactive process with Complainant to determine available reasonable 75 F.3d 1130 accommodations.

14. EEOC regulations state it "may be necessary" for the employer to initiate "an informal, interactive process" with the disabled employee to determine possible reasonable accommodations. 29 C.F.R. § 1630.2(o)(3). The steps of this process are provided in the *EEOC Interpretive Guidance*:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the person to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

EEOC Interpretive Guidance, at §1630.9, ("Process of Determining the Appropriate Reasonable Accommodation").

15. The determination of whether an accommodation is possible is *fact-specific issues.*

> The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.
>
> *Hall v. United States Postal Serv.*, 857 F. 2d 1073, 1079 quoting *School Bd. of Nassau County v. Arline*, 772 F.2d 759, 764-65 (11th Cir. 1985) (citations omitted), *aff'd*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

16. In making a determination regarding what the essential functions of a particular job position are, 42 U.C.S. § 12111(8) provides that:

> (...) consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

17. The regulations implementing the ADA define essential functions as "those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation." 29 C.F.R. 1630.

18. It is plain enough what "accommodation" means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work. *Vande Zande v. Wisconsin Dep't. of Admin.*, 44 F.3d 538 at 542, 543.

19. Complainant's employment application initiated the process of requesting an accommodation.

20. The Commission's expert witness, Jenna Tudela (Tudela), has a Master's Level Engineering degree with a focus on rehabilitation engineering. (Tr. 83)

21. Tudela has been a rehabilitation engineer for eleven (11) years and specializes in assessing work environment to determine whether and how a person with a disability can be accommodated. (Tr. 84)

22. Tudela has experience in accommodating people who are deaf in industrial and factory environments. (Tr. 86-87)

23. Tudela provides rehabilitation engineering consulting services in the areas of work site accommodations, ergonomics, home accessibility, mobility seating, computer access, sensory disabilities, environmental control units and custom design devices. (Tr. 83-84, Comm. Ex. 1)

24. Tudela is employed by MJT Engineering Services, LLC, State of Ohio as an Engineering Engineer and Ergonomist.

Tudela holds a B.S. in Engineering with a Biomedical Concentration and an M.S. in Engineering, with a concentration in Rehabilitation Engineering from Wright State University.

25. The evidence introduced by Respondent regarding the occupational hazard defense was based on the testimony of their expert witness, Gary Curren (Curren).

26. I found Curren's testimony to be unpersuasive.

27. Curren does not have any experience in providing workplace accommodations for people who are deaf. (Tr. 217)

28. Curren does not have any experience with the current devices and technology used to assist people who are deaf in the work environment. (*Id.*)

29. Curren's expertise is in the area of workers' compensation issues and a majority of Respondent's affirmative defense

was based on citing the OHSA and Workers' Compensation regulations.

30. O.A.C. 4112-5-08(D)(3) states that only those OSHA requirements that are "not correctable by reasonable accommodation" may support an occupational hazard defense.

31. Curren's expert opinion regarding the occupational hazards associated with employing a deaf person in Respondent's work environment were based on speculation about the risk instead of objective factors.

32. The Commission provided credible evidence of how job restructuring and mechanical devices could assist Complainant in performing the essential functions of the job of a GUE. (Tr. 61-68, 96-97, 104-109, 110-112)

33. In passing the ADA in 1990, the inclusion of the affirmative duty to provide a reasonable accommodation to a qualified disabled person was explained in *Vande Zande supra* at 542, (citing § 12112(b)(5)(A)) in the following manner:

> The more problematic case is that of an individual who has a vocationally relevant disability--an impairment such as blindness or paralysis that limits a major human capability, such as seeing or walking. In the common case in which such an impairment interferes with the individual's ability to perform up to the standards of the workplace, or increases the cost of employing him, hiring and firing decisions based on the impairment are not "discriminatory" in a sense closely analogous to employment discrimination on racial grounds. The draftsmen of the Act knew this. But they were unwilling to confine the concept of disability discrimination to cases in which the disability is irrelevant to the performance of the disabled person's job. Instead, they defined "discrimination" to include an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the ... [employer's] business."

34. If Respondent asserts that Complainant cannot be reasonably accommodated, the Commission's rules place the burden upon Respondent to affirmatively demonstrate that the requested accommodation would create an occupational hazard to Complainant and other employees:

> (...) whether one is a direct threat to the safety of himself or others is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm.
>
> *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 at 764 (5th Cir. 1996).

35. Curren was not asked by Respondent to observe the plant and determine how Respondent could accommodate a person who is deaf prior to Respondent's decision not to hire Complainant. (Tr. 220)

36. The GUEs perform a variety of jobs including: Product Inspection, Dumping Pasta, Wiping, Sauce Inspector, Line Supplier, Relief Crew, Ingredient Prep, and Pack Out. (Comm. Ex. 4)

37. A job duty is essential if the reason the position exists is to perform the job function; and/or the function is highly specialized such that the reason the person is hired is for his or her

expertise. *Miami Univ. v. Ohio Civ. Rights Comm.*, (1999), 133 Ohio App. 3d 28, 38-40, *citing* 29 C.F.R. 1630(n).

38. All GUE's do not perform all of the tasks that are set forth in the position description. Some of the tasks are only done on "particular lines". (Comm. Ex. 4)

39. Therefore, all tasks described in the GUE list of tasks are not performed on every production line.

40. The facility houses twenty (20) production lines. (Tr. 43)

41. Tudela determined that with reasonable accommodation, Complainant can work four (4) of the GUE job functions: Product Inspection, Wiping, Sauce Inspector, and Packout. (Tr. 110-111)

42. Tudela determined that the remaining tasks relate to Complainant's ability to communicate and minimize interactions with forklift traffic:

> Ms. Terrell: And uh I think you've mentioned this before, but how could job restructuring accommodate Mr. Caldwell?

Ms. Tudela: Well just in looking at the general utility position, eliminating certain positions where they may be involved in areas where there's much higher traffic. So eliminating those specific positions, but still giving them four or five positions where they can rotate through so they meet the goal of not working in one position all day long and could accumulate some type of repetitive trauma disorder. Say the question again.

Ms. Terrell: I think you answered it but just how job restructuring can be used as an accommodation.

Ms. Tudela: I just want to say that in other job positions or other companies that I've worked with, that can be an accommodation. It's not just about technology. You know it can be administrative controls. So it can be additional training but it can be kind of carving out a job for that person so that they are still valuable to the company but there are certain set positions that will greatly reduce the chance of injury and of errors.

(Tr. 109-110)

43. Since all GUEs are not required to perform all of the tasks in the job description, Tuleda's recommendation regarding job restructuring would not fundamentally alter the position. *Id.* at 40.

44. When Respondent denied Complainant employment due to his disability on February 13, 2007 it did not undertake a

careful and open-minded weighing of the risks and alternatives in determining whether or not a reasonable accommodation could be identified that would enable Complainant to safely and substantially perform the essential functions of the job of a GUE.

45. Respondent has engaged in discriminatory conduct, and Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

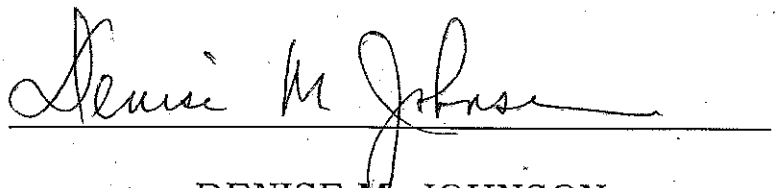
For all of the foregoing reasons, it is recommended in Complaint No. 07-EMP-CIN-32705 that:

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 ten (10) days of the Commission's Final Order for the position of General Utility Employee. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage he would have been paid had he been employed as a General Utility Employee on February 10, 2007 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 ten (10) days of the offer of employment a certified check payable

to Complainant for the amount he would have earned had he been employed as a General Utility Employee on February 10, 2007 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less interim earnings, plus interest at the maximum rate allowed by law.[4]



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 10, 2012

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

Ohio Civil Rights Commission
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STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	:	
CARL CHALMER CALDWELL,	:	
COMPLAINANT,	:	**COMPLAINT NO. 07-EMP-CIN-32705**
v.	:	**ADMINISTRATIVE LAW JUDGE: DENISE M. JOHNSON**
MICHELINAS, INC.,	:	
RESPONDENT.	:	

STATEMENT OF OBJECTIONS OF BELLISIO FOODS, INC. TO DECISION OF ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE AND OF THE FACTS

Without any significant evidence that Mr. Caldwell can safely and substantially perform as a General Utility employee, the ALJ is requiring that Mr. Caldwell serve as the proverbial "canary in the coal mine" with the hope that he or other employees will not be injured while Mr. Caldwell works at a judicially fashioned experimental position in the Bellisio Foods plant.

Bellisio Foods, Inc. (formerly known as Michelinas, Inc.) operates a food production facility in Jackson, Ohio. The facility encompasses approximately 650,000 square feet. (Tr., p. 138). There are 100 supervisors managing over 1,100 people in the Plant. (Tr., p. 136).

On February 13, 2007 Carl Caldwell applied for an opening as a General Utility Worker. (Tr., p. 19). The General Utility position is unskilled and has a starting pay of $7.46. (Tr., p. 19, 32). Of the approximately 1,100 employees in the Plant, half of them are General Utility employees. (Tr., p. 39). General Utility employees go from Plant to Plant and from one side of the Plant to the other. (Tr., p. 51). Their assignments are made from day to day, line to line depending on needs. (Tr., p. 59). The work environment is both fast-paced and noisy. (Tr., p. 60). All General Utility Workers are exposed to truck traffic due to the design of the Plant. (Tr., p. 193). There is also an intercom system for general warnings and evacuations. (Tr., p. 141). Due to variable work flow and absenteeism, it is essential that General Utility employees rotate and be able to

work on a wide variety of jobs and production lines. (Tr., pp. 146-147, 150, 174).

Sarah Williams, a Human Resources Assistant, interviewed Mr. Caldwell. After interviewing him, Ms. Williams determined that he met the basic standards for hire. The only issue was that he was deaf. She spoke with Jim Harris who was then the Company's Safety Director to determine if a deaf person could be hired and Mr. Harris indicated that if he could not hear at all, he could not be safely employed. (Tr., p. 25). In order that all options were explored, Mr. Harris discussed the hiring of Mr. Caldwell with Larry Sprague. (Tr., pp. 172-175). After several discussions, nobody could come up with a way to safely employ Mr. Caldwell. (Tr., pp. 172-175)

The Company's safety concern principally involves Mr. Caldwell's exposure to motor vehicle traffic without the ability to hear audible warnings. (Tr., p. 139). In addition, he would be unable to hear line start up safety warnings or intercom warnings. In short, employees must be able to have sufficient hearing to hear horns and other alarms to be safely employed. (Tr., pp. 141, 145-146).

