

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

VERNON HOWARD, Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,

and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal commenced on Feb. 24 and closed on Apr. 7, 2011 after six days of hearing before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Whitney Traylor, Esq. The Agency was represented by Assistant City Attorney Joseph Rivera. Director of Parks and Recreation Doug Woods served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

Appellant Vern Howard challenges the Department of Parks and Recreation's June 16, 2010 action disqualifying him from the position of operations supervisor, asserting race and disability discrimination. Agency Exhibits 2 – 4 and 6 – 14, 15-1 to 15-7, 15-16 – 15-17, 19, and 20 were admitted. Appellant's Exhibits B, H, and J were also admitted into evidence.

II. ISSUES

The issues in this appeal are:

1. Whether the Agency established that Appellant's disqualification was taken in compliance with Career Service Rules 14-20 to 14-22,
2. Whether Appellant established that the disqualification discriminated against him on the basis of disability, in violation of CSR § 19-10 A.2.a. and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), and
3. Whether Appellant established that the disqualification discriminated against him on the basis of race, in violation of CSR § 19-10 A.2.a. and Title VII of the Civil Rights Act of 1964.

III. FINDINGS OF FACT

Appellant has been employed with the Department of Parks and Recreation since 1991, and was promoted to an operations supervisor position eleven years ago. An operations supervisor manages the resources and personnel in the geographical recreation districts of the City and County of Denver. [Appellant, 3/15/11, 3:47 pm; Exh. 9-1.]

In Dec. 2009, the Agency consolidated six recreation districts into four districts as a part of a reorganization designed to trim \$5 million from the Agency's budget and increase efficiency after three high-level management employees retired. [Woods, 2/24/11, 4:48 pm; 3/3/11, 3:03 pm; Exh. 15.] As a result, current supervisors manage larger geographic areas, using different equipment and smaller crews. Appellant was transferred to the Southwest district, working under Field Superintendent Jill Coffman. The Southwest district "had the least amount of field FTEs [at 16, whereas] the other districts at the time had 22, 24, [and] 29" crew members. [Woods, 3/3/11, 3:13 pm; Exh. 15.] Appellant was the only African American of the 18 operations supervisors in Parks and Recreation. [Appellant, 3/15/11, 4:06 pm; Exh. 15-1.]

In Nov. 2009, Coffman met with Appellant and Director Woods to prepare for the reorganization. The Agency and Appellant have differing accounts of that meeting. Coffman recalled that she informed Appellant the job was considered that of a working supervisor, meaning that he would be an active member of the crew. [Coffman, 3/3/11, 8:56 am.] Appellant testified that they discussed the job in detail, including his schedule, possible work areas, reporting facility, uniform and cell phone, but no one used the phrase working supervisor to describe the job. [Appellant, 2/24/11, 1:35 pm; 3/15/11, 4:12 pm.]

Appellant had different assignments within the Southwest district. In December, Appellant was assigned to Rosedale and worked out of Washington Park. In January, he was transferred to Kenyon and supervised the Orphan Parcel Program. An orphan parcel is a small piece of land owned by the city that has no improvements and is not a part of a park. It often looks like a vacant lot, and maintenance for the most part requires removal of weeds, trash and graffiti. [Appellant, 2/24/11, 1: 26 pm.] Coffman told Appellant he would need to evaluate his staffing, equipment, and schedule needs, and become familiar with the orphan parcels in the Southwest district and perhaps the entire city, as the program was in flux.

