

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 45-10 A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

VERONON HOWARD,

Appellant/Respondent,

vs.

DEPARTMENT OF PARKS AND RECREATION, and the City and County of Denver, a
municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's petition for review. After considering the evidence in the record, the Board **REVERSES** the Hearing Officer's Decision dated June 16, 2011, on the grounds outlined below.

I. FACTUAL SUMMARY

Appellant began working as an Operations Supervisor in 2002. However, by 2009, the combination of reduced staffing and increased workloads required operation supervisors to become "working supervisors." (Testimony of Jill Coffman, Leo Daras, Juan Marsh, Adam Smith and Doug Woods). The physical tasks required of "working" operations supervisors included the removal of graffiti, trash and snow, operating tractor mowers and loading machinery and equipment onto trucks. Decision, p. 8; R. 296 (Ex. 11-3). Based on the totality of evidence presented at the hearing, the Hearing Officer found that performing these physical tasks, which included the ability to lift, bend and stoop, were essential functions of Appellant's job. Decision, p. 9.

In January 2010, Appellant notified his supervisor that he had injured his back while off the job. By March, Appellant had exhausted leave available under the FMLA and the Agency began the interactive process to determine whether he was able to perform the essential functions of his position, and whether any reasonable accommodations could be provided. An interactive process meeting was held on April 1, 2010, with the City's ADA Coordinator, Rita Murphey. During this meeting, Ms. Murphey observed that Appellant was uncomfortable and had difficulty walking. *Id.* at 4.

Appellant's physician, D. Sutton, provided Ms. Murphey with a reasonable accommodation questionnaire as well as an updated status report that contained the following medical restrictions and related information:

no frequent lifting of > 20 lbs. & no repetitive lifting, bending, or stooping as these will aggravate his back strain. A desk-oriented job would be significantly more in the interest of Mr. Howard's continued recovery than one involving heavy, repetitive labor. His condition may gradually improve to a level where resumption of work without restrictions can occur, but this date is not known to me.

R. 283 (Ex. 6-2).

Based on the written job specifications for an operations supervisor and the information provided by Appellant's supervisor, Jill Coffman, including the thirteen physical tasks outlined in Ex. 11-3, Ms. Murphey concluded that performing physical tasks, including the ability to lift, bend and stoop, were essential functions of Appellant's job. Transcript, 2/25/11, pp. 115, 127-128. However, during the interactive process meeting, Appellant disputed that performing physical tasks was required of him:

He was- - was very adamant that his position did not require him to do physical duties in the position; that it was not a working operations supervisor position. That his position was sedentary in nature. And he was very focused on that. . . .[B]ecause his focus was returning to work doing the sedentary or desk type duties of his position. And he was adamant that he did not have to do any physical component of the position.

Transcript, 2/25/11, pp. 131-132.

Based on D. Sutton's medical restrictions, Ms. Murphey determined that Appellant was unable to perform the essential functions of his job. *Id.* at 133. Because of the variety of physical tasks Appellant was required to perform in the field, Ms. Murphey concluded that it was impossible to find a reasonable accommodation that would enable him to perform all the essential functions of his current position. *Id.* at 134, 142-143, 148-149, 160.¹ She then turned her attention to a job reassignment. Ms. Murphey explored clerical positions in the administrative support series, but all of those positions required filing activities and the related ability to bend and stoop, which

¹ During the hearing, Ms. Murphey was asked whether the use of a mechanical "grabber" would be an accommodation. She acknowledged that such a device could be used to pick up a stray piece of trash, but would not accommodate all the other physical activities required of Appellant's position, including utilizing machinery and lifting over 20 pounds. *Id.* at 166.

Appellant could not do because of his medical restrictions. *Id.* at 135. Nevertheless, on April 28, 2010, there were no vacant clerical positions in the City. *Id.* at 136.