Robert Arnold is a management employee who works in the area of safety. He noted a high level of interaction between people and equipment in the Plant. (Tr., p. 199). The Plant area is highly congested and there are many blind spots created by interior walls and equipment. (Tr., pp. 192-193).

The commission's own expert, Ms. Tudela, agrees that absent an accommodation, a deaf person cannot safely perform the General Utility position. She was asked:

> "Mr. Gibson: Um, absent an accommodation, it's your opinion that a deaf person could not safely perform the General Utility position?
>
> Ms. Tudela: That's correct." (Tr., p. 127).

The Respondent's expert, Garry Curren, is a certified safety professional. (Tr., p. 204). He noted that the plant environment was very concentrated with a high density of work being done in a relatively small area. (Tr., p. 210). Like the other witnesses, he characterized the pace of the work as being very rapid. (Tr., p. 210). Mr. Curren noted that the OSHA requirement for audible warnings on motor vehicles in a plant was enacted to warn employees of danger. It was his opinion as a safety professional that having a person who was completely deaf in the plant elevated the risk of injury to that employee and others to an unacceptable level. (Tr., pp. 215, 230). He was of the opinion that substituting pagers for the horn would not work in the plant environment. (Tr., p. 217). Mr. Arnold agreed that vibrating pagers would not work (Tr., pp. 194-196).

The commission's expert, Ms. Tudela, testified that an accommodation ought to be tried involving deaf employees working on a more remote line. (Tr., p. 97). She also would limit the deaf employee to only four of the nine functions of the General Utility position. She admitted that the rotation of General Utility Workers is an important aspect of the job. (Tr., p. 98). She agreed that

individuals should be rotated through different positions to reduce repetitive stress injuries. (Tr., p. 98). Ms. Tudela concedes that one needs instant recognition of vehicle alarms in order to be safe. (Tr., p. 124). Audible warnings make employees instantly aware. (Tr., p. 124). She shared management's concern that line start ups and truck traffic while walking in the Plant are legitimate safety concerns. (Tr., p. 124).

Ms. Tudela concedes that a deaf individual with the accommodations she recommends should be hired only on a trial basis to find out whether or not the accommodations are feasible. (Tr., p. 127). Not only did she admit that a trial of the accommodations was required to see if it works but that additional consultation is still necessary with other individuals to determine whether or not her proposed accommodations are feasible. (Tr., p. 128). She also admitted under the accommodations that she proposed Mr. Caldwell could only perform four (4) of the nine (9) job functions listed in the job description. (Tr., p. 99). Her proposed limitations make it impossible for Mr. Caldwell to rotate throughout the plant as required by the General Utility position. (Tr., pp. 146-147, 150, 174).

OBJECTION NO. 1

The ALJ erred as the commission failed to prove that Mr. Caldwell could substantially and safely perform the essential functions of a General Utility employee, and this error was compounded by the ALJ incorrectly placing the burden on Bellisio Foods to disprove a required element of the commission's prima facie case.

The Supreme Court of Ohio in *Columbus Civ. Serv. Comm. V. McGlone,* 82 Ohio St.3d 569, 697 N.E.2d 204 (1998) adopted a three-prong test for a prima facie case of handicap discrimination under Ohio law. The court stated that: "a plaintiff must show: (1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, due to the plaintiff's handicap; and (3) that the plaintiff can **safely** and **substantially** perform the essential functions of the job with or without a reasonable accommodation." Id. At 571. (Emphasis added) The failure to establish any one of these elements is fatal to a disability discrimination claim. *Rongers v. University Hospitals of Cleveland, Inc.*, 8th Dist., Case No. 91669, 2009 Ohio 2137, 2009 WL 1244146. It is the burden of the person seeking the protection of the law to establish that he or she can safely perform the essential functions of the job. *Jurczak v. J&R Schugel Trucking Co.*, (10 Dist., Case No. 03AP-451), 2003-Ohio-7039, 2003 WL 22999504.

Garry Curren, the only certified safety professional to testify at the hearing, emphasized the importance of employees being able to hear audible warnings. (Tr., p. 210). In his assessment, not being able to hear created an unacceptable risk in Bellisio's work place. (Tr., pp. 215-217) Bob Arnold from

the safety department at Bellisio explained in his testimony why OSHA requires audible warnings and expressed his concern of a high level of interaction between people and equipment in the plant. Larry Sprague, the Company's Vice President of Human Resources, testified that safety is the number one priority in the plant. (Tr., p. 131). He is concerned about a deaf person's inability to hear audible warning signals, intercoms, and start up alarms. It is his belief that to be safe, people need to be able to hear the horns. (Tr., p. 145-146). This is especially true since employees are not always in the places that they are supposed to be. (Tr., p. 146). He testified that the Company currently has three (3) hearing impaired employees but they can all hear. Visual warnings only work if you are looking in the direction of the visual warning. (Tr., p. 148).

Mike Evans, the Vice President of the supply chain, indicated that things are planned in the plant to have foot traffic at a low level where there is a high level of forklift traffic. (Tr., p. 69). However, General Utility employees do go to the staging areas of the warehouses. (Tr., p. 67). Mr. Evans testified that the lifts weigh approximately 8,000 pounds and hence, there is a real risk of serious accident or death. (Tr., p. 79).

These concerns by Bellisio management are not hypothetical; they are in fact codified in Federal and State law. The Occupational Safety & Health Administration codified the need to be able to hear a vehicle coming toward a worker at 29 CFR 1926.601. That regulation states in pertinent part:

"(3) all vehicles shall be equipped with an adequate audible warning device at the operator's station and in an operable condition.

(4) no employer shall use any motor vehicle equipment having an obstructed view to the rear unless the vehicle has a reverse signal alarm audible above the surrounding noise or noise level."

The Ohio Bureau of Workers' Compensation Division of Safety & Hygiene is a state agency charged with employee safety. Ohio Administrative Code § 4123:1-3-06 governs motor vehicles and mechanized equipment in the workplace states in pertinent part:

(D) Motor Vehicles.

(1) All trucks shall be equipment with an audible warning device in operable condition at the operator's station.

(2) On mobile equipment having an obstructed view to the rear, the employee shall (a) provide a reverse signal alarm audible above the surrounding noise.

These two Code Sections are a clear statement that employees must be able to hear warnings. There is no substitute for an audible warning device in either Code Section.

The issue of the safety concern raised by a deaf person's inability to hear audible warnings and alarms was directly addressed in *Equal Employment Opportunity Commission v. Stoughton Trailer, L.L.C.*, 2010 WL 2572813 (W.D. Wis. 2010). In a case very similar to this case, the U.S. District Court held that no reasonable accommodation existed that would allow deaf persons to perform safely job functions that required assemblers to hear bells, alarms and verbal communications. A copy of the *Stoughton* case is attached as Appendix A.

Interestingly, the district court rejected proposed accommodations very similar to those proposed by Ms. Tudela. The District Court in *Stoughton* granted summary judgment in favor of the employer.

In *Tibbs v. Ernst Enterprises, Inc.*, 2nd Dist. No. 22850, 2009-Ohio-3042, 2009 WL 1813776, an employer dismissed an employee as an over-the-road truck driver after the employee had a heart attack and underwent a procedure to have a defibrillator implanted. The employer's concern in that case was the Federal Motor Carrier Safety Regulations at 29 CFR Section 391.41 that disqualified individuals with defibrillators from over-the-road trucking. The Court noted that it is well-established that a person seeking the protections of 4112.02(A) must establish that he or she can safely perform the essential functions of the job. The Court found that the Federal Safety Regulations controlled even though Mr. Tibbs had a statement from a physician stating that he was qualified to perform the job. The statement by the physician did not permit the employer to knowingly violate a Federal regulation. Similarly, in this case the regulations control as neither the federal or state regulations have any exceptions for vibrating pagers or visual warnings.

A similar result was reached in *Lanterman v. Columbia Gas of Ohio*, 7th Dist. Case No. 01-C0-54, 2002-Ohio-5224, 2002 WL 31169030, plaintiff was terminated from his position as a welder since his condition of mild claustrophobia prevented him from wearing a SCBA mask. The employer required all employees who had the possibility of being exposed to oxygen

deficient atmospheres to complete a certification process for self-contained breathing apparatus (SCBA). The employer did so based on its belief that the requirement was mandated by OSHA. The decision turned on the Court's finding that the mild claustrophobia did not impact major life activities but, nonetheless, upheld a summary judgment for the employer where the employee had a health condition that management believed precluded his performing a job consistent with OSHA regulation.

None of the witnesses that actually worked in the plant testified that a deaf person would be safely employed. (Tr., pp. 146-147, 174) Given these witnesses unique ability to observe the conditions in the plant over an extended time period and under many circumstances, their testimony has a greater probative value than a single paid expert witness, who was only at the plant once for less than three (3) hours. (Tr., p. 92).

The commission never even proved through any probative and substantial evidence, that Mr. Caldwell could substantially and safely work as a General Utility employee. It is the employees not some paid expert that know the conditions in their plant, and the people that worked in the plant all testified that it was unsafe for Mr. Caldwell to work there. (Tr., pp. 174-175)

In addition to this failure of proof, the ALJ compounded her error by placing the burden on Bellisio to show that a reasonable accommodation is available. (Decision, p. 19; ¶ 34). This is part of the employee's overall burden

to show that the employee can safely and substantially perform the essential functions of the job.

The Courts have rejected employer liability for not offering an accommodation and have held that it is the employee who must show that a reasonable accommodation is available. In *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, (8th Cir., 1999), the Court rejected employer liability based on not engaging in an interactive process with a disabled employee regarding an accommodation. In *White v. York International Corp.*, 45 F.3d 357, (10th Cir., 1995), the Court noted that an employee does not have to engage in the interactive process regarding an accommodation unless the employee shows that a reasonable accommodation is available. In *Willis v. Conopco Inc.*, 108 F.3d 282, (11th Cir., 1997), the Court held that a plaintiff must show that reasonable accommodations were available and an employer cannot be held liable merely for not offering an accommodation.

OBJECTION NO. 2

The ALJ improperly ignored the written job description in her unsupported finding that Mr. Caldwell could substantially and safely perform the essential duties of a General Utility employee when the commission's own expert opined that even with accommodations that Mr. Caldwell could perform only four of the nine enumerated essential job functions.

