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Madhu Singh

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Jason Ott
Complainant,

Complaint No. 11-EMP-AKR-35633

v.

Colfor Manufacturing, Inc.
Respondent.

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

MIKE DeWINE
ATTORNEY GENERAL

David A. Oppenheimer, Esq.
Assistant Attorney General
Civil Rights Section
615 W. Superior Avenue, 11th Floor
Cleveland, Ohio 44113
Counsel for Commission

Gust Callas, Esq.
Whitney Willits, Esq.
Black, McCuskey, Souers & Arbaugh
220 Market Street, Suite 1000
Canton, Ohio 44720
Counsel for Respondent
Colfor Manufacturing, Inc.

Jason Ott
418 Woodland Avenue, Apt. 1
Louisville, OH 44641
Complainant

ALJ'S REPORT
Denise M. Johnson
Ohio Civil Rights – Hearing Division
State Office Tower, 5th Flr.
30 East Broad Street
Columbus, OH 43215
614-466-6684
Chief Administrative Law Judge

CENTRAL OFFICE
30 East Broad Street
5th Floor
Columbus, Ohio 43215
(614) 466-2785 Phone
(888) 278-7101 Toll Free
(614) 466-7742 Fax
www.crc.ohio.gov

Ohio Civil Rights Commission

July 30, 2015

David A. Oppenheimer, Esq.
Assistant Attorney General
Civil Rights Section
615 W. Superior Avenue, 11th Floor
Cleveland, Ohio 44113
Counsel for Ohio Civil Rights Commission

Gust Callas, Esq.
Whitney Willits, Esq.
Black, McCuskey, Souers & Arbaugh
220 Market Street, Suite 1000
Canton, Ohio 44720
Counsel for Respondent
Colfor Manufacturing, Inc.

Jason Ott
418 Woodland Avenue, Apt. 1
Louisville, OH 44641
Complainant

Re: *Jason Ott v. Colfor Manufacturing, Inc.*
Complaint No. 11-EMP-AKR-35633

Attached is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code §4112-1-02, your Statement of Objections must be **received** by the Commission no later than **August 24, 2015**. *No extension of time will be granted.*

Any objections received after this date will be untimely filed and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin / jmd

Desmon Martin
Director of Enforcement and Compliance

Attachments

cc: Lori A. Anthony, Section Chief – Civil Rights Section/Kari Stilwell, Administrative Secretary / G. Michael Payton, Executive Director / Keith McNeil, Director of Operations and Regional Counsel / Stephanie Bostos-Demers, Chief Legal Counsel

INTRODUCTION AND PROCEDURAL HISTORY

Jason Ott (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2011.

The Commission investigated the charge and found probable cause that Colfor Manufacturing, Inc. (Respondent) engaged in unlawful employment practices in violation of R.C. 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on February 23, 2012.

The Commission alleged that Respondent engaged in discriminatory conduct by failing to engage in the interactive process regarding a reasonable work accommodation for Complainant's disability.

The Respondent filed an Answer to the Commission's Complaint on July 9, 2012.

A public hearing was held on August 22, 23, 2013, April 8, 9, and June 23, 2014 at the Carroll County Courthouse located at 119 South Lisbon Street, Carroll, Ohio.

The record contains previously described pleadings, a hearing transcript consisting of 797 pages, a post-hearing brief filed by the Commission on September 8, 2014, Respondent's post-hearing brief[1] filed on October 23, 2014, and the Commission's reply brief filed on November 4, 2014.

[1] Respondent asserts that the ALJ's application of the rules of evidence at the hearing is inconsistent with R.C. 4112.02(5)(E) which states in pertinent part that the ALJ "shall not be bound by the Rules of Evidence in ascertaining the practices followed by the Respondent." Applying the rules of evidence, when applicable, in an adversarial legal proceeding insures that the ALJ follows uniform rules governing proof of facts. The application of evidentiary rules to the hearing process is therefore consistent with the purpose and construction of the Ohio Evi. R.102: "The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined.(...)"

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the ALJ's 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 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 March 2, 2011.