On Jan. 26, 2010, Appellant notified Coffman and Woods that he injured his back while off the job. [Appellant, 2/24/11, 2:39 pm.] On Mar. 5, 2010, the Agency informed Appellant that he had exhausted his FMLA leave, and that he was required to submit a return-to-work release before coming back to work. The letter added that if he was unable to return by that time, the Agency may proceed with the interactive process to determine whether he was disabled under the ADA, and if so, whether reasonable accommodations could be provided. [Exh. H.] On Mar. 15, his physician submitted a return-to-work release indicating that Appellant could not work until Apr. 15th. [Exh. J.] Two days later, the Agency notified Appellant it was commencing the interactive process under the ADA and Career Service Rules, and that the first meeting

was set for Apr. 1, 2010. The Agency included a medical release, reasonable accommodation questionnaire for his physician, and a copy of his job classification and last performance review. [Exh. 2.] Appellant executed the general medical release on Mar. 26, 2010. [Exh. 3; Appellant, 2/24/11, 2:45 pm.] Dr. Scott Sutton, a specialist in internal medicine, completed the reasonable accommodation questionnaire and returned it to the Agency on Mar. 29th. Dr. Sutton reported that Appellant had been diagnosed with acute low back strain and pain, aggravated by heavy lifting or prolonged sitting or standing, and that he was tentatively scheduled to return to work on Apr. 15th to a light-duty, desk-oriented job with no heavy or frequent lifting, bending or stooping. He added that further details about functional limitations would have to be provided by a specialist in that field. [Exh. 4.] That same day, Appellant updated Agency Manager Kevin Patterson and Woods that he may require surgery to repair a herniated disc, and that he had an MRI scheduled for Apr. 23, 2010. [Exh. 19.]

On Apr. 1, 2010, Appellant attended the interactive process (IAP) meeting with his representative Walt Beckert. ADA Coordinator Rita Murphey ran the meeting, which was also attended by Appellant's supervisor Jill Coffman, Senior HR Generalist Janice Hathaway and Staff HR Professional Michelle Pena. Appellant recalled that he was questioned about his job duties. [Appellant, 2/24/11, 2:48 pm.] Murphey could not recall her specific questions to Appellant, but stated she generally asks an employee whether he is physically able to perform his essential duties, then questions the Agency about the physical demands of the job, since her task was to compare the medical condition to the work requirements. [Murphey, 2/25/11, 11:07 am.] Coffman told her Appellant was a working supervisor who was required to lift machinery onto the trucks and empty trash. [Murphey, 2/25, 11:38 am.] He countered that his main duties were administrative, including planning, staffing, equipment and maintenance required to run the Orphan Parcel Program. He relied on his position description and his PEPR to explain his responsibilities to support his conclusion that his job did not require heavy lifting, frequent bending or stooping. He Appellant recalled that Coffman described the job as oversight of operations in the district, and occasionally driving a tractor because he has a CDL license. [Appellant, 2/24/11, 2:51 pm.]

On Apr. 27, 2010, the Agency received the return-to-work release signed by Dr. Sutton, which indicated Appellant could go back to work on May 4, 2010, with restrictions:

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 at this time.

[Exh. 6-2.]

Murphey determined that this release was consistent with the earlier reasonable accommodation questionnaire provided by the doctor, as both listed restrictions

preventing Appellant from performing the full duties of his position. [Exhs. 4, 6-2; Murphey, 2/25/11, 12:21 pm.] Murphey observed that Appellant was uncomfortable and was having difficulty walking at the April IAP meeting. Ultimately, Murphey determined that Appellant was unable to fulfill his job's essential duties because he could not lift more than twenty pounds or perform repetitive lifting, bending, or stooping. [Murphey, 2/25/11, 11:38 am.] She also concluded that Appellant was disabled under the ADA because he could not perform the essential functions of his position. [Murphey, 2/25/11, 2:41 pm.]

As required by CSR §§ 5-84, 14-22 and the ADA, Murphey then turned her attention to the issue of reasonable accommodation. The City does not grant light duty unless an employee is injured on the job. [Murphey, 2/25/11, 2:49 am.] Murphey concluded that it is impossible to provide a reasonable accommodation once for any Administrative Support Assistant (ASA) vacancies that did not require filing, but found none. [Murphey, 2/25/11, 11:52 am.]