Under both the case law and the United States Code, a written job description is evidence of essential job functions. The ALJ recognized this law in her decision at p. 15 in ¶ 16 as follows:

> 16. In making a determination regarding what the essential functions of a particular job position are, 42 U.C.S. § 12111(8) provides that:
>
> (...) consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

The written job description for a General Utility employee was introduced as Commission Exh. 1. After properly quoting the law, the ALJ then ignored these requirements in her decision despite well-established law that the court should not second guess an employer's judgment as to the essential function of its jobs. *Stoughton*, at pp. 6, 10, FN 2; *Peters v. City of Mauston*, 311 F.3d 835, 845 (7th cir. 2002).

Prior to the Supreme Court's decision in *Columbus Civil Service Commission v. McGlone, supra*, the Ohio Supreme Court in *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 658 N.E.2d 738, (1996), fashioned a test sometimes referred to as a "Hood test" that requires plaintiff to show that he can

safely and substantially perform the essential functions of his or her job. *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 658 N.E.2d 738 (1996) and see *Miller v. Pond*, 171 Ohio App.3d 347, 870 N.E.2d 787, 2007-Ohio-2084 (2007).

The Commission's Exhibit 1 is the General Utility Employee Job Description. A General Utility Employee is rotated through nine different functions or jobs. They are Product Inspection, Dumping Pasta, Wiping, Sauce Inspector, Extruder Tear Down, Line Supplier, Relief Crew, Ingredient Prep, and Pack Out. Ms. Tudela's accommodations eliminate more than half of the job's essential functions. (Tr., p. 99). Her accommodations would limit the deaf employee to Product Inspection, Wiping, Sauce Inspector, and Pack Out. (Tr., p. 99). The Courts have required that accommodations allow the employee to perform the essential functions of the employment position. *Bryne v. Avon Products, Inc.*, 328 F.3d 379, (7th Cir., 2003). Ms. Tudela's accommodations preclude the performance of five of the nine essential functions of the job and hence, is not really an accommodation. Reasonable accommodations may take the form of job restructuring a realignment of duties but here, Ms. Tudela's accommodation means elimination of five of the nine essential job functions.

In addition to eliminating five of the nine functions, Ms. Tudela would also restrict the deaf employee to performing four (4) of the functions on the more remote lines. (Tr., p. 97). The mere fact that some employees do not always perform all nine (9) functions does not mean that they are not essential job functions as flexibility and the ability to rotate between and perform all nine (9)

job functions as the hallmark of the General Utility position. (Tr. pp. 146-147, 174).

Accommodations contemplated by the Act are those that will allow a person to perform the essential functions of the job. An inability to perform most of the job's essential tasks is not an accommodation but an admission that the disabled employee is incapable of performing the essential functions. Ohio Administrative Code § 4112-5-02(A) defines accommodation to mean "a reasonable adjustment made to a job and/or the work environment that enables a qualified handicapped person to safely and substantially perform the duties of that position." *See, Martinez v. Ohio Dept. of Adm. Services,* 118 Ohio App.3d 687, 693 N.E.2d 1152 (1997). Reasonable accommodation does not involve eliminating essential duties.

Clearly, the commission's own expert admits that even with the creation of basically a new position, Mr. Caldwell can still only perform less than half of the essential duties. With the elimination of these requirements, the ALJ is requiring an employer to create a new position with entirely different duties, which is not an accommodation. An employer is not required to manufacture a new job to accommodate a handicapped person. *See, Jasany v. United States Postal Service, et al.*, 755 F2d1244 (6th Cir. 1985).

OBJECTION NO. 3

The ALJ incorrectly disregarded the essential job function that General Utility Employees be able to rotate between a variety of jobs throughout the plaint when she created an entirely new job limited to work on certain lines in certain areas under the guise of a reasonable accommodation.

The job description indicates that a General Utility employee will rotate between jobs every thirty (30) minutes, and the importance of rotating between jobs and lines was reiterated in the testimony. (Exh. 1, Tr., pp. 146-147, 150, 174). The written job description was an exhibit at the hearings and for the convenience of the commission a copy is attached as Appendix B.

The ability to rotate General Utility employees is an essential job requirement for several reasons. First, in the fast paced and rapidly changing work environment of the plant, Bellisio needs the flexibility to put workers where and when they are needed. (Tr., pp. 146-147). Second, the rotation of employees helps eliminate repetitive stress injuries. (Tr., p. 98). Finally, it also helps them to stay mentally and physically fresh which reduces boredom and fatigue and reduces the resulting injuries and quality control issues created when employees are bored and not paying attention. (Tr., pp. 146-147). The commission's own expert agrees that rotation is crucial. (Tr., p. 98).

The importance of job rotation was emphasized in the *Stoughton* case. In that case, the employer's EEOC expert, like Ms. Tudela, agreed that job rotation was an essential component of the position. *Stoughton*, at p. 6. Other courts have held that an inability to rotate through the various required positions of a

job meant that an individual could not perform the essential functions of that job. *Dargis v. Sheahan*, 526 F.3d 981, 986-987 (7th Cir. 2008); *Nolan v. Midwest Generation, LLC*, 2008 WL 2945459 (N.D. Ill. 2008) at p. 4.

By Ms. Tudela's own testimony, Mr. Caldwell cannot rotate through all nine (9) required positions throughout the plant. He can only perform four (4) of the jobs. (Tr., p. 99) More importantly, Mr. Caldwell is limited to work on the remote lines. (Tr., p. 97). This limitation eliminates the ability to rotate between different jobs and lines. Even with the proposed accommodations, Mr. Caldwell still cannot safely rotate through different jobs as required by the General Utility position. Consequently, he cannot safely and substantially perform the essential functions of a General Utility employee.

OBJECTION NO. 4

The ALJ inappropriately relied solely on the speculative testimony of the commission's expert, who could only recommend a trial program that might allow Mr. Caldwell to safely and substantially perform the essential functions of a General Utility Employee.

The sole basis for ALJ's decision was the testimony of the commission's expert, Ms. Tudela. No testimony was offered by any current or former employee that a deaf person could safely work in the Bellisio plant. However, the ALJ failed to fully consider that when taken as a whole that Ms. Tudela's testimony is speculative and does not rise to the level of probability appropriate for expert testimony in Ohio. *See, Tepe v. Tepe*, 4th Dist. Case No. 11CA13, 2012-Ohio-1482, 2012 WL 1108362.

In fact, the ALJ recognized the speculative nature of Ms. Tudela's testimony when she stated in ¶ 32 of her decision:

> 32. The Commission provided credible evidence of how job restructuring and mechanical devices could assist Complainant in performing the essential functions of the job of a GUE. (Tr. 61-68, 96-97, 104-109, 110-112)

Ms. Tudela testified that with proper accommodations, a deaf employee can safely work at Bellisio Foods. (Tr., p. 97). However, that testimony is inconsistent with the rest of her testimony regarding the supposed accommodations. For instance, at page 95 of the transcript she testified that she does not know whether or not an assessment of safety from an OSHA standpoint can be made until after her suggestions are tried. The accommodations must first be put in place and then an assessment regarding safety should be made.

(Tr., p. 95). At page 124 of the transcript, she acknowledges that in the case of start up alarms and horns and beepers on trucks, there are occasions when there needs to be instantaneous recognition. She testified that she was unaware of any studies that have shown the effectiveness of vibrating pagers in a noisy work environment. (Tr., p. 126). She agrees that instant recognition is required to be safe. (Tr., p. 126). Further, she indicated that she was unaware of any studies that show how quickly the average worker responds to a pager. (Tr., p. 126). Clearly, there was no objective evidence that her proposed pager accommodation would work.

Then, at page 127 she gave the following testimony:

> "Mr. Gibson: Absent an accommodation, it's your opinion that a deaf person could not safety perform the General Utility position.
>
> Ms. Tudela: That's correct.
>
> Mr. Gibson: Okay, In looking at your last paragraph you mention that the company might consider hiring a deaf individual on a trial basis and I took that to mean to find out whether or not it is going to work, am I right about that?
>
> Ms. Tudela: That's right. I've worked with other companies where, um, say for example, higher, rehab services commission, they will actually pay for the individual's salary while they are working.
>
> Mr. Gibson: Okay. To see if it's a good match for them. So, in other. words, not only does there need to be a trial to see if it works, you also are recommending additional consultation with other people to see that it works, are you not?
>
> Ms. Tudela: **I am** because I am talking in general terms today on transmitting pager devices. There are so many available on the market that we would need to narrow down and find a specific solution and then there's questions to be answered in terms of

> whether it would be a wireless system or something that is hard-wired." (Tr., p. 127).

In other words, from a safety standpoint, she is recommending a trial run as opposed to stating that there is in fact a safe accommodation. Such speculative testimony does not support the conclusion that it is more likely than not that the proposed accommodations would work which is yet another example of the failure of proof on this case.

Federal courts have rejected Ms. Tudela's let's give it a try approach under the Federal law. *See, Stoughton* at p. 11; *Peters*, 311 F.3d at 846. Such an approach is an admission by Ms. Tudela that she cannot state that it is probable or likely that Mr. Caldwell could safely do the job even with the proposed accommodations. If she was sure, why is a "trial" even necessary? When read in its entirety, Ms. Tudela's speculative and incomplete opinion is an inadequate basis for the ALJ's decision.

OBJECTION NO. 5

In light of the speculative nature of the testimony of the commission's expert, the ALJ erred in finding that the hazards presented by a deaf person's inability to hear audible warnings on forklifts and on the assembly line were correctable by reasonable accommodation.

Ms. Tudela opined with no studies or other objective support or data that visual signals and pagers could make up for Mr. Caldwell's inability to hear audible warnings on forklifts and the assembly lines. (Tr., p. 126). The testimony regarding the pagers and visual warnings are contradicted by all the other testimony and OSHA and Ohio regulation. (Tr., p. 194)

Mr. Curren does not believe a pager system would work. (Tr., p. 217). Mr. Arnold, from the Company's Safety Department, agrees with Curren that a paging system would be ineffective. (Tr., p. 196). He had pagers from 1991 to 2004 in the manufacturing environment and had difficulty recognizing vibrating pagers when they occurred. (Tr., pp. 196-197) Likewise, Mr. Sprague believed that vibrating pagers and text messaging devices would not work. (Tr., p. 149).

Finally, with regard to safety, OSHA Code Section 29 CFR 1926.601 does not provide for vibrating paging devices to substitute for a necessity of audible alarms and neither does Ohio Administrative Code § 4123:1-3-06 provide for vibrating paging devices to substitute for audible alarms. If the State and Federal Agencies require alarms to be audible, individuals who cannot hear those alarms by definition cannot safely be around the equipment. The Commission raised Respondent's forklift rate of employee accidents involving motorized

vehicles. However, the obvious point is being missed. Whatever the Company's experience of employee/vehicle accidents has been, that experience has been with employees who can all hear the vehicles audible alarms.