2. The Commission determined on September 29, 2011 probable cause existed that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

3. The Commission attempted, but failed to resolve this matter by informal methods of conciliation.

4. Respondent is a manufacturer of automotive parts.

5. Respondent employs its workforce through the International Union of United Automobile Aerospace & Agricultural Implement Workers of America pursuant to the terms of the collective bargaining agreement (CBA). (Comm. Exh. 17)

6. Prior to September 2010 the Respondent operated three manufacturing plants in Ohio in Malvern, Minerva, and Salem.

7. Tim Moran (Moran) is the Respondent's Personnel Director.

8. Complainant began working for Respondent as a temporary employee in February of 1994 at the Respondent's Malvern plant. (Tr. 97-99, Comm. Exh. 3, 4)

9. Complainant was hired as a fulltime employee at the Malvern plant, and completed a sixty day probationary period in September 1994. (Comm. Exh. 3, 4)

10. In 2005, Complainant bid into a Forge Press Operator position at the Malvern plant. (Tr. 120, Comm. Exh. 9)

11. The job duties of a Forge Press Operator entail creating automotive parts using "hot presses" or "cold presses." (Tr.103-104)

12. Hot presses forge parts using blank steel pieces called "billits" by heating up the billit to approximately 1,200 to 2,000 degrees before the billit is formed into the desired part using dies attached to the press. (Tr. 42-43, 103-104)

13. Steel parts forged from hot presses radiate heat and have a distinct, visible red glow emanating from them and must be handled with tongs to prevent injury to the press operator. (Tr. 103-104)

14. Cold presses forge billits into parts using the dies attached to the press without heating the billits before forging. (Tr. 103-104)

15. The slang terms "hot job" and "cold job" are commonly used among Respondent's employees and those in the forging industry as a way of stating whether an employee is operating a hot press or a cold press. (Tr. 41-42)

16. The forged parts are then put in CNC machines where they are lathed to the exact dimensions needed to be a finished part. (Tr. 104-106, 238-239)

17. In February 2006, Complainant bid into a CNC Machine Operator position at the Salem plant. (Tr. 120-122, Comm. Exh. 11)

18. In September 2007, Complainant bid into a Forge Press Operator position at the Salem plant operating hot and cold presses. (Tr. 122-123, Comm. Exh. 12)

19. In January 2009, Complainant began to experience painful swelling in his right arm. (Comm. Exh. 15)

20. Complainant sought treatment for the swelling with Joseph Masternick, DO (Masternick).

21. Masternick recommended that Complainant be restricted to only 40 hours of work per week and no hot jobs for two months. (Tr. 128, Comm. Exh. 14)

22. The Respondent honored the restrictions. (Tr. 127-131, 271-273)

23. On April 1, 2010, the Complainant experienced stroke-like symptoms while working, suffering three "spells" in which the left-side of Complainant's body shut down and he had trouble with his balance. (Tr. 132-133)

24. Later that evening Complainant went to the emergency room. (Tr. 132-133)

25. The CAT scan performed at the emergency room showed lesions in the Complainant's brain.

26. The Complainant was referred to a neurologist, Andrew Stalker, MD (Stalker). (Tr. 133-134, Comm. Exh. 2)

27. In April of 2010, Respondent announced to the union that it was ceasing operations of the plant in Salem where Complainant worked. (Tr. 566-567)

28. Respondent and the union negotiated an agreement regarding the closure of the Salem plant and the jobs that would be moved from the Salem plant to the Malvern and Minerva plants. (Tr. 566-567) (Resp. Exh. 30)

29. Under the CBA, union members bid on available jobs through union notices and submit bids for an available position if they meet the minimum job qualifications. (Comm. Exh. 22, 23)

30. Later in the Spring of 2010, Complainant suffered approximately 40 spells in one weekend and went to the emergency room.

