

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 80-04

DECISION

IN THE MATTER OF THE APPEAL OF:

ROBERT L. ALEXANDER, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT DIVISION,
Agency, and
the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Robert Alexander, appeals the denial of employment at the Department of Public Works, Wastewater Management Division (Agency). The Agency offered to employ the Appellant on June 1. Before the Appellant accepted, the Agency rescinded its offer. The Appellant filed his appeal on June 10, 2004.

The hearing concerning this appeal was held on September 28, 2004, before Hearing Officer Bruce A. Plotkin. The Appellant was *pro se*. The Agency was represented by Robert Nesor, Esq., with Mr. Steve Bello serving as the Agency's advisory witness.

Agency exhibits numbered 1-3 were admitted without objection. Agency exhibit #4 was admitted over objection. The Appellant's exhibits C-I were admitted without objection. His exhibits A, and B were admitted over objection

The Agency presented the following witnesses: Ms. Annette Rossi-Davis, Ms. Angie Lee, Mr. Tyrone Abeyta, Ms. Patti Abeyta, Mr. Stephen Bello, Mr. Mike Michalek, and Mr. Steven Brendlinger. The Appellant testified on his own behalf with no other witnesses.

II. ISSUES

The following issues were presented for appeal:

1. Has the Appellant stated a claim upon which the Hearings Officer has jurisdiction to grant relief?
2. Was the Appellant disabled within the meaning of the Americans with Disabilities Act (ADA)?
3. If the Appellant was disabled within the meaning of the ADA, did the Agency wrongfully discriminate against him in failing to hire him?
4. If the Agency wrongfully discriminated against the Appellant in failing to hire him, what relief is due?

III. FINDINGS AND ANALYSIS

A. Background

The Appellant was an employee for the Department of Public Works, Solid Waste Management Division from 1996 to June of 2000. He was injured on the job in 1999. In his Worker's Compensation claim following that injury, the Appellant was deemed to have reached maximum medical improvement (MMI) from that injury on June 16, 1999, with an anticipated permanent partial disability of 13% to his left shoulder. [Exhibit D-2 B]. He was thereafter permanently restricted from lifting more than 30 pounds. *Id.*

Because the Solid Waste Management Division determined the Appellant's restrictions prevented him from performing the essential functions of his position, it began an interactive process with the Appellant in January, 2000. [Exhibit 4]. During that process, the Appellant was offered a demotional appointment to the Public Office Buildings (POB) Division of the Department of Public Works. The Appellant accepted the demotional appointment on June 2, 2000, thereby concluding the interactive process. The agreement for the demotional appointment specified that no determination would be made regarding whether the Appellant was disabled under the ADA. *Id.* The Appellant resigned from POB in March, 2001.

On May 11, 2001, the Appellant was examined by the surgeon who originally treated the Appellant following his workplace accident. The surgeon determined the Appellant had no more disability and released him from all work restrictions. [Exhibits D, E, F]. That information was placed in the Appellant's permanent medical file at the City of Denver Employee Clinic. [Testimony of Annette Rossi-Davis].

On December 29, 2003, the Appellant applied for the position of Senior Utility Worker with the Wastewater Management Division. He took the written test for that position on April 19, 2004 and received a passing score of 76.2%. He then interviewed for that position on May 20, 2004.

On June 1, 2004, Mike Michalek, Senior Agency Personnel Analyst, left a voicemail message at the Appellant's home notifying him of a contingent offer of employment with the Agency. The message stated as follows:

I'm trying to get a hold of a Robert Alexander, and this is Mike Michalek from Public Works, Human Resources, 720-913-8510; and if you could call me back, I have a job offer for you, and again, that would be over at Wastewater. Thank you.

[Exhibit C].

The same day, Michalek called back, retracting the offer before the Appellant learned of the original offer. Michalek left the following message.

[Inaudible] for Robert Alexander. This is Mike Michalek from Public Works, Human Resources, 720-913-8510 at 3:40 p.m. on Tuesday. Sir, [inaudible] offer of employment, repeat, retract our offer of employment, and the reason why is because, well, you were at Solid Waste and we were able to locate this. You were disqualified from performing the essential functions of the position there. Once Wastewater realized the positions would be similar, they realized there would be similar functions or duties, and since you were disqualified, you would not be able to perform those functions; therefore this offer has been retracted. If you need to talk to me, again my number is 720-913-8510.

[Exhibit C].