This very issue was addressed in *Stoughton*. The EEOC raised a similar argument regarding pagers which was rejected with the court holding that the ability to hear audible alarms quickly was an essential job function. *Stoughton*, at p. 10. Ms. Tudela testified not that accommodations such as pagers or visual signals would have eliminated the safety risk but that they were available and should be tried. (Tr., p. 126). In fact, she admitted that instant recognition of vehicle alarms is necessary to be safe. (Tr., p. 124). Such speculative testimony falls far short of carrying the burden of proof on this issue.

OBJECTION NO. 6

The ALJ arbitrarily and incorrectly excluded the lay opinion of Mr. John Smith based on his personal observation and experience.

The ALJ refused to allow John Smith, a Union representative to testify regarding his safety concerns regarding forklifts and audible alarms and all clear signals on the production line. (Tr., pp. 182-183). His testimony was proffered for the record. (Tr., pp. 235 – 236). Ohio Evidence Rule 701 states as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Since he had been to the plant many times and observed it in operation over a long period of time, Mr. Smith meets Requirement No. 1. As a Union representative, he also was privy to the safety concerns of all the Union employees. (Tr., p. 180). As a Union representative, he has extensive experience in safety matters. There is little difference between his testimony on the safety issue and police officers who are routinely permitted to give opinions based on their own perceptions and observations. Given his unique perspective of having been in the plant many times and his work with union members on safety issues, Mr. Smith should have been allowed to testify fully at the hearing.

OBJECTION NO. 7

The ALJ erred in finding handicap discrimination as there was no evidence that Mr. Caldwell requested any accommodation.

The ALJ found in ¶¶ 11 and 12 of her decision as follows:

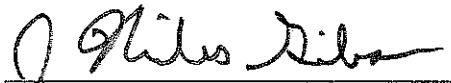
> 11. Complainant did not identify the specific type of accommodation that would help him perform a job within Respondent's facility. He indicated that he is deaf and hoped that the employer would be able to find a job for him.
>
> 12. A reasonable inference can be drawn from Complainant's presence with an interpreter, and his hope that Respondent can find a job for him, that he was requesting Respondent provide a reasonable accommodation for his deafness in order to work as a GUE.

The ALJ does not specify how she infers from a mere job application that a reasonable accommodation was being requested. There is no evidence in the interview process that Mr. Caldwell ever requested a specific accommodation. The ALJ's unsupported inferences would eliminate the requirement that an employee request an accommodation, which is part of the claimant's burden. *See, Niles v. National Vendor Services, Inc.*, 2010 WL 3783426, 2010-Ohio-4610 at ¶ 27. The lack of any evidence that Mr. Caldwell requested any accommodation during the interview process is yet another reason to reverse the ALJ and enter judgment for Bellisio.

CONCLUSION

Respondent, Bellisio Foods, Inc. requests that its objections be sustained and that an order be entered dismissing the complaint or in the alternative if only objection six (6) is sustained, then the case should be remanded to the ALJ to hear additional evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing ***Statement of Objections of Bellisio Foods, Inc. to Decision of Administrative Law Judge*** was mailed by ordinary U.S. Mail this 24th day of August, 2012 upon the following:

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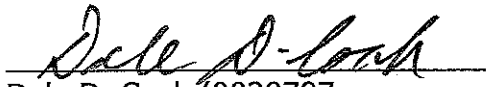

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United States District Court,
W.D. Wisconsin.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Jeffrey Willis, Plaintiff–Intervenor,
v.
STOUGHTON TRAILERS, LLC, Defendant.

No. 08–cv–748–slc.
June 23, 2010.

West KeySummary**Civil Rights 78 ⚷1218(4)**

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of **Handicap**, Disability, or Illness
78k1218 Who Is Disabled; What Is Disability
78k1218(4) k. Employment Qualifications, Requirements, or Tests. Most Cited Cases

No reasonable accommodation existed that would allow job applicant, who was **deaf**, to perform safety-related job function which required assemblers to hear bells, alarms, and verbal communications, precluding applicant's ADA claim against prospective employer. Bells, alarms, and verbal communications were used to warm assemblers of approaching dangers, including overhead crane movement and approaching **forklifts**. An assembler's line of sight was often blocked and the ability to perceive and process warnings quickly and adequately was an essential job function. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a); 29 C.F.R. § 1630.2(r).

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OPINION AND ORDER

STEPHEN L. CROCKER, United States Magistrate Judge.

*1 In April 2004, plaintiff-intervenor Jeffrey Willis, who is deaf, applied for a job as an assembler at defendant Stoughton Trailers, LLC's trailer manufacturing plant in Stoughton, Wisconsin. After two meetings with Willis, Stoughton Trailers determined that there were no accommodations that it could offer Willis that would allow him safely and efficiently to perform all of the tasks required of its assemblers. As a result, Stoughton Trailers did not offer Willis a job. Willis believed this was a discriminatory decision and sought relief. Agreeing with Willis, the Equal Employment Opportunity Commission has filed this lawsuit against Stoughton Trailers contending that the company violated the Americans with Disabilities Act. Willis then intervened.

Stoughton Trailers has moved for summary judgment pursuant to F.R. Civ. Pro. 56 (*see* dkt. 53), and having considered the parties' evidence and arguments, I am granting the motion. The EEOC has failed to adduce evidence from which a jury could find that Willis could perform the "buck and shoot" function on the assembly line, with or without accommodation. Additionally, the EEOC has failed to adduce evidence of any reasonable accommodation that would allow Willis to perform a safety-related job function that required assemblers to hear bells, alarms and verbal communication.

From the parties' proposed findings of fact, I find the following facts to be undisputed for the purpose of deciding Stoughton Trailer's motion: [FN1]

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FN1. Some of plaintiff's responses to defendant's proposed findings of fact are marbled with argument, opinion, and even case citations. *See, e.g.,* Plt.'s Opp. to Def.'s PFOF, dkt. 62, ¶¶ 19, 20, 22, 30, 35 *etc.* Unless plaintiff proposed a specific fact supported by a citation to admissible evidence that contradicted the fact proposed by defendant, I have deemed the fact undisputed. *See* Procedure to be Followed on Motions for Summary Judgment, Section II C. and D.4.

FACTS

Defendant Stoughton Trailers, LLC, is a manufacturer of semi-truck trailers, including customized trailers. The events relevant to this lawsuit occurred in early 2004 when the company was enjoying a boom in production. At that time, Stoughton Trailers's primary facility was Plant 6, which, together with adjoining Plant 5, encompassed approximately 600,000 square feet (not quite fourteen acres) and ran four assembly lines, each of which was approximately 800 feet long and had 10–12 assembly stations. At many of these stations, assemblers worked on two trailers located side-by-side with about a 10–foot space between the trailers, which typically were 28–53 feet long and 13'6" high. The trailers moved nose-to-tail down the assembly line, creating four long, 10–foot wide alleys. During a typical eight-hour shift, a fully-staffed line could manufacture 15 to 20 trailers; in 2004, Plant 6 was manufacturing up to 200–250 trailers each week.

Plant 6 had multiple overhead and jib cranes that maneuvered completed trailers and components throughout the building. The cranes were equipped with flashing lights, alarms or sirens that would notify the assemblers when the crane was operating. In addition to these warnings, certain assembly workers were designated as "spotters" to warn employees through verbal commands of approaching dangers. The plant was very noisy, so all assemblers wore ear protection.

Cranes were not the only motorized equipment operating in Plant 6: approximately 23 forklifts and a number of motorized golf carts operated constantly to transport various components and supplies throughout the production areas. Although there were designated pathways in the primary aisles for the forklifts and golf carts, these vehicles moved into all areas of the production facility, including the workspaces occupied by the assemblers. Like the cranes, these vehicles were equipped with flashing lights and horns to warn assemblers as they approached, warnings that were utilized frequently because of the many blind corners and narrow passageways around the areas where assemblers worked. Sometimes during crane operation assembly workers were designated as spotters to warn employees through verbal commands of approaching dangers. Because of the continual motion in the production environment, assemblers constantly had to be aware of the surrounding environment and of potential dangers.

*2 Assemblers at Stoughton Trailers were cross-trained in all aspects of the trailer manufacturing process and rotated throughout the assembly process during a shift. An assembler performed work in a variety of positions on the assembly line, including inside, under, adjacent to and on top of the trailers. Much of their work was aloft on ladders, lifts, and scaffolding which generally were designed for only one person. The majority of an assembler's work was performed using two hands, they often held tools or materials, and they frequently worked beyond arms' reach of other assemblers.

Assemblers were required to work in pairs, such as during a task known as the "buck and shoot," which involved two assemblers riveting on either side of a trailer wall, or when installing a roof on a trailer. Because the assemblers were unable to see each other while performing the buck and shoot, they communicated by pounding on the sides of the trailers or by yelling.

Because of the trailer customization process, unique problems often arose on the assembly line.

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Stoughton Trailers required its assemblers to troubleshoot these problems and to relieve bottlenecks on the line, tasks that required substantial flexibility, speed and communication skills.

In early 2004, Stoughton Trailers ramped up its production and added several hundred assembly positions. The "Assembler B" written job description required assemblers to be able to "[p]erform all assigned tasks in a safe, efficient, timely, accurate and highly productive manner according to company policy;" "work and communicate in a team environment;" and have the "ability to hear bells, alarms and all verbal communication."

In April 2004, plaintiff-intervenor Jeffrey Willis applied to Stoughton Trailers for an Assembler B position in Plant 6. Willis, who is profoundly deaf, communicates by American Sign Language, gestures and body language. Willis has rudimentary writing skills. In high school Willis worked four or five months for a steel company in Harvard, Illinois, where he drove a fork lift, cut steel and worked a machine that bent pipe. Willis had technical school training in auto bodywork, diesel mechanics and a technical college diploma in auto mechanics. Between 1989 and 2004, Willis had worked as a maintenance worker at Page Avjet in Minneapolis, as an assembler and mechanic at the U.S. Navy Weapons Station, as an installer (mechanic) for Sears Automotive in Louisville, a maintenance technician for Inertial Airline Services in Louisville, and a clerk/mail handler for the U.S. Postal Service in Madison, Wisconsin.

After receiving Willis's application, Sarah Stormer, a recruiter in Stoughton Trailers's Human Resources Department, arranged an interview. On April 16, Willis came to the Plant 6 facility with his sister-in-law, Jelaine Olsen, who served as an interpreter. During the nearly two-hour interview, Stormer and Willis discussed Willis's employment history, the job description and benefits of the assembler position, the methods Willis used to communicate with others and the methods by which assembly workers in Plant 6 communicated during the manufacturing process. Willis's interview included a tour of the plant, which was not in production at the time.