31. Tests performed by Stalker confirmed the Complainant's symptoms and spells were the result of Multiple Sclerosis. (Tr. 136)

32. Complainant was also off from work under Stalker's orders. (Tr. 137, Comm. Exh. 16)

33. Stalker recommended in his June 29, 2010 report that due to Complainant's sensitivity to heat Complainant not work in environments that exceed 85 degrees and work no more than 40 hours per week. (Tr. 155, Comm. Exh. 2)

34. On July 26, 2010, Respondent received a letter from Stalker that contained work restrictions for Complainant. (Tr. 159, Comm. Exh. 18-20)

35. The work restrictions limited Complainant to 40 hours of work per week and to avoid hot presses.

36. On July 26, 2010, Michael Marvin, MD (Marvin) performed a fitness for duty exam on Complainant to determine whether Complainant was able to return to work. (Comm. Exh. 20)

37. Marvin recommended that Complainant was fit for duty under Stalker's restrictions of working no more than 40 hours per week and avoiding hot presses due to his sensitivity to heat. (Comm. Exh. 20)

38. On July 28, 2010, Respondent received Marvin's report that the Complainant was fit for duty. (Comm. Exh. 20)

39. Respondent received additional correspondence from Stalker on July 29, 2010 stating that Complainant could return to work on August 2, 2010 with the permanent restrictions of not working hot jobs and only working 40 hours per week. (Comm. Exh. 19)

40. When Complainant returned to work at the Salem plant on August 2, 2010, Complainant's foreman assigned Complainant to working only cold presses. (Tr. 161)

41. On September 14, 2010 a Notice of Job Opening was posted by Respondent seeking 10 (ten) Forge Press Operators for the Malvern plant. (Comm. Exh. 22)

42. Complainant submitted a bid for the open Forge Press Operator positions at the Malvern plant on September 15, 2010. (Comm. Exh. 23)

43. On September 24, 2010, Moran posted a list of successful bid applicants who were awarded the Forge Press Operator positions at the Malvern plant. (Comm. Exh. 26)

44. Complaint was not named as a successful bidder on the September 24, 2010 notice, nor was he listed as an applicant for the available positions at the Malvern plant.[2] (Comm. Exh. 26)

45. Among the successful bidders were employees from the Salem plant with less seniority. (Tr. 167-169, 270, 461, 502, 590-591, 681-685, 702-703, 768-769 Comm. Exh. 25, 26)

46. Complainant spoke with his foreman regarding the Complainant's omission from the September 24, 2010 notice. (Tr. 169-170)

47. Complainant's foreman then contacted Moran regarding Complainant's omission from the September 24, 2010 notice. (Tr. 169-170)

48. On October 1, 2010, the Complainant received a memo from Moran.

[2] The CBA requires that notice be posted for all applicants for the position at the time that the successful bidders for a position are posted.

49. The memo indicated that Complainant was not awarded a Forge Press Operator position because of the Complainant's work restriction of not being able to work hot jobs.

50. The memo further indicated that "[t]his type of restriction would prevent the Company from assigning work effectively and efficiently (Job Rotation) which is our obligation." (Comm. Exh. 27)

51. Complainant spoke to the union president, Alva "Butch" Powell (Powell), who suggested a meeting with Moran to discuss why Complainant was denied one of the Forge Press Operator positions at the Malvern plant. (Tr. 177)

52. A meeting between Powell, Complainant, and Moran was held at the Salem plant the morning of October 21, 2010. (Tr. 185, Comm. Exh. 36)

53. Complainant brought a Request for Accommodations letter with him to the meeting, but Moran would not accept the letter without a signed release to discuss the Complainant's medical information. (Tr. 186-187, Comm. Exh. 28, 36)

54. Complainant mailed Moran a copy of his accommodations request letter after the October 21, 2010 meeting.

55. Complainant's accommodation request letter was received by Respondent on November 1, 2010. (Comm. Exh. 29)

56. On November 2, 2010, Respondent posted two separate notices for 2 (two) CNC Machine Operator positions and 8 (eight) Forge Press Operator positions available at the Malvern plant. (Comm. Exh. 30, 33)