The next day, Murphey informed Appellant of her conclusions that he was "unable to perform the essential functions of your position and a return to work date is unknown. Unfortunately, there is no desk job to provide you. Therefore, there is no reasonable accommodation." Murphey concluded the interactive process and referred the matter back to the Agency "for their consideration of extending you additional leave." [Exh. 7.]

On May 5, 2010, HR Professional Michelle Pena notified Appellant that he must request additional leave from the Agency if he believes he needs it. "Ensure to include the requested amount of leave and the expected date of your ability to return to duty and perform the essential functions of your position." [Exh. 8.] On May 7, the Controller's Office informed Appellant's supervisor Jill Coffman that Appellant was no longer eligible for interactive process leave, and would have to request leave effective Apr. 29, 2010. Appellant replied to Patterson and Woods that he was not going to seek extended leave, but instead requested permission to return to work. "Being that my core duties are not manual labor in nature, and the current restrictions are primarily relation to strenuous activity, I can return and perform my supervisory responsibilities." He informed them his doctor believed his condition would progressively improve over the next two to six weeks. Based on his 19 years of service and experience in a variety of programs, Appellant asked to serve as fill-in supervisor for City-wide Services or Recreation vacancies, and/or use his CDL driver's license to take the Show Wagon to events. [Exh. 9.] Agency Manager Kevin Patterson advised HR Supervisor Suzanne Iversen to begin the disqualification process based on Appellant's inability to perform the essential functions of the position and the restrictions in the work release. [Iversen, 3/3/11, 12:05 pm.]

On May 26, 2010, the Agency notified Appellant that it was contemplating disqualification, and had scheduled the pre-disqualification meeting for Friday, June 4th. [Exh. 10.] Iversen conducted the meeting, which was also attended by Woods, Coffman, Appellant, and his representative. The Agency requested that Appellant explain his job duties. Appellant told them his position was office-oriented, and referred to the essential duties listed in the operations supervisor classification description to

describe his tasks. [Appellant, 2/24/11, 3:54; Exh. 2-11 – 2-15.] Coffman shared her hand-written list of 13 duties she deemed essential to the Orphan Parcel Program, a list she later typed. Appellant disagreed, maintaining that those were the duties of a crew supervisor, not an operations supervisor. Appellant testified that he based this conclusion on his 11 years of experience performing the job, and his work on various committees that devised the operations supervisor job specification, including a mayoral committee. [Appellant, 3/17/11, 11:26 am.] Appellant told those present that he had been released to work with restrictions, and had a follow-up appointment with his physician that afternoon, which would give him more information about his current physical limitations. [Appellant, 2/24/11, 4:02 pm; Exh. 6-2.]

At his medical appointment later that day, Dr. Sutton concluded that Appellant "continues to suffer from daily, episodic back pain worsened by repetitive physical activity and especially bending or stooping at the waist. He has made some, but limited, progress with months of physical therapy since his original injury." Dr. Sutton referred Appellant to a medical specialist in functional assessment determinations to ascertain his specific limitations presented by his back injury. "I would defer to this assessment regarding what aspects of the essential functions of Mr. Howard's job he can or cannot perform in light of his injury." [Exh. 13-2.]

On Tuesday June 8, Iverson sent Dr. Sutton the typed list of 13 job duties Coffman deemed essential to meet Agency standards for managing operations. [Murphey, 2/25/11, 2:34 pm; [Exh. 11-3.]

On June 11, Appellant forwarded his doctor's June 4th letter to Iverson and Woods, noting that he is "searching out a specialist in this area so I am better equipped to give you a better idea of what my limitations may be." [Exh. 13-1.] Appellant then obtained an appointment for June 18 with an occupational health specialist to perform the recommended functional assessment determination. Iverson had already faxed Dr. Sutton Coffman's list of 13 essential functions. Coincidentally, the doctor faxed his response to the list a few hours after Appellant emailed Dr. Sutton's June 4th letter to the Agency. The doctor's response took the form of a second work release, which repeated that he did not have the certification to perform a functional assessment, and had recommended Appellant seek a specialist in that field. [Exh. 12.] Thus, by close of business on Friday June 11, the Agency was in receipt of two statements from Appellant's doctor that Appellant would need a functional assessment determination, as well as Appellant's confirmation that he was seeking out a specialist per his physician's recommendation. [Iverson, 3/3/11, 12:18 pm; Exhs. 12, 13.]