B. Jurisdiction and Burden of Proof

The Appellant claims the Agency's failure to hire him was based on disability discrimination under Career Service Rule (CSR) 19-10 c) 1). That subject is properly within the purview of the Hearing Officer's jurisdiction, and was not contested by the Agency.

The Appellant bears the initial burden of establishing a *prima facie* case for his claim of disability discrimination. See In Re Nguyen, 169-03. In order to establish a *prima facie* case for disability discrimination, the Appellant must show that (1) he is a disabled person as defined by the ADA¹; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) the employer discriminated against him because of the disability. Taylor v. Pepsi-Cola Co.,

¹ The Career Service Rules regarding disability are intended to comply with and be interpreted consistent with the ADA. See CSR 5-84, and In Re Nguyen, 169-03.

196 F.3d 1106, 1109 (10th Cir., 1999), *citing* Butler v. City of Prairie Village, 172 F.3d 736, 748 (10th Cir. 1999).

If the Appellant makes such a showing, the Agency must then demonstrate a legitimate, non-discriminatory business purpose for its actions. If the Agency makes such a showing, Appellant must then establish that the Agency's non-discriminatory business purpose is a pretext for discrimination. In Re Vigil, 17-03, p.7. Due to this burden-shifting scheme, the Appellant proceeded first with his case-in-chief.

C. Was the Appellant disabled within the meaning of the Americans with Disabilities Act (ADA)?

1. The ADA, generally.

The ADA, or Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, prohibits employers from discriminating against qualified individuals with disabilities because of their disabilities. Lowe v. Angelo's Italian Foods, 87 F.3d 1170, (10th Cir.1996). Regulations for administering the ADA which were promulgated by the Equal Employment Opportunity Commission (EEOC) provide significant guidance for defining terms such as "disability."²

Disability means, with respect to an individual --

- (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (2) a record of such an impairment; or
- (3) being regarded as having such an impairment.

29 C.F.R. §1630.2 (g). The Appellant claims he is disabled under §(2), having a record of impairment, and §(3), being regarded as having an impairment.

2. A Record of Impairment

The phrase "has a record of such impairment" means an individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. 1630.2(k). The purpose of this provision is twofold: to protect employees from discrimination because of a history

² Even though the U.S. Supreme Court expressed some skepticism that EEOC regulations interpreting the term "disability" in the ADA are due any deference, Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 194 (U.S., 2002), many cases have adopted those interpretive regulations, with respect to ADA definitions and interpretations, *see id.* The Hearings Officer will follow the lead of nearly every jurisdiction including the 10th circuit in adopting the EEOC interpretive regulations in defining ADA terms. *See, e.g.,* Lowe v. Angelo's Italian Foods, 87 F.3d 1170 (10th Cir., 1996).

of disability, such as a former cancer patient; and to protect against discrimination based on erroneously classifying an employee as disabled. 29 CFR 1630 Appendix.

This part of the definition is satisfied if a record relied on by an employer indicates the individual either has or had an impairment that substantially limits a major life activity. The only evidence presented by the Appellant in this regard was his 1999 worker's compensation claim. A worker's compensation claim under state law may not be used as evidence of having a record of impairment under the ADA. Mann v. City of Inglewood, 1998 U.S. App. LEXIS 29034 (9th Cir., 1998),. Also, the Appellant did not claim his shoulder injury substantially limited a major life activity. For both these reasons, the Appellant has failed to establish, by a preponderance of the evidence, that he was disabled under the "record of impairment" prong of the ADA test for disability.

3. Being Regarded as Having Such an Impairment

The Appellant presented evidence, although not stated as such, that the Agency regarded him as having a substantial impairment. "Regarded as having such an impairment" means the employee

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation.

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. 1630.2(l).

In order to be regarded as substantially limited in the major life activity of working, the focus is not on the plaintiff's actual abilities but instead, is on the Agency's misperceptions of the Appellant's ability. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). The employer must wrongfully regard the employee as unable to perform a class of jobs or a range of jobs in different classes, not just a particular job. Long v. City of Leawood, 2000 U.S. App. LEXIS 273 (10th Cir., 2000).

As regards the Sutton tests, Michalek's second telephone message clearly indicates the reason the Agency rescinded its offer of employment was "you would not be able to perform those [essential] functions." [Exhibit 3, and Michalek testimony]. The Appellant's evidence that he has not been disabled since May 11, 2001 was un rebutted. Therefore, the Appellant's evidence tends to show the Agency misperceived the Appellant's ability to perform the essential functions of the job which is the subject of this appeal. The Sutton analysis does not stop there, however. The "regarded as"

prong of the ADA test, requires the Agency must also deem the Appellant unable to perform a class of jobs or range of jobs in different classes.