57. The Complainant submitted a bid for the open Forge Press Operator positions.

58. The Complainant was denied the position on November 10, 2010. (Comm. Exh. 33)

59. The Complainant also submitted a bid for the open CNC Machine Operator position on November 5, 2010.

60. Complainant was awarded the CNC position on November 10, 2010. (Comm. Exh. 31, 32)

61. A letter from the Respondent regarding the Complainant's accommodation request was sent to Complainant on November 12, 2010. (Comm. Exh. 26)

62. In the letter Moran stated that, "since your Doctor has not seen our operations, he would need to explain what a 'hot job' means" and that Moran was available to meet with Stalker regarding the Complainant's restrictions. (Comm. Exh. 36)

63. Complainant then asked the union not to represent him further in the matter and retained Merl H. Wayman (Wayman) as counsel. (Tr. 488-489, Comm. Exh. 37)

64. Wayman sent the Respondent correspondence on December 10, 2010 and enclosed a signed medical release regarding the Complainant's medical information. (Comm. Exh. 37)

65. Wayman sent a follow-up letter to Respondent on December 31, 2010. (Comm. Exh. 38)

66. Wayman sent Respondent a third letter on January 6, 2011 enclosing a report from Dr. Stalker written on November 18, 2010 regarding Complainant's work restrictions. (Comm. Exh. 39)

67. On January 13, 2011, Wayman sent Respondent a fourth letter stating that Stalker recommended that the Complainant should not work in environments that exceed 90 degrees. (Comm. Exh. 40)

68. Respondent did not reply to any of Wayman's letters. (Comm. Exh. 40)

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]

1. The Commission's complaint alleges that Respondent engaged in discriminatory conduct by failing to engage in the interactive process regarding a reasonable work accommodation for Complainant's disability.

[3] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. These allegations, if proven would constitute a violation of R.C. § 4112.02, which provides in pertinent part, that:

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the ... disability ... 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 by a preponderance of reliable, probative, and substantial evidence.

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.

5. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act (ADA) of 1999 as amended by the Americans with Disabilities Act Amendments of 2009 (ADAA).

6. 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).

7. The Commission's burden of establishing a *prima facie* case is not an onerous one. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981).

8. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its adverse employment action. *McDonnell Douglas v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

9. The parties do not dispute that Complainant's diagnosis of Multiple Sclerosis is a disability that limits a major life activity of the Complainant within the meaning of the R.C. 4112.01 (A)(13).

10. During Complainant's tenure with Respondent, Complainant worked as a Forge Press Operator on both hot and cold jobs. (Tr. 98-99, 108-119; Comm. Exh. 3-8)

11. When Complainant returned to work at the Salem plant in August 2010 his supervisor honored his work restrictions by restricting him to operate a Forge Press machine that was a cold job. (Tr. 161)

12. The Commission established the second element of a *prima facie* case of disability with the introduction of evidence that Complainant had experience working as a Forge Press Operator and that the Complainant could perform the position with the reasonable accommodation of operating a Forge Press that is a cold job.

13. The Commission introduced evidence that Respondent did not hire Complainant for the positions of Forge Press Operator in September and October 2010 because of Complainant's work restrictions based on his disability.

14. The Commission established a *prima facie* case of disability discrimination.

15. The Respondent's articulated reason for denying the Complainant the position of Forge Press Operator is: (1) Complainant did not request an accommodation prior to bidding on the position in September 2010, and (2) Complainant failed to engage in the interactive process after he was denied the position in October 2010.

16. An employer has an affirmative duty to make a reasonable accommodation to the disability of an employee. O.A.C. 4112-5-08(E)(1).

17. Therefore the *McDonnell Douglas prima facie* case and burden shifting analysis does not apply in a failure to accommodate case. *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283-1284 (7th Cir. 1996).

18. To establish a *prima facie* case that Respondent failed to engage in the interactive process regarding a reasonable work accommodation the Commission must establish evidence demonstrating that:

    1) Respondent knew about the Complainant's disability;

    2) Complainant requested accommodations or assistance for his or her disability;

    3) Respondent did not make a good faith effort to assist the Complainant in seeking accommodations; and

    4) Complainant could have been reasonably accommodated but for the Respondent's lack of good faith.