In a letter dated April 28, 2010, Ms. Murphey informed Appellant that he was unable to perform the essential functions of his job because of his medical restrictions and his return to work date was unknown. (Ex. 7). The letter also indicated that Ms. Murphey had considered Dr. Sutton's recommendation of a "desk job" but "there is no desk job to provide you." *Id.* Ms. Murphey advised that because there was no reasonable accommodation available, she was ending the interactive process. *Id.* She also advised that she was sending the matter back to the Agency to consider whether additional leave time should be granted. *Id.*

On May 5, 2010, the Agency's HR representative notified Appellant that he could request additional leave from the Agency if he believed he needed it. Decision, p. 4. However, Appellant indicated that he was not going to seek additional leave because he did not believe his job required physical activity. Instead, he requested permission to return to work immediately. *Id.* Agency Manager Kevin Patterson advised HR Supervisor Suzanne Iversen to begin the disqualification process. *Id.*

A pre-disqualification meeting was held on June 4, 2010. (As of June 4th, Appellant had been off work for more than 5 months.) During this meeting, Ms. Coffman shared with Appellant the list of 13 physical activities that she deemed essential to his position. Ex. 11-3. Again, Appellant disputed that his job required any of those physical activities. Decision, p. 5. However, Appellant advised that he had an appointment with his physician later that day which would give him more information about his current physical limitations. *Id.* The Agency then permitted Appellant to provide additional information from his physician. *Id.*

In a letter dated June 4th, Dr. Sutton advised that Appellant "continues to suffer from daily episodic back pain worsened by repetitive physical activity and especially bending or stooping at the waist." *Id.* Dr. Sutton indicated that he was referring Appellant to a functional assessment specialist to ascertain the specific physical limitations presented by Appellant's back injury and that he (Dr. Sutton) would defer to that assessment. *Id.* Dr. Sutton did not indicate how long a functional assessment would take. R. 302 (Ex. 13-2).

Ms. Iversen testified that the management team decided to move forward with disqualification based on the lack of specific information: "We didn't know when he was going to see a specialist, we had no information that his condition was improving, we had no end date for it . . . From my perspective, we had enough information that he still could not perform the essential functions of his job." Decision, p. 5-6. On June 16th, the Agency notified Appellant in writing that he was disqualified from his position on the ground that he had not been released to full duty: "The City and County of Denver does not accommodate 'modified duty' for non-work related injuries or illness . . . It is the Agency's position that you are presently still unable to perform the essential functions of

your present position as an Operations Supervisor over the Orphan Parcel Mowing Program.” *Id.* at 5.

Following the career service hearing, the Hearing Officer reversed the Agency's disqualification action and determined that the Agency had discriminated against Appellant on the basis of his disability. Decision, p. 13.

II. FINDINGS

A. Burdens of Proof.

At the hearing, the Agency bore the burden of proving that it complied with the City's career service rules related to the interactive process and disqualification procedures. However, Appellant bore the burden of proving that the Agency discriminated against him on the basis of a disability. We will address these issues separately.

B. The Essential Functions of Appellant's Job.

The ADA specifically provides that consideration shall be given to the employer's judgment as to what functions of a job are essential. 42 U.C.S. § 1211 (8). As a result, courts generally give substantial weight to the employer's view of job requirements. *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 76 (1st Cir. 2010); *Frazier v. Simmons*, 254 F.3d 1247, 1259-61 (10th Cir. 2001) (it was essential for a criminal investigator to be capable of physically restraining violent individuals even though the primary functions of the position – investigation and desk work – did not require physical exertion.)

The Hearing Officer found that performing physical tasks, which included the ability to lift, bend and stoop, were essential functions of Appellant's job. This finding is supported by the testimony of various Agency witnesses, including Appellant's supervisor, Ms. Coffman, and Appellant's CSA Job Specification, which designates "other duties as assigned" as essential functions. The Hearing Officer's finding on essential job functions provides the foundation for our findings regarding the career service rules and Appellant's disability claim.

C. The Hearing Officer's Interpretation of Career Service Rules.

CSR 14-21 provides that prior to disqualification "the agency must have attempted to make a reasonable accommodation" under the ADAAA . The Hearing Officer concluded that the Agency failed to comply with this rule because in its decision to disqualify Appellant it relied on the findings of the City's ADA Coordinator instead of making its own separate findings on the issues of disability and reasonable accommodation. We find the Hearing Officer misinterpreted CSR 14-21.

The City's ADA Coordinator initiates the interactive process on behalf of all City agencies and acts as their agent. As Ms. Murphey testified, her role was to determine whether Appellant was able to perform the essential functions of his job and to explore whether any reasonable accommodations, including job reassignment, could be provided. Ms. Murphey did in fact perform those functions on behalf of the Agency and CSR 14-21 does not require City agencies to engage in a second interactive process and make separate findings on the issues of disability and reasonable accommodation.