*3 After not hearing from Stoughton Trailers for more than a week, Olsen called Stormer to check the status of Willis's job application. Stormer responded that Kate Schieldt, the company's Human Resources Director, was responsible for the hiring decision. On April 30, 2004, Olsen called Schieldt, who reported that Stoughton Trailers was still reviewing Willis's application but that it had concerns about his ability to work safely at Plant 6 and to communicate with others on the manufacturing floor.

Stoughton Trailers invited Willis back for a second interview and plant tour on May 28, 2004. The interview was conducted by Schieldt and Bob Brown, the company's Safety Manager. Willis was accompanied by his brother, Basil Willis. During a tour of Plant 6, which was operating at the time, Schieldt and Brown asked Willis for suggestions as to how he could work safely in the Plant 6 manufacturing environment and how Stoughton Trailers could accommodate his disability. Willis and his brother suggested possible accommodations, including: 1) having Willis work only on the brakes and tires in a different area; 2) assigning Willis to only one area of the plant; 3) using lights as signals; 4) using notepads to communicate; and 5) tapping on shoulders and using sign language or gestures to communicate.

After this interview, Schieldt discussed with Brown possible accommodations for Willis. Schieldt considered accommodations such as adding flashing lights to moving hazards, tapping Willis to get his attention, using flashlights or a system of hand signals to communicate, and adding more mirrors to the facility, but determined that none of them would be sufficient to warn Willis of all of the safety hazards. Schieldt further determined that allowing Willis to work in just one area of Plant 6 was not feasible because limited duty positions were not available, the assembler position re-

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quired rotation among the various functions of the job, and single-area placement would have put Willis at a higher risk for a repetitive-stress injury. Schieldt concluded that Willis would not be able to safely and efficiently perform the duties of an Assembler B, including the duties and requirements of hearing and engaging in verbal communication, hearing warning sounds used to alert workers of safety hazards and rotating among the various job duties along the assembly line. Accordingly, Stoughton Trailers did not offer Willis the job.

Beginning in 2005, Stoughton Trailers instituted numerous improvements and lean manufacturing changes to its production facility. These changes included establishing designated aisles for forklift and golf cart traffic that are located around the perimeter of the facility, reducing the number of assembly lines from four to two, moving the trailers down the line sideways rather than nose-to-tail, installing computers containing design specifications at every workstation and reducing the amount of manpower required for material handling.

*4 Because of the national economic downturn, Stoughton Trailers has reduced its trailer production to about 60 a week in early 2010 when the instant motion was filed.

OPINION

The Americans with Disabilities Act provides that a covered employer shall not "discriminate against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). "Discrimination" under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." § 12112(b)(5)(A). To establish a failure to accommodate claim under the ADA, a plaintiff must show that: (1) he is a "qualified individual with a disability"; (2) the employer was aware of his disability; and (3) the defendant failed to reasonably accommodate his disability. *Gratzl v. Office of Chief Judges,* 601 F.3d 674, 678 (7th Cir.2010).

The parties agree that Stoughton Trailers knew that Willis was deaf when it declined to hire him. Stoughton Trailers contends, however, that Willis is not a "qualified individual with a disability." A qualified individual with a disability is someone who (1) satisfies the requisite skill, experience, education, and other job-related requirements of the sought-after employment position, and (2) can perform the essential functions of the desired position, with or without reasonable accommodation. 29 C.F.R. § 1630.2(m); *Gratzl,* 601 F.3d at 679; *Budde v. Kane County Forest Preserve,* 597 F.3d 860, 862 (7th Cir.2010). Stoughton Trailers contends that the EEOC has adduced no evidence to show that, with or without accommodation, Willis was able to perform these essential duties of the job of assembler: (1) rotate between the various job functions performed by an assembler, including the "buck and shoot" function; (2) communicate with co-workers; and (3) hear bells, alarms and other verbal communications. Alternatively, Stoughton Trailer contends that Willis was not qualified because he posed a direct threat to his own health and safety or that of others.

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court must construe all facts and inferences in favor of the nonmoving party; however, this does not extend to drawing inferences supported only by speculation or conjecture: the nonmoving party must do more than raise some metaphysical doubt as to the material facts. It must come forward with specific facts showing that there is a genuine issue for trial, that is, that sufficient evidence exists favoring the nonmoving party that would permit a jury to return a verdict for that party. *Argyropoulos v. City of Alton,* 539 F.3d 724,

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732 (7th Cir.2008).

I. Job Rotation

*5 An employer's understanding of the essential functions of the job is presumed to be correct unless the plaintiff offers sufficient evidence to the contrary. *Gratzl,* 601 F.3d at 679. Further, an employer may specify, for legitimate reasons, multiple essential duties for a position, and when an employee is expected to rotate through duties, he will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties. *Id.; see also Basith v. Cook County,* 241 F.3d 927, 928–29 (7th Cir.2001). In support of its contention that rotation through all jobs on the assembly line was an essential duty of an assembler, Stoughton Trailers has submitted a declaration from Robert Wahlin, its Vice President of Operations, who testified to that fact.

Citing *EEOC v. Target Corp.,* 460 F.3d 946 (7th Cir.2006), the EEOC responds that such a "mere statement" is not evidence and is insufficient to carry Stoughton Trailers's burden on summary judgment. EEOC's Br. in Opp., dkt. 61, at 20. But *Target* does not advance the instant analysis because it is legally and factually distinguishable. In *Target,* the court found that, after the EEOC had presented a prima facie case of disparate treatment by the defendant, the defendant had failed to meet its burden of showing a legitimate, non-discriminatory reason for its decision when all it offered was a statement that "[b]ased upon [his] interview, Target decided that [Daniels] did not meet the requirements for an ETL position, and therefore elected not to hire him as an ETL." *Id.* at 958. The court explained that Target had failed to give enough detail to allow the EEOC to muster evidence establishing pretext. *Id.*

As a preliminary observation, the *McDonnell Douglas's* burden-shifting analysis at issue in *Target Corp.* is not applicable here.

More to the point and contrary to the EEOC's implication that Stoughton Trailers has provided no more than an opaque headline, Wahlin submitted a 53 paragraph affidavit (dkt.56, Exh. 21) outlining plant layout, the trailer assembly process, and assembler job responsibilities, including some reasons for requiring station rotation, *id.* at ¶¶ 27–28. The EEOC does not argue that Wahlin did not make his affidavit on personal knowledge or was otherwise unqualified to testify regarding Stoughton Trailers's understanding of the essential functions of the assembler position.

Further, Wahlin's sworn statement that job rotation was an essential function of the assembler job is corroborated by the written job description, which provides that an assembler was expected to "[p]erform all assigned tasks in a safe, efficient, timely, accurate and highly productive manner according to company policy." The employer's judgment and the written job description are relevant to deciding which functions of a job are essential. 20 C.F.R. § 1630.2(n)(3)(I); *see also* 42 U.S.C. § 12111(8) ("[I]f an employer has prepared a written description ..., [it] shall be considered evidence of the essential functions of the job.").

*6 In an apples-to-oranges rebuttal attempt, the EEOC points out that Stoughton Trailers allows injured workers temporarily to forego working at certain workstations if the work exceeds their physical restrictions. It is well-settled, however, that providing a temporary exception to otherwise-mandatory job rotation for employees recovering from injuries does not render rotation "non-essential" or give rise to an obligation to similarly accommodate a non-injured but disabled employee. *Gratzl,* 601 F.3d at 678 ("[E]ven if the court continued the practice of temporarily reassigning court reporters to the control room, we have already noted that this would not create an obligation that it accommodate Gratzl with a permanent control-room position"); *Watson v. Lithonia Lighting,* 304 F.3d 749, 751 (7th Cir.2002) (plaintiff's contention that she should be permanently assigned to light-duty position reserved for injured workers "would simultaneously

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increase the incidence of workplace injury and diminish the employer's ability to accommodate employees who have transient conditions"); *Winfrey v. City of Chicago,* 259 F.3d 610, 616 (7th Cir.2001) (creation of modified position for plaintiff did not demonstrate that four duties he performed were only essential duties of unmodified job that plaintiff sought); *Basith,* 241 F.3d at 930 (refusing to punish employer for going beyond requirements of ADA by requiring employer to maintain more unnecessary accommodation).

Even the EEOC's expert, Kevin Schutz, agreed that "[j]ob rotation is a key component in the Stoughton Trailer's plant." Dkt. 68, Exh. 2, at 7. In short, the EEOC has adduced no evidence from which a jury could conclude that job rotation was not an essential component of the assembler's job.

Further, Schutz found that a deaf person would be unable to rotate through all of the positions in the plant without accommodation. In particular, he opined that a deaf person would be *unable* to perform the "buck and shoot" function, performed by two assemblers working as a team without the ability to see each other or communicate non-verbally. [FN2] This alone might be sufficient evidence that Willis is not a qualified individual. *See, e.g., Dargis v. Sheahan,* 526 F.3d 981, 986–87 (7th Cir.2008) (plaintiff's inability to rotate through the various required positions of the correctional officer's position means that he cannot perform the essential functions of that job).

FN2. As the EEOC points out, Schutz offered this opinion without having observed the buck and shoot function on the day he toured Stoughton Trailers's plant. Dkt. 61 at 7. However, the EEOC presents no evidence that Schutz misunderstood how an assembler would have to perform this function. And what does it say about the EEOC's evidence when it must impeach its own expert on a fact material to proving that Willis was qualified to be an assembler? The Seventh Circuit won't even second-guess a defendant employer's judgment as to the essential functions of its jobs, *see Peters v. City of Mauston,* 311 F.3d 835, 845 (7th Cir.2002).

Not so fast, rejoins Schutz: Stoughton Trailers could have accommodated Willis by having someone else take his place on the buck and shoot. *Id.* But assigning someone else the essential duties of a position is not a reasonable accommodation under the ADA. *Peters,* 311 F.3d at 845–846 (having someone else do heaviest lifting for plaintiff if he could not handle it was unreasonable accommodation because it required another person to perform essential function of plaintiff's job); *Hansen v. Henderson,* 233 F.3d 521, 523–24 (7th Cir.2000) (employer need not create new job or provide helper as accommodation to disabled employee); *Sieberns v. Wal–Mart Stores, Inc.,* 125 F.3d 1019, 1022 (7th Cir.1997) ("to accommodate him [the employer] would have to hire someone else to help perform some duties. That clearly was beyond a reasonable accommodation."); *Cochrum v. Old Ben Coal Co.,* 102 F.3d 908, 912 (7th Cir.1996) ("hiring a helper to perform the overhead work would mean the helper would de facto perform [the] job. We cannot agree that [an employee] would be performing the essential functions of his job with a helper.").