The following Wednesday, June 16, 2010, the Agency notified Appellant 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 illnesses . . . 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." [Exh. 14.]

Suzanne Iverson testified that the management team decided after receiving the above statements to move forward with the disqualification based on the lack of

information. "We didn't know when he was going to see a specialist, we had no indication 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." [Iversen, 3/3/11, 12:18 pm.] The Agency did not attempt to make a reasonable accommodation because "[m]y understanding was that [Murphey] was unable to determine if he was disabled." [Iversen, 3/3/11, 12:37 pm.]

In his decision to disqualify Appellant, Woods relied solely on the fact that the June 10th work release contained restrictions. [Woods, 3/15/11, 9:27 am; Exh. 12-2.] At the time of the decision, Woods was not aware of the nature of Appellant's physical limitations, but he believed Appellant could not perform the essential duties of his position. [Woods, 3/15/11, 9:02 am.] He did not consider allowing Appellant time to obtain a functional assessment because the process had already consumed five months, and Woods was unwilling to delay the process any further. [Woods, 3/3/11, 4:18 pm; Exhs. 12-2; 13-2.] Woods did not consider the issue of whether Appellant was disabled or needed reasonable accommodation, relying instead on Murphey to have made those determinations. [Woods, 3/3/11, 4:10 pm.]

IV. ANALYSIS

1. Did the Agency disqualify Appellant in compliance with CSR § 14-22?

The Agency bears the burden to prove its disqualification of Appellant was proper under the Career Service Rules. In re Montabon, 122-03, 9 (3/31/04).

A career service employee shall be disqualified if a physical impairment or incapacity "prevents satisfactory performance of the essential functions of the position." Before disqualification of a disabled employee, an agency must attempt to make reasonable accommodation under the ADA. CSR § 14-21.

A. Existence of a Physical Impairment

Appellant informed the Agency in January that he was unable to work based on a back injury which may require surgery. His physician reported that Appellant suffered from musculoskeletal low back strain, which prevented frequent lifting over 20 lbs., heavy or repetitive labor, and repetitive lifting, bending or stooping. The injury affected Appellant's ability to perform the major life activities of lifting, bending, and performing manual labor. Based on this evidence, the Agency established that Appellant had a physical impairment at the time of the disqualification. 42 USCA § 12102(1), (2).

B. Satisfactory Performance of Essential Functions of the Position

Next, it must be determined whether that impairment prevented satisfactory performance of the essential functions of the position. The Agency contends that the physical duties of weeding, loading tools and equipment, driving, plowing, and dumping trash are essential functions of the job of operations supervisor. Appellant argues that his job was to plan and administer delivery of parks services, and physical duties were incidental and not critical to the position.

[A] job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

42 USCA § 12102(2).

a) Does the position exist to perform the listed manual tasks?

The core responsibilities of Appellant's job are listed in his performance evaluation as communication, compliance documentation, special projects, athletic facility maintenance, safety training and compliance, and human resources management. [Exh. 2-21 to 2-26.] The job classification describes the position as supervision of employees engaged in the operation, construction, maintenance, and repair of city facilities, parks and urban forests. It lists no specific physical demands as minimum qualifications. Other positions, such as crew supervisor, exist to supervise skilled trade, labor and maintenance functions; yet others exist to perform skilled trades, labor and maintenance. [Exh. 2-11.] The evidence is undisputed that the position of operations supervisor exists to manage the delivery of park services and supervise working supervisors and crew, rather than to perform manual labor.

b) Are there a limited number of employees available to perform the tasks?