As to the interactive process, the Hearing Officer concluded that "potential reasonable accommodations were not discussed." (Decision, p. 10). However, as discussed in detail below, this conclusion is not supported by the evidence in the record, nor by ADA caselaw.² Under the ADA, both the employer and the employee have an obligation to work together in exploring reasonable accommodations. *Templeton v. Neodata Servs. Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). Appellant's position during the interactive process was to dispute the essential functions of his job; he believed his job involved only administrative duties and he wanted to return to work and perform only those duties. Thus, Ms. Murphey found herself in the difficult and one-sided position of having to explore possible reasonable accommodations with an employee who was insisting he did not need any accommodations and was insisting on returning to work, despite his medical restrictions. The record does not reflect that Appellant participated in exploring reasonable accommodations with Ms. Murphey.

According to the Hearing Officer, job reassignment may have been a potential reasonable accommodation. *Id.* However, while reassignment to a vacant position may be a reasonable accommodation, *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999), there were no vacant clerical positions open on April 28, 2010. Transcript, 2/25/11, p. 136. In addition, Ms. Murphey concluded that all the clerical positions in the administrative support series involved filing and the related ability to bend and stoop, which Appellant could not do because of his medical restrictions. Thus, based on the evidence in the record, job reassignment was not a potential reasonable accommodation.

The Hearing Officer also concluded that a mechanical grabber would have been a reasonable accommodation, but it was not discussed. *Id.* However, Appellant never requested or suggested a mechanical grabber during the interactive process meeting. At the hearing, Ms. Murphey acknowledged that a grabber could be used to pick up an errant piece of trash without bending, but a grabber would not resolve all the other physical issues associated with Appellant's job, such as utilizing machinery and lifting over 20 pounds. Transcript, 2/25/11, p. 166. A reasonable accommodation is one that enables an employee to perform all of the essential functions of his job. *Peters v. City*

² Although the Board is bound by the Hearing Officer's findings of fact, it is not bound by her ultimate findings. *Vukovich v. Civil Service Commission*, 832 P.2d 1126 (Colo. App. 1992). Ultimate findings are either mixed questions of fact and law, or purely legal conclusions. *Bd. Of Education of West Yuma v. Flaming*, 938 P.2d 151, 157 (Colo. 1997).

of *Mauston*, 311 F.3d 835, 845 (7th Cir. 2002). Thus, a mechanical grabber was not a reasonable accommodation.

Next, the Hearing Officer's conclusion that the Agency did not offer Appellant a leave of absence is difficult to understand as it is contrary to her own findings of fact. Following the interactive process, the Agency's HR representative notified Appellant that he could request additional leave, but Appellant rejected this offer and insisted on returning to work. Decision, p. 4. On the other hand, in reaching this conclusion, the Hearing Officer may have been trying to suggest that the Agency should have offered additional leave based on Dr. Sutton's June 4th letter. However, offering additional leave based on the information provided by Dr. Sutton would not have been a reasonable accommodation.

A reasonable accommodation "refers to those accommodations which presently or in the *near future* enable an employee to perform the essential functions of the job." *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000). When a leave of absence is the requested accommodation, the employee is required to provide his employer with the expected duration of his impairment. *Id.* at 1130. An indefinite leave of absence is not a reasonable accommodation because it does not enable the employee to perform essential job functions in the near future. *Id.* at 1129. Here, Dr. Sutton's June 4th letter indicated that he was referring Appellant to a functional assessment specialist for further evaluation. Dr. Sutton did not provide the Agency with the expected duration of Appellant's impairment. Thus, additional leave time under these circumstances would have amounted to an indefinite leave of absence, not a reasonable accommodation.

CSR 14-21 provides that "if a reasonable accommodation cannot be provided or the employee rejects a reasonable accommodation, disqualification may be initiated."

We find, based on the evidence in the record, that the Agency, through the City's ADA Coordinator, engaged in the interactive process and made a good faith attempt to find a reasonable accommodation, but because of Appellant's medical restrictions and the lack of any vacant positions for which Appellant was qualified, it was unable to do so. Following the interactive process, the Agency notified Appellant that he could request additional leave time if he believed he needed it, but Appellant rejected that accommodation. We find the Agency acted appropriately in giving Appellant additional time after his pre-disqualification meeting to provide further medical information, but that Appellant failed to provide an expected duration of impairment as he was required to do. For all these reasons, we find that the Agency complied with CSR 14-21 and properly disqualified Appellant from further employment.