*7 In spite of Schutz's suggestion that Stoughton Trailers could have accommodated Willis by exempting him from the buck and shoot, the EEOC attempts to argue that there is evidence from which a jury could find that Willis could perform the task even *without* accommodation. In its brief, dkt. 61 at 21, it cites to the deposition testimony of Stoughton Trailers's expert, Jay Kappelusch, wherein he stated that he did not "see any immediate pressing safety hazard [associated with the buck and shoot] that would put a deaf individual in any more or less risk than an otherwise healthy person." Dep. of Jay Kappelusch, Dec. 21, 2009, dkt. 69, at 99. But the EEOC is taking this statement wholly out of context: Kappelusch was not opining wheth-

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er Willis could perform the buck and shoot without accommodation, he was discussing safety hazards, explaining the basis for his own opinion that the production environment as it existed at Stoughton Trailers in 2004 was too hazardous to accommodate a deaf individual. In Kappelusch's opinion, the buck and shoot itself was not particularly dangerous; it was the facility's lack of dedicated pathways for material handling, compounded by sight lines that were blocked by trailers and poor lighting, that created an environment where a person needed to be able to hear in order to receive adequate verbal warning of approaching dangers. *Id.* at 99–100.

Later in his deposition, Kappelusch made clear that Willis could not perform the buck and shoot function:

> [The buck and shoot] is something that I think [Schutz] would agree is not something you can accommodate in to. The reason being, you have no line of sight, which he acknowledges, at all. And you have no means of hearing or seeing anything. The way the workers communicate is they pound. They have a system of pounding on the side of the walls. And they use that auditory signal to tell them whether they need to move up, move down, hit the rivet again. Okay? I'm not aware of any accommodation that's going to facilitate this operation. And that's reasonable. Not everything is accommodatable. That's just fact.

Id. at 174.

As noted above, Schutz did not disagree that Willis was incapable of performing the buck and shoot and Schutz did not suggest that the function was not essential to the job of an assembler; to the contrary, he suggested that Stoughton Trailers could have accommodated Willis by excusing him from this duty. As a matter of law, however, this suggestion was unreasonable. When the only accommodation the employee suggests is unreasonable, he fails to meet his burden under the ADA. *Gratzl,* 601 F.3d at 680.

Accordingly, the EEOC has failed to adduce evidence from which a jury could conclude that Willis could perform all of the various tasks required of an assembler with or without accommodation or that job rotation is not an essential function. Therefore, defendant is entitled to summary judgment. [FN3]

> FN3. In light of the conclusion that no reasonable accommodation existed that would have allowed Willis to perform the buck and shoot function, it is unnecessary to address the EEOC's claim that Stoughton Trailers failed to engage in the "interactive process" required by the ADA. *Mays v. Principi,* 301 F.3d 866, 870 (7th Cir.2002) ("[W]hen no reasonable accommodation is possible the failure to jaw about accommodation is harmless."). I note, however, that the EEOC's stridency on this point is misdirected in light of Stoughton Trailers having invited Willis back for a second interview directly with its HR Director and as part of a plant tour invited Willis and his brother to suggest accommodations.

II. Ability to Hear Bells, Alarms and Verbal Communications

***8** Stoughton Trailers also contends that the EEOC has failed to adduce facts showing that any reasonable accommodation existed that would have allowed Willis to perform the essential function of hearing bells, alarms and verbal communications that were used to warn assemblers of approaching dangers, including overhead crane movement and approaching forklifts. This argument could be viewed as the flipside of Stoughton Trailers's claim that as a result of his inability to hear such warnings, Willis posed a "direct threat" to his own health and safety or that of others than could not be eliminated by any reasonable accommodation. To prevail on its essential function argument, Stoughton Trailers must establish that the ability to perceive aural warnings and communicate verbally

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are essential job functions for which there are no reasonable accommodations; to prevail on its direct threat argument, Stoughton Trailers must prove that Willis's inability to perceive aural warnings or to communicate verbally render him a direct threat to safety. Despite the significant overlap of these arguments, it seems that the undisputed facts currently in the record establish Stoughton Trailer's essential function argument but do not suffice to prove its direct threat argument.

Let's deal with the "direct threat" argument first. An employee is not a qualified individual under the ADA if he poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *Branham v. Snow,* 392 F.3d 896, 905–06 (7th Cir.2004) (quoting 29 C.F.R. § 1630.2(r)). The assessment of risk "must be based on medical or other objective evidence" and the determination that a significant risk exists must be objectively reasonable. *Bragdon v. Abbott,* 524 U.S. 649–50 (1998). To determine whether a risk is significant, the employer must consider: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2r); *see also Emerson v. Northern States Power Co.,* 256 F.3d 506, 514 (7th Cir.2001). 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'...." *Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73, 86, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002) (quoting 29 C.F.R. § 1630.2r).

In general, the employer bears the burden of proving that an employee posed a significant risk that could not be eliminated by a reasonable accommodation. *Branham,* 392 F.3d at 906–07 (citing *Dadian v. Village of Wilmette,* 269 F.3d 831, 841 (7th Cir.2001)). Even so, "[t]here may be some instances in which there is an overlap of the question whether an employee can perform the essential functions of a job and the question whether he or she is a direct threat." *Hammel v. Eau Galle Cheese Factory,* 2003 WL 21067091, * 11 (W.D.Wis.2003) . This appears to be such a case, insofar as Stoughton Trailers's contention that Willis cannot perform the essential function of hearing bells, alarms and verbal communication overlaps with its claim that Willis posed a direct threat. Although some courts place the burden on plaintiff in this situation, *see, e.g., EEOC v. Amego, Inc.,* 110 F.3d 135, 144 (1st Cir.1997) (where essential job functions necessarily implicate safety of others, it is plaintiff's burden to show that she can perform those functions in way that does not endanger others), in this circuit, Stoughton Trailers has the burden of proving that the question of Willis's direct threat is so one-sided that no reasonable jury could find for Willis. *Branham,* 392 F.3d at 907 & n. 5 (surveying the cases).

*9 The parties do not dispute that Willis's profound deafness is a permanent, immutable condition that cannot be alleviated or mitigated with the use of any personal corrective measures such as hearing aids. It is undisputed that at Stoughton Trailers' Plant 6 in 2004, an assembler's line of sight often was blocked by the line of trailers moving tail-to-nose down the production line, and by the various blind alleys and corners in the facility. According to Stoughton Trailers, this lack of sight lines and the constant movement of materials throughout the plant by different means, including cranes and forklifts, meant that audible communication and audible warnings often were necessary to ensure worker safety.

Then, contrary to the EEOC's contention, Stoughton Trailers conducted an "individualized assessment" before rejecting Willis's application: it invited Willis to tour the plant and to make suggestions on how he could be accommodated, and it considered those suggestions and other possibilities before concluding that no reasonable accommoda-

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tion existed that would allow Willis to work safely in Plant 6. Schieldt determined that having other employees warn Willis by tapping him, gesturing or shining a flashlight in his eyes would be ineffective because assemblers did not always work within arm's length of each other and because there would be no guarantee that another assembler would notice that Willis was in danger or that he would see the warning. In addition, Stoughton Trailers's forklifts and cranes were already equipped with flashing lights, but those did not provide an effective warning in the many blind spots where the assemblers often worked. There is no support in the record for the EEOC's assertions that Stoughton Trailers "rigidly assumed" that speaking was the only way to communicate in Plant 6 or that it "ignored the methods proposed by Willis in 2004" to accommodate his disability. *See* dkt. 61, at 18.

The EEOC argues that Stoughton Trailers overstates the extent to which auditory warnings were required. It points out that the plant was very noisy, all assemblers wore ear protection, and the cranes and forklifts were equipped with flashing lights to provide a visual warning to the employees on the production floor. While the EEOC has not persuaded the court that Stoughton Trailers has overstated the extent to which auditory warnings were required, I agree with the EEOC that Stoughton Trailers has not submitted sufficient supporting evidence on this point for Rule 56 purposes to establish the absence of a disputed fact on Stoughton Trailer's direct threat argument.

Put another way, although one reasonable inference from the objective evidence is that a profoundly deaf assembler would pose a significant and insufficiently remediable risk of substantial harm to his own safety (and maybe the safety of others), it's not such an exclusive inference on this record that defendant is entitled to summary judgment on it. As the party with the burden of proof on this issue at trial, Stoughton Trailers must establish affirmatively the lack of sufficient evidence favoring the EEOC for a jury to return a verdict rejecting the direct threat defense, namely that the evidence of direct threat is so one-sided that no reasonable jury could find for Willis and the EEOC. *Branham,* 392 F.3d at 907.

*10 Stoughton has presented objective evidence outlining the myriad hazards confronting assemblers in Plant 6, but how would a jury account for the EEOC's arguments about other workers wearing ear protection, and Plant 6's use of visual warnings? Is such evidence sufficient to reduce the safety risk from "significant" to something less? *See Branham,* 392 F.3d at 906 (when considering a direct threat defense, the key inquiry is not whether a risk exists but whether it is significant); *but see Darnell v. Thermafiber, Inc.,* 417 F.3d 657, 662 (7th Cir.2005)("where the plaintiff's medical condition is uncontrolled, of unlimited duration and capable of causing serious harm, injury may be considered likely to occur"). Although the evidence favors Stoughton Trailers, given the heavy burden confronting it on this argument, I cannot conclude that Stoughton Trailers is entitled to summary judgment on its claim of direct threat.

But that's just one side of the coin. The other side is Stoughton Trailer's assertion that it was an essential function of the Assembler 2 position to be able "to hear bells, alarms and all verbal communication." There is ample evidence that these skills were necessary to avoid the myriad hazards confronting assemblers in Plant 6. A single failure to hear the horn of an approaching forklift or a shout from a fellow employee warning that a 53-foot trailer was swinging overhead could lead to catastrophe. The fact that Willis was able to work at a number of shop and factory jobs without incident before applying for the assembly job at Stoughton Trailers is of no moment: the EEOC presents no evidence that any of these previous work environments posed the same hazards as Plant 6. *See LaChance v. Duff's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir.1998) (argument that plaintiff performed job safely at other places was "unavailing" in absence of evidence that other jobs

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required using same kind of appliances); *cf. Darnell,* 417 F.3d at 662 (employee with health condition who has experienced no on-the-job episodes can still pose threat to workplace safety). In sum, there is no question that the ability to perceive and process warnings quickly and adequately is an essential function of the Assembler B job; the question is whether some reasonable accommodation existed that would have qualified Willis for the position.