Appellant's job as operations supervisor over the orphan parcel program requires daily field inspections for planning and maintenance of parks programs. Appellant's supervisor testified that performance of the 13 physical tasks was a necessary efficiency because of reductions in the Agency staff. Predictably, Parks Department job duties change with the seasons: winter requires snow removal, plantings occur in the spring, summer involves weeding, trimming, and trash pickup, and leaf removal and bedding preparation are needed in the fall. In every season, a supervisor who observes physical work that needs to be done is required to assure that it gets done in the most effective manner reasonable under the circumstances. That may include doing it himself or assigning it to another employee.

During the winter month before Appellant's back injury, he operated without his two-member crew because they had been assigned to the Denver International Airport to assist with snow removal. Appellant's duties therefore included shoveling snow from the hand routes and disposal of any trash he noticed during his inspections, as well as his normal administrative duties. Appellant testified that he saw no large items dumped on the parcels during that month. By the time of his disqualification in June, the physical job duties changed to trash removal and weed trimming by tractor as needed to handle immediate problems and assist the two-man crew, which had by then returned from DIA. Thus, seasonal and other occasional staffing shortages required

Appellant to perform some physical tasks as a part of his job when efficiency required it, which occurred frequently.

c) Are the functions highly specialized?

There is no evidence that the physical work listed on Exhibit 11-3 was highly specialized, or that Appellant was hired for his expertise or skill in performing those functions.

d) What is included in the written job description?

As noted above, the job classification of operations supervisor indicates the position “[p]erforms supervisory duties over non-supervisory and/or working supervisory employees involved in the operation, construction, maintenance, and/or repair of City facilities, infrastructure, parks, and urban forests or in the collection and disposal of solid waste.” The job requires no minimum qualification for lifting any specific weight or performing any other physical task. [Exh. 2-11.] The job description did not include the performance of the physical tasks listed in Exh. 11-3 as essential functions.

e) Testimony of prior or current employees performing the same job

Field superintendants have discretion to add duties as needed to assure that the work in the district is accomplished. [Woods, 3/3/11, 4:39 pm; Exh. 2-12; Anderson, 3/15/11, 3:17 pm.] When she began as Field Superintendant in the Southwest district, Coffman adapted the working supervisor model from her experience as crew supervisor in the Neighborhood Inspection Services program. That model requires operations supervisors to function as active members of their crew when needed, performing tasks that require repetitive lifting, bending, stooping, and frequently lifting more than twenty pounds. [Coffman, 2/25/11, 3:11 pm; 3/3/11, 8:52 am; Woods, 2/24/11, 4:59 pm; Exh. 11-3, item 3.] Due to budgetary limitations, operations supervisors in the Southwest district do not have crew supervisors working under them. [Coffman, 3/3/11, 9:26 am.]

The Agency presented convincing testimony that operations supervisors in the Southwest district are required to and frequently do assist their crews in graffiti, trash and snow removal, operating tractor mowers, and loading tools, supplies and equipment on trucks. [Smith, 2/25/11, 8:53 am; Darras, 3/15/11, 9:57 am, Coffman, 2/25/11, 3:20 pm; Exh. 11-3, items 4 – 8.] Standing, stooping, bending, kneeling, and crawling are common movements for these positions in performing their duties. Operations supervisors are also assigned as crew members to special projects such as spreading gravel and wood chips, removing stumps, and assembly of the Ruby Hill rail yard. [Darras, 3/15/11, 10:24 am; Coffman, 2/25/11, 3:46 pm.] As supervisors, they do not generally trim weeds or handle trash daily as a part of their duties. [Marsh, 3/17/11, 2:50 pm; 3:32 pm.] Former Field Superintendent Jim Kellner described the 13 tasks included in Exh. 11-3 as more closely resembling the duties of a crew member. [Kellner, 3/17/11, 4:01 pm.] Joe Renteria, Jr., Operations Supervisor in the East district, agreed. [Renteria, 4/7/11, 12:19 pm.]