D. Appellant's Claim of Disability Discrimination.

In order to establish a *prima facie* case of disability discrimination, Appellant was required to demonstrate: 1) that he had a disability under the ADA; 2) that he was a "qualified individual" under the ADA, able to perform the essential functions of his job

with or without a reasonable accommodation, and 3) that he suffered discrimination because of the disability. *Justice v. Crown Cork and Seal Co., Inc.* 527 F.3d 1080, 1086 (10th Cir. 2008). Here, Appellant failed to prove the second part of this test and therefore failed to establish a *prima facie* case of disability discrimination.

The determination of whether an employee is a “qualified individual with a disability” must be made at the time of the employment decision. *Cisneros*, at 1129. Appellant testified that he could perform all the physical duties of his position by using a mechanical grabber and by using his authority as a supervisor to assign other physical duties to his subordinates. Decision, p. 12. The Hearing Officer concluded that the use of a grabber together with the reassignment of other physical duties were reasonable accommodations. We disagree.

As we have already discussed, the mechanical grabber would have only permitted Appellant to pick up stray pieces of paper without bending. That accommodation would not have enabled Appellant to perform all the essential functions of his job, including picking up trash that weighed more than a piece of paper, operating machinery, snow removal activities, and lifting more than 20 pounds. Further, assigning essential job functions to other employees, as Appellant suggested, is not a reasonable accommodation.

The idea of accommodation is to enable an employee to perform the essential functions of his job; an employer is not required to remove essential functions. *Hennigar v. Utah Dept. of Corrections*, 587 F.3d 1255, 1264-65 (10th Cir. 2009). *Accord*, *Rehrs v. Iams Co.*, 486 F.3d 353, 358 (8th Cir. 2007); *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1255 (11th Cir. 2007); *Mulloy v. Acushnet Co.*, 469 F.3d 141, 153 (1st Cir. 2006) (the employer is not required to assign essential functions to other employees.) Thus, at the hearing, Appellant failed to prove he could perform all the essential functions of his position with one or more reasonable accommodations and therefore he failed to prove that he was a “qualified individual with a disability” under the ADA.

Further, the Hearing Officer concluded that the Agency discriminated against Appellant on the basis of his disability because it failed to either make a reasonable accommodation or engage sufficiently in the interactive process to identify a reasonable accommodation. Decision, p. 12. That conclusion, however, is contrary to ADA caselaw. *Hennigar v. Utah Dept. of Corrections* involved a similar claim of disability discrimination based on the failure to make a reasonable accommodation. *Hennigar*, like Appellant in this case, suggested that her employer eliminate those job functions she was unable to perform. The court determined that the ADA did not require her employer to do so. As to her claim that her employer refused to engage in an interactive process to develop a reasonable accommodation, the court held:

Even if an employer fails to fulfill its interactive obligations to help secure a reasonable accommodation, the employee will not be

entitled to recovery unless she can also show that a reasonable accommodation was possible. . . . As explained above, Hennigar has not shown that a reasonable accommodation was possible.

Hennigar, at 1265, quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999). Similarly here, Appellant failed to demonstrate that at the time of his disqualification a reasonable accommodation was possible that would have enabled him to perform all the essential functions of his job.

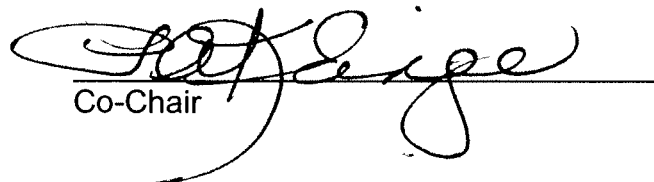
For these reasons, Appellant failed to prove his claim of disability discrimination.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision dated June 16, 2011, is **REVERSED** and the Agency's disqualification action is reinstated.

SO ORDERED by the Board on November 17, 2011, and documented this
15th day of December, 2011.

BY THE BOARD:


Co-Chair

Board Members Concurring: Nita Henry, Michelle Lucero, Patti Klinge.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **Findings and Order** on December 1, 2011, in the manner indicated below, to the following:


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A handwritten signature in black ink, appearing to read "Leon A. Duran", written over a horizontal line.

Leon A. Duran