    Shaver v. Wolske & Blue, 138 Ohio App. 3d 653, 664, 742 N.E.2d 164, 171-72 (2000) citing *Taylor v. Phoenixville Sch. Dist.,* 184 F. 3d 296, 319-20 (3d Cir. 1999).

19. Before an employer can be found to have violated the reasonable accommodation provisions of the ADA an employee has the initial duty to inform the employer of his disability. *Shaver,* 138 Ohio App. 3d at 668 citing *Beck v. Univ. of Wis. Bd. of Regents,* 75 F.3d 1130, 1134 (7th Cir. 1996).

20. Respondent's assertion that Complainant did not request an accommodation prior to bidding on the position of Forge Press Operator in September 2010 lacks credibility.

21. Moran knew of Complainant's disability prior to Complainant bidding on the positions of Forge Press Operator in September and October of 2010 because he had notice of Stalker and Marvin's requests that Complainant not work any hot jobs and work only forty hours a week.

22. Although the doctors' permanent restriction letters to Respondent did not contain the words "accommodation request" a reasonable inference can be drawn that Complainant made a request for an accommodation. *Smith v. Henderson*, 376 F.3d 529, 535 (6th Cir. 2004).

> "What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation". *Taylor,* 184 F.3d 296, 313.

23. After Complainant inquired as to why he was not listed as a person who had bid for a Forge Press Machine operator position he received a memo from Moran dated October 1, 2010.

24. Moran stated that Complainant was not awarded the job of Forge Press Machine operator due to the restriction that he could not work any hot jobs.

25. Moran's memo also stated that the Complainant's requested work restriction would prevent the company from assigning work effectively and efficiently.

26. Moran's statement shows that he failed to understand an employers obligation under the ADAAA to treat an employee with a disability differently, i.e., preferentially. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

> 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.

27. The Commission introduced credible testimony that some Forge Press Operators run hot jobs, others run cold jobs, while some rotate between hot and cold jobs, and others sort parts so that parts that aren't made properly are scrapped. (Tr. 40, 46-48, 59-62, 102-103, 236, 362-363, 660-663, 701-702)

28. Moran did nothing to determine whether Complainant could operate a Forge Press that was a cold job even though Complainant operated a Forge Press that was a cold job at Salem when he returned to work in August 2010.

29. Moran, instead, based his reason for not awarding Complainant the position on an assumption rather than undertaking an objective investigation. (Tr. 40, 48-51, 82-83, 211, 594-596; Comm. Exh. 25-26) (Tr. 47, 62)

30. Complainant then sought the assistance of the union to interact with Respondent about Complainant's need for accommodation to work as a Forge Press Operator.

31. The Complainant met with Moran and Powell on October 21, 2010.

32. Moran refused to discuss Complainant's medical restrictions at the meeting with Complainant and Powell.

33. Moran stated that any further clarifications as to Complainant's medical condition or restrictions would have to come from Complainant's doctor, requiring that the doctor come to the plant. (Tr. 196-200, 290-291, 384-386, 466-467, 478-479, 483-484, 523-526, 598-599, 603-604, 622, 709-714; Respondent's Exh. 23)

34. Once Respondent was informed of Complainant's disability and a request for a reasonable work accommodation the Respondent had a duty to initiate an interactive process with the Complainant. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated on other grounds* 535 U.S. 391, 122 S. Ct. 1516 (2002).

> The duty of an employer to make a reasonable accommodation mandates that the employer interact with an employee in a good faith effort to see if a reasonable accommodation is possible. *Shaver v. Wolske & Blue*, 138 Ohio App. 3d 653, 664, 742 N.E.2d 164 (2000) citing *Taylor, Kleiber v. Honda of Am. Mfg., Inc.* 485 F. 3d 862, 868 (6th Cir. 2007) citing *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir. 1996).

35. The interactive process requires participation from both sides as each party holds information the other does not have or cannot easily obtain. The employer will often hold more information than the employee about what adjustments are feasible. *Taylor, supra at 316.*

> "[N]either party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Bultemeyer,* 100 F.3d at 1285 quoting *Beck,* 75 F.3d at 1135.