The Solid Waste Management Division's offer of a demotional appointment to the Appellant in 2002 stated "[i]t is our understanding that there are no vacant equivalent positions within the City for which you meet the minimum qualifications and can perform with or without reasonable accommodation;" [Exhibit 4]. The Agency endorsed that understanding in its rescission of the offer to hire the Appellant. [Exhibit 3, and Michalek testimony]. The Hearing Officer concludes the Agency's reliance of that statement constitutes its determination the Appellant cannot perform the class of jobs from which he was demoted. The Appellant has therefore shown, by a preponderance of the evidence that the Agency deems the Appellant unable to perform a class of jobs

The final portion of the "regarded as" prong requires the Agency view the Appellant as unable to perform a range of jobs in different classes. In Burgard v. Super Valu Holdings, 1997 U.S. App. LEXIS 12228 (10th Cir., 1997), a union employee, Burgard, injured his back in a work accident. He was determined to have a twenty five pound lifting restriction from his injury. His supervisors believed he was unable to perform the essential functions of all union warehouse jobs which required a worker to lift greater than fifty pounds. For that reason, the Super Value terminated Burgard, then offered him a different, non-union job, which he accepted. The court stated Super Valu's consideration of the Burgard's lifting restrictions "did not cause him to be regarded as disabled under the ADA, especially since Super Valu offered Burgard a nonunion warehouse job he was capable of performing." *Id.* Thus, even though the employer in Burgard may have regarded its employee as unable to perform a class of jobs - that of all union warehouse jobs - it did not regard him as unable to perform a range of jobs in different classes; the proof was the job offer in a different class of work. Similarly, even though the Agency deems the Appellant incapable of performing the essential functions of a certain class of jobs, by adopting the Solid Waste Management Division finding that the Appellant is capable of performing the essential functions of a position in a different class, the Agency does not regard the Appellant as unable to perform a range of jobs in different classes.

Conant v. Hibbing, 271 F.3d 782 (8th cir. 2001) is a case with many factual similarities to the present case. Conant applied for a General Laborer position with the City of Hibbing, MN. The City conditionally offered Conant a position, subject to his passing a pre-employment physical examination. Conant was examined by a doctor who had previously treated him for a back condition. After examining Conant, the doctor issued a report to the City stating Conant should not lift more than thirty pounds and other restrictions. Based on the doctor's report, the City sent Conant a letter rescinding its conditional offer of employment. Conant contacted the City to explain that he had rehabilitated his back and that he was fully capable of performing the duties of the job without accommodation. A subsequent examination revealed that Conant was indeed, fully capable of performing all of the essential job functions for the job of General Laborer. Conant brought those findings to the City's attention, but the City still declined to hire him. The letter to Conant rescinding the City's employment offer stated it

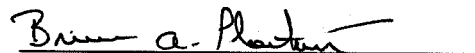
concluded Conant could not meet the requirements of the position of General Laborer, and not that the City regarded Conant as "disabled" within the meaning of the ADA.

The Conant court concluded the mere fact that the City was aware of Conant's past medical condition and might have perceived Conant as still having a medical restriction, is insufficient to establish that the City regarded Conant as disabled. Conant, citing Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000). As in Conant, the Agency's awareness of, and even wrongfully determining the Appellant was unable to perform the essential functions of the Senior Utility Worker position, does not equate, under the Conant ruling, to the Agency's determination that the Appellant is precluded from working in a range of jobs in different classes; nor did the Appellant provide proof the Agency deemed him unable to perform a range of jobs in different classes. Because the Appellant is not precluded from performing a range of jobs in different classes, the Hearing Officer must conclude the Agency did not regard the Appellant as disabled as defined in the ADA. It follows, then, that the Appellant is not disabled within the meaning of the ADA.

IV. DECISION

As the Appellant has failed to meet his burden to prove by a preponderance of the evidence that he is disabled within the meaning of the ADA, he has therefore not met his burden to prove, by a preponderance of the evidence, that the Agency wrongfully discriminated against him in failing to hire him. The Agency action in rescinding its offer of employment to the Appellant is therefore AFFIRMED.

Dated this 7th day of October, 2004.



Bruce A. Plotkin
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this ~~11th~~ day of ~~October~~, 2004, addressed to:

17th November 2004

Mr. Robert L. Alexander
657 Meade Street
Denver, CO 80204

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the inter-office mail, this ~~11th~~ day of ~~October~~, 2004, addressed to:

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