The EEOC does not appear to contend that any of the accommodations suggested by Willis would have reduced or eliminated the safety risk. Instead, it focuses on the opinion of its expert, Schutz, as proof that reasonable accommodations existed. In his report, Schutz suggested a number of accommodations that Stoughton Trailers could have implemented, including: 1) assigning plaintiff to a crew with consistent placement and one or more supervisors or lead employees who understand his limitations; 2) having a few supervisors and employees learn some sign language; 3) provide notepads to co-workers; 4) place additional lighting in Plant 6; 5) provide a sign language interpreter during the training process; and 6) provide electronic devices, such as a vibrating pager or a "personal digital assistant" to allow other employees to communicate with plaintiff.

***11** Whether Schutz's opinion even would be admissible at trial is questionable. He formed his opinion regarding the availability of accommodations after touring Plant 6 in October 2009, more than five years after Willis applied for the assembler job. As the EEOC acknowledges, beginning in 2005, Stoughton Trailers began an overhaul of Plant 6 that changed traffic patterns, increased automation, eliminated movement of large objects around blind corners and made it easier to move large objects into place.[FN4] However, Schutz did not account for any of these changes when he assessed the feasability of accommodations that could have been made for Willis in 2004. At his deposition, Schutz admitted that he did not know the traffic patterns of forklifts and golf carts in Stoughton Trailers's assembly plant in 2004, did not know if they entered the assemblers' work space, did not know how materials were delivered to the assemblers or how materials moved through the assembly lines and did not how the movement of door frames or rear assemblies was communicated to assemblers. Absent such knowledge, his opinion is of little value. *See generally Ervin v. Johnson & Johnson, Inc.,* 492 F.3d 901, 904 (7th Cir.2007) (setting forth three-step analysis for addressing relevance and reliability of expert testimony).

> FN4. The EEOC implies that if Stoughton Trailers had made these changes sooner, it could have accommodated Willis. *See* dkt. 61 at 23. Perhaps this would have been true, but it's an analytical non sequitur: requiring a manufacturer to revamp its entire production process and plant setup in order to accommodate a deaf job applicant wouldn't qualify as "reasonable.".

Even assuming, *arguendo,* that Schutz's opinions are admissible, he failed to propose any reasonable accommodation that would have eliminated the threat posed if Willis had been allowed to work at Stoughton Trailers's facility in 2004. Even after evaluating the arguably lesshazardous work conditions as they existed at Plant 6 in 2009, Schutz proposed that Stoughton Trailers could have accommodated Willis's deafness by assigning him a "key employee" who would "specifically check to see if [Willis] was in the area of risk or potential harm." Dkt. 68, exh. 2, at 9.[FN5] However, a recommendation that an employee be provided with another employee to "check up" on him is not a reasonable accommodation. *Hammel v. Eau Galle Cheese Factory,* 407 F.3d 852, 866–867 (7th Cir.2005) ("Accommodations which require special dispensations and preferential treatment are not reasonable under the ADA, thus Davis's recommendation that Hammel be given special training and provided with a person to 'check' up on him does not qualify as a reasonable accommodation."); *Williams v.*

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United Ins. Co. of America, 253 F.3d 280, 282 (7th Cir.2001) ("the employer is not required to give the disabled employee preferential treatment, as by giving her a job for which another employee is better qualified, or by waving his normal requirements for the job in question"). The unreasonableness of this proposal is all the more palpable in a huge, hazardous, fast-paced production environment like Plant 6 in May 2004. Assigning an employee to shepherd Willis past the dangers in his daily shift probably would have slowed down the production process and might even have added novel safety risks to the shepherd. *See Hammel,* 407 F.3d at 867 ("To be sure, the ADA does not require an employer to accommodate a disabled employee by making special, individualized training or supervision available in order to shepherd that employee through what is an essential and legitimate requirement of the job.").

FN5. The EEOC asserts that Schutz testified that Willis could have worked safely with "minimal accommodations," such as notepads. This assertion is not supported by Schutz's report or deposition testimony. Central to Schutz's proposal was assigning Willis to a crew with consistent placement and having one or two supervisors or "lead employees" who understood Willis's limitations. Nothing in Schutz's report or deposition suggests that he was of the view that merely providing Willis and other assemblers with notepads would have been enough to address the safety concerns raised by having Willis on the production floor.

***12** Finally, the EEOC suggests that Stoughton Trailers should have accommodated Willis by hiring him and then trying different ways to accommodate his deafness before concluding that no reasonable accommodations existed. The Seventh Circuit rejected this "try and see" approach in *Peters,* 311 F.3d at 846 ("[A] employer is not obligated to allow the employee to try the job out in order to determine whether some yet-to-be requested accommodation may be needed."). *Hoffman v. Caterpillar, Inc.,* 256 F.3d 568 (7th Cir.2001), the case cited by the EEOC, is not on point. In that case, the issue was whether the plaintiff, who was missing her left arm below the elbow, was treated differently from non-disabled employees when she was denied the opportunity to be trained on a high-speed scanner, which was a non-essential function of her job. Ruling on the plaintiff's disparate treatment claim, the court found that there was evidence from which the jury could find that plaintiff was capable of running the high-speed scanner, contrary to the employer's determination that she would not be able to do so with only one hand. *Id.* at 573. As for the employee's failure to accommodate claim, however, the court made clear that if the plaintiff actually was found to be unable to operate the scanner by herself, the employer had no obligation to provide accommodations that would allow her to do so. *Id.* at 577. *Hoffman* provides no support for the notion that an employer making a new hire actually must try various accommodations before it may conclude that no reasonable ones exist. Given the hazards that existed in Plant 6 in 2004, the use of auditory warnings to alleviate those hazards and the substantial harm that could have resulted from a failure to hear a warning signal, Stoughton Trailers cannot be faulted for deciding not to "try and see" if there was set of accommodations that would allow Willis to work safely in Plant 6.

In sum, I conclude that there is no evidence from which a jury reasonably could conclude that reasonable accommodations existed that would have allowed Willis to perform the essential job function of hearing bells, alarms and verbal communications. Accordingly, Stoughton Trailers also is entitled to summary judgment on this ground.

ORDER

IT IS ORDERED that defendant Stoughton Trailers, LLC's motion for summary judgment, dkt. 53, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

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W.D.Wis.,2010.
E.E.O.C v. Stoughton Trailers, LLC
Not Reported in F.Supp.2d, 2010 WL 2572813 (W.D.Wis.), 23 A.D. Cases 929

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General Utility

*Denotes additional requirements on particular lines (jobs are rotational every thirty minutes)

Product Inspection – Employees work in a team of two or three. The Ishida is a machine that drops a certain amount of material into each tray. Assuming the material is shrimp, each tray may require six or seven shrimp to an entrée. If the Ishida only drops four shrimp in an entrée, the employees working this area make up the difference.

Dumping Pasta – Employees bring pasta to the line from the blanchers in a lowboy. A lowboy is a wheeled, stainless steel tub that measures two feet cubed. The general utility employee working this area pushes the lowboy onto a lift until it locks automatically. The employee engages the lift which raises the lowboy up and controls the tilt when it reaches the top so that only the amount of pasta needed falls into the HEMA. The HEMA is a vertically tilted conveyor and depositor. The conveyor drops a specific amount of pasta into each entrée. The operator's only job is to keep the HEMA filled as needed. Position rotates after thirty minutes.

Wiping – In this position the employee inspects the entrées passing by at a rate of one hundred and twenty per minute. If any sauce or pasta is present on the lip of the entrée this employee wipes the excess material from the tray using a tissue wipe. This action is required to assure that the lid seals correctly onto the entrée. Not every entrée needs to be wiped and usually only a portion of the lip needs to be wiped.

Sauce Inspector – This employee checks to ensure the proper amount of sauce and/or product is present in each entrée. If an entrée does not meet the specific requirements for the product this employee removes the entrée from the line and places it on a nearby cart.

*Extruder Teardown – If time permits an experienced employee (former extruder operator) and a general utility worker can be tasked to tear down the extruder for cleaning/sanitation. Lockout/Tagout is required. Job is one hour only.

*Line Supplier – This position requires the employee to use a pallet jack to bring material up to the line for use by trayformer and/or lidsealer operators. Material is kept in designated areas approximately fifty to sixty feet from the line. Materials used on the line are restocked as needed approximately every twenty to thirty minutes. A General Utility can be assigned this position separate form the rotational positions above and it is an all day position.

*Relief Crew – Employees in this position rotate through the above mentioned positions relieving employees for their fifteen minute breaks and thirty minute lunches.

Ingredient Prep - Employees in this position break down large amounts of ingredients into smaller batches for use in production. These employees match batch sheet numbers with material numbers to verify the ingredients are correct and dump these ingredients into lowboys or white lugs. They then move the lowboy or racks of lugs across the plant to the cooler where they will be used as needed during the day. These employees also clean floors and take out trash to the trash dock as required.

B

Packout - Packout employees case-pack and palletize finished and shippable entrées. The frozen seven ounce entrée comes to the packout employee out of a spiral freezer. Sorters grab entrées with their fingertips and slide them onto a conveyor belt directly to their front, release the entrées so that they line up for easy entry into the case-packing machine, and reach for the next entrées. Entrée's that are placed onto a conveyor belt by the sorters go to the case packing machine which automatically makes a box and packs in twelve entrées, seals the box and ejects them to the palletizer who removes this seven pound box every twenty seconds and places it onto a pallet that is within two feet of where the palletizer is standing. If the case packer jams employees assemble on a manual case packing line and take three entrées off at a time and drop them into a box in front of them. The employees then send full boxes down to an employee who seals the box in an automatic sealer and places them on a pallet. All positions rotate every thirty minutes.

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August 31, 2012

original

Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission
30 East Broad Street, 5th Floor
Columbus, Ohio 43215

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

Re: *Carl Chalmer Caldwell v. Michelinas, Inc.*
Complaint No. 07-EMP-CIN-32705

Dear Mr. Martin:

Enclosed please find the *Response to Respondent's Objections* to be filed in the above-referenced action. I have enclosed an additional copy to be time-stamped and returned.

Thank you for your assistance in this matter.