36. Complainant brought a request for accommodations letter to the meeting.

37. Moran refused to accept the letter without a signed release to discuss the Complainant's medical information.

38. Although Moran was aware of the purpose for the meeting he did not inform Complainant prior to the meeting that he would not discuss Complainant's medical condition without a signed release. (Tr. 187-188)

39. After the October 21, 2010 meeting, Complainant sent a request for accommodations to Moran that was received on November 1, 2010.

40. On November 2, 2010 Respondent posted openings for eight Forge Press Operator positions.

41. Complainant bid on the Forge Press Operator position.

42. Complainant was denied a Forge Press Operator position on November 10, 2010.

43. On November 12, 2010 Complainant received a letter from Moran stating that Stalker needed to explain what a "hot job" means and that Moran was available to meet with Stalker.

44. Complainant testified that he explained to Stalker what a "hot job" is and that Stalker said he would not come to the Malvern plant because he was not qualified to specify exactly which hot presses Complainant could or could not operate. (Tr. 290, 324-325)

45. I found Complainant's testimony to be credible.

46. The Respondent's assertion that Complainant caused the break down in the interactive process because he failed to work with the union also lacks credibility.

47. After the meeting Complainant told Powell that he was not pleased with the representation that he was getting from the union but did not tell Powell until December 20, 2010 that he no longer wanted the union involved. (Tr. 202-204, 488-491, Resp. Exh. 27)

48. Complainant believed that the union was not providing him with adequate representation and eventually sought the help of an attorney to contact Respondent.

49. I found Complainant's testimony to be credible.

50. Moran stated about Complainant that "(p)hysically he looks like he can do any job. You know, there's nothing obviously that I see that restricts him from doing any job." (Tr. 710)

51. Moran's assessment of Complainant's disability based on physical appearance is what the ADA was enacted to combat.

> In the opening provisions of the ADA, Congress determined that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 588, 119 S.Ct. 2176, 2181 (1999).

52. Moran's treatment of Complainant's bids for Forge Press Operator positions in September and October 2010 shows a pattern of obstruction and delay in initiating the interactive process.

53. The credible evidence shows that Respondent refused to initiate the interactive process and engage in a good faith effort to determine if accommodations were available that would permit Complainant to work as a Forge Press Machine Operator position after Complainant bid on those positions in September and October 2010.

54. Respondent's failure to engage in the interactive process regarding a reasonable work accommodation after Respondent had notice is illegal disability discrimination in a violation of R.C. 4112.02(A).

55. Therefore, Complainant is entitled to relief as a matter of law.

RECOMMENDATION

For all of the foregoing reasons, it is recommended in Complaint No. 11-EMP-AKR-35633 that:

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

2. The Commission orders Respondent within 10 days of the Commission's Final Order to pay Complainant back pay, including raises, benefits and overtime pay based on the wages Complainant would have been paid had he not been denied the Forge Press Operator position he bid on in September 15, 2010 [4]; and

3. Complainant be awarded the next available Forge Press Operator position with Respondent at the Malvern plant with back pay accruing up until the date that the Respondent offers Complainant the position of Forge Press Operator at the Malvern plant ; and

[4] Pay for the position of Forge Press Operator was $17.35 per hour and the CNC operator position pay was $15.60 for a difference of $1.75 per hour. To calculate owed back pay the Complainant should receive $1.75 per hour worked at the lower rate of $15.60 per hour. The ALJ does not have the amount of hours Complainant worked at the lower rate to complete the calculation. (Comm. Ex. 25, 30)

4. The Commission orders Respondent to receive training on the anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order. As proof of participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training. The letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order; and

5. The Commission orders Respondent within nine (9) months of the date of the Commission's Final Order to submit to the Compliance Department a draft for an Employee Handbook outlining Respondent's policies and procedures regarding Ohio's anti-discrimination laws, *including but not limited to,* sections regarding:

- Zero tolerance for any form of discrimination based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry
- Sexual harassment
- Racial harassment
- Pregnancy
- Disabilities
- Progressive discipline and disciplinary grid
- Reporting and investigation of complaints

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 30, 2015