f) Amount of time spent performing physical tasks

Operations supervisors in Parks and Recreation have administrative, field-related, and physical duties that are essential functions of the position. Administrative and supervisory duties comprise 80-90% of their essential duties, depending on the season, and manual labor makes up the remainder. [Marsh, 3/17/11, 2:44 pm; Kellner, 3/17/11, 3:52 pm; Renteria, 4/7/11, 12:15 pm]. It is undisputed that Appellant is able to perform the administrative functions of his position, which consume up to two hours each day. [Exh. 11-3, items 2, 10 – 13.] The rest of the day is spent in the field, much of it performing inspections or supervising crews implementing work plans. [Renteria, 4/7/11, 12:22 pm.] Supervisors drive from two to six hours a day, depending on the season and need for snow removal by plow. [Smith, 2/25/11, 9:23 am; Appellant, 2/24/11, 2:17 pm; Exh. 11-3, item 1.]

The Agency did not establish that driving seven hours a day and daily weeding, trash removal or driving a tractor are essential functions of the position. [Marsh, 3/17/11 2:52 pm; Kellner, 3/17/11, 3:46 pm]. However, the tasks of driving, weeding, and trash removal are expected of operations supervisors when the need arises, as it frequently does.

Based on the totality of the evidence, I conclude that performing manual tasks, lifting and bending were essential to perform the position of operations supervisor in a satisfactory manner, as that job was defined and evaluated by Appellant's supervisor. Appellant's abilities to perform manual work, lift and bend were impaired by his back injury.

C. Was Appellant Disabled?

Before an agency may proceed to disqualify an employee based on a physical or mental impairment or incapacity, it must determine whether the employee is disabled under the ADAAA. CSR § 14-21.

ADA Coordinator Rita Murphey ended the interactive process by letter dated Apr. 28, 2010. The letter stated that Appellant was unable to perform the essential functions of his position, but made no finding as to whether Appellant was disabled, a key purpose of the interactive process. CSR § 5-84 E.1. Murphey did find that Appellant was disabled within the meaning of the ADAAA, but did not communicate that finding to the Agency personnel involved in the disqualification process. [Murphey, 2/25/11, 2:41 pm.] HR Supervisor Suzanne Iverson testified that she believed Murphey was not able to determine if Appellant was disabled.

The evidence is supportive of Murphey's determination of disability. Appellant's treating physician concluded that his ongoing back strain may be causing neurological symptoms to his left leg, limiting his ability to lift, bend, stoop, or perform heavy, repetitive labor. A person is disabled if he has "a physical . . . impairment that substantially limits one or more of the [individual's] major life activities". CSR § 5-84 D.1.

D. Did Agency Attempt Reasonable Accommodation?

Based on Murphey's determination that Appellant was disabled, the Agency was then obligated to attempt reasonable accommodation, i.e., to determine if Appellant could perform all of the essential job functions with any needed adjustments, unless the accommodations would pose an undue hardship on the Agency's operation. CSR § 5-84 B. See also Mathews v. Denver Post, 263 F.3d 1164, 1167 (10th Cir. 2001).

Reasonable accommodation means modifications to the work environment that enable a qualified disabled employee to perform the essential functions of his job. It may include job restructuring, reassignment, and use or modification of equipment or devices. 42 U.S.C. § 12111(9)(B). Under appropriate circumstances, a reasonable allowance of time for medical care and treatment may also be a reasonable accommodation. E.E.O.C. v. C.R. England, Inc., 2011 WL 1651372, at *15 (10th Cir. May 3, 2011). Employers are not required to modify the essential functions of the position in order to accommodate a disabled employee. Duvall v. Georgia-Pacific Consumer Products, L.P., 607 F.3d 1255, 1262 (10th Cir. 2010). The Career Service Rules and federal regulations implementing the ADA require the employer and employee to engage in an interactive process to determine if a reasonable accommodation or reassignment can accommodate the disabled employee