Sincerely,

MIKE DeWINE
Ohio Attorney General

Duffy Jamieson/kas

DUFFY JAMIESON
Assistant Attorney General
Civil Rights Section
duffy.jamieson@ohioattorneygeneral.gov

DJ/kas
Enclosures
cc: J. Miles Gibson, Esq.
Carl Chalmer Caldwell

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	)	COMPLAINT NO. 07-EMP-CIN-32705
	)	
Carl Chalmer Caldwell,	)	Administrative Law Judge:
	)	Denise M. Johnson
Complainant,	)	
	)	
vs.	)	
	)	
Michelinas, Inc.	)	
	)	
Respondent.	)	

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OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

RESPONSE TO RESPONDENT'S OBJECTIONS

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& Bringardner Co., LPA

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Counsel for
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A. Summary of Response to Respondent's Objections

Respondent, Bellisio Foods (formally Michelinas), admits that it did not hire Complainant, Mr. Carl Caldwell, because he is deaf. Bellisio also admits that it had the financial resources to accommodate Mr. Caldwell. Nevertheless, it urges the Commission to reject the Administrative Law Judge's Report and Recommendation because it believes there is no way a deaf person could ever work at Bellisio. The Administrative Law Judge has already carefully considered Bellisio's safety arguments, and has rejected them. Since there are several basic accommodations that will enable Mr. Caldwell to work, the Commission should reject Respondent's objections, and issue a cease and desist order.

B. Discussion

Bellisio's objections boil down to one point – Mr. Caldwell cannot safely and substantially perform the essential functions of the job because he is deaf. However, at the hearing, the Commission proved otherwise. Through the testimony of its expert witness, Jenna Tudela,[1] the Commission proved that with reasonable accommodations, Mr. Caldwell can safely perform the essential functions of the General Utility Employee (GUE) job. The evidence established that by 1) restructuring the job, 2) providing basic communication accommodations, and 3) minimizing his foot traffic in forklift areas, Bellisio could readily accommodate Mr. Caldwell.

1. Job restructuring

GUEs perform a variety of tasks, including, Product Inspection, Dumping Pasta, Wiping, Sauce Inspector, Line Supplier, Relief Crew, Ingredient Prep, and Packout. None of this work is

[1] Ms. Tudela has a master's level engineering degree with a focus on rehabilitation engineering. Ms. Tudela has been a rehabilitation engineer for eleven years, and specializes in assessing work environments to determine whether and how a person with a disability can be accommodated. She has experience in accommodating people who are deaf in industrial and factory environments.

highly specialized. While GUEs rotate through some of these jobs, all GUEs are not required to perform all of the tasks.

In Ms. Tudela's expert opinion, Mr. Caldwell can perform four of the different tasks—Product Inspection, Wiping, Sauce Inspector, and Packout. Restructuring a job for Mr. Caldwell that includes working these four tasks is a reasonable accommodation. There are approximately 550 GUEs at Bellisio. Because Bellisio has such a large GUE staff, carving out tasks in this manner does not fundamentally alter the job.

2. Communication accommodations

There are several reasonable accommodations that can help Mr. Caldwell overcome any communication barriers he may encounter because he is deaf. For instance, a sign language interpreter can help him at his job orientation. When Mr. Caldwell first starts his job, he can be paired with another co-worker to show him what to do. Mr. Caldwell can also be trained by having him watch other GUEs.

Moreover, there are resources, like the Ohio Rehabilitation Services Commission, which provide job coaches to people who are deaf. The Twelfth District Court of Appeals has specifically found that a job coach can be a reasonable accommodation. *Miami University v. Ohio Civil Rights Comm's* (1999), 133 Ohio App.3d 28, 42-42. The court noted that in disability discrimination cases, the parties must work together to institute accommodations. Id. at 43. Job coaching is one way the parties can work together.

Of course, Mr. Caldwell will occasionally need to communicate with his co-workers and supervisors while working on a production line. For instance, he will need to communicate with others when the production line stops and re-starts. In these situations, there are two reasonable accommodators Bellisio can offer. First, it can use lights to signal that the line has stopped. In

fact, Bellisio already uses lights on its lines. Second, when the line starts back up again, Mr. Caldwell can be accommodated with visual cues. Again, Bellisio already has equipped some of its production lines with lights to indicate the line is re-starting.

Still another way Bellisio can provide communication accommodations is by equipping Mr. Caldwell with a vibrating pager. The pager can send and receive unique and/or pre-programmed text messages to and from his supervisor. Alternatively, Bellisio can give Mr. Caldwell a ring, attached to his belt, with laminated pre-printed cards with statements to address commonly raised issues. Finally, basic hand signals, already used by Bellisio employees to communicate over the noisy environment, is yet another example of a simple and reasonable accommodation that will help Mr. Caldwell overcome any issues related to communication.

3. Minimizing forklift traffic

Bellisio is concerned that Mr. Caldwell will not hear a forklift coming up behind him. This situation is easily accommodated. Bellisio can assign Mr. Caldwell tasks related to Product Inspection, Wiping, Sauce Inspector, and Packout. The work done in these areas does not require much time near fast-moving forklift traffic. The majority of the forklift traffic is in the warehouse and freezer areas, away from the employees performing inspection jobs.

Because most of the forklift traffic in the assembly line areas travels on the main aisle, a reasonable accommodation is to assign Mr. Caldwell to internal assembly lines that are not adjacent to the main aisle ways. On the internal lines, Mr. Caldwell will have less interaction with forklifts.

Additionally, Mr. Caldwell's work stations can be equipped with safety ropes and/or colored tape on the floor to alert the forklift drivers to take caution in these marked-off areas. The work stations can also be equipped with rear-view mirrors to allow Mr. Caldwell to see

approaching forklift traffic. The forklifts can also be equipped with vibrating pager devices that function much like a horn. In the event Mr. Caldwell does not see a forklift approaching behind him, a forklift driver can activate a vibrating pager worn by Mr. Caldwell.

C. Conclusion

In summary, there were many ways Bellisio could have accommodated Mr. Caldwell. Instead of exploring any of these possibilities, it made a knee-jerk decision that a deaf person could never work at its plant. The Ohio Laws Against Discrimination prohibit such stereotypical decisions. Thus, the Commission should issue the Final Order that was previously attached to the Ohio Attorney General's Objections.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

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Counsel for the Ohio Civil Rights Commission

CERTIFICATE OF SERVICE

I certify that on August 31, 2012, I mailed a copy of the Response to Respondent's Objections to:

J. Miles Gibson, Esq.
Wiles, Boyle, Burkholder & & Bringardner Co., LPA
300 Spruce Street, Floor One
Columbus, Ohio 43215
Counsel for Respondent

Carl Chalmer Caldwell
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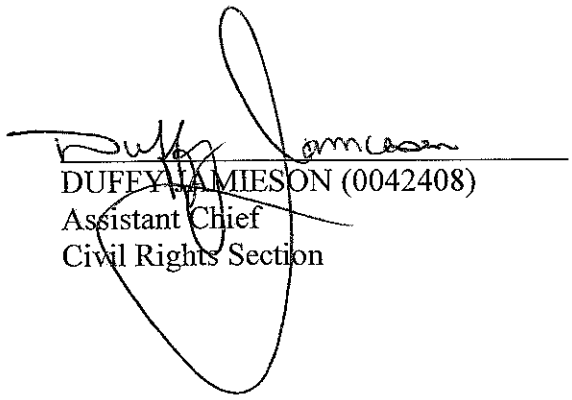
Wellston, Ohio 45692
Complainant



DUFFY JAMIESON (0042408)
Assistant Chief
Civil Rights Section

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert., Chair
Stephanie M. Mercado, Esq.
William Patmon, III
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

October 29, 2012

Carl Chalmer Caldwell
460 S. Michigan Ave.
Apartment No. 7
Wellston, OH 45692

Miles Gibson, Esq.
Wiles, Boyle, Burkholder & Bringardner Co.
300 Spruce St., 1st Floor
Columbus, OH 43215

Re: Carl Chalmer Caldwell v. Michelinas Inc.
CINB5(32705)05142007
22A-2007-05333C
Complaint No. 07-EMP-CIN-32705

Enclosed is a certified copy of the Commission Order issued in the above captioned matter. This Order requires Respondent to Cease & Desist from any and all practices involving the violation of Chapter 4112 of the Ohio Revised Code.

Respondent is herewith notified of its right to obtain judicial review of this Order, as set forth in Revised Code § 4112.06.

FOR THE COMMISSION

Desmon Martin / cjs

Desmon Martin
Director of Enforcement and Compliance

DM:cjs

Enclosure

Lori A. Anthony, Esq. – Chief, Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [Martin – Kanney – Woods]

Certified No. 7003 1680 0007 0163 1674 [Carl Chalmer Caldwell]
Certified No. 7003 1680 0007 0163 1681 [Miles Gibson, Esq.]

John Kasich, Governor

IN THE MATTER OF:	)	
	)	
Carl Chalmer Caldwell	)	
	)	
Complaint,	)	
	)	COMPLAINT NO: 07-EMP-CIN-32705
v.	)	
	)	
Bellisio Foods, Ind. F/K/A Michelina's	)	
	)	
	)	
Respondents.	)	

CEASE AND DESIST ORDER

This matter came before the Commission upon Complaint and Notice of Hearing No. 07-EMP-CIN-32705, issued October 4, 2007; the official record of the public hearing held on October 30-31, 2008, before Denise M. Johnson, the duly appointed Chief Administrative Law Judge; all exhibits therein; the post-hearing brief submitted by the Commission on November 20, 2009; the post-hearing brief filed by Respondent on December 22, 2009; the reply brief filed by the Commission on January 8, 2010; the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations dated July 10, 2012; and the objections to her report.

Complaint 07-EMP-CIN-32705 alleges that Respondent failed to hire Carl Chalmer Caldwell (Complainant) because of his disability in violation of R.C. 4112.02(A). After the public hearing, the Chief Administrative Law Judge recommended that the Commission find that Respondent engaged in unlawful conduct and recommended that Respondent cease and desist its discriminatory conduct, that Mr. Caldwell be offered employment, and that he be paid back pay with interest.

With all matters now before it and carefully considered, the Commission hereby adopts and incorporates, as if fully rewritten herein, the findings of fact, conclusions of law, and recommendations contained in the Chief Administrative Law Judge's Report and specifically orders Respondent to:

(1) Cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

(2) make an offer of employment to Complainant for the position of a General Utility Employee within ten (10) days of this order;

(3) pay Complainant $29,006.00 (the amount he would have earned had he been employed as a General Utility Employee on February 19, 2007, and continued to be so employed up until the date of the hearing, October 31, 2008) plus interest at the maximum rate allowed by law;

(4) pay Complainant the amount he would have earned had he been employed as a General Utility Employee from October 31, 2008, up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less interim earnings, plus interest at the maximum rate allowed by law.

This ORDER issued by the Ohio Civil Rights Commission on this 18th day of October, 2012.

Tom Roberts

Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.

Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission

DATE: 10/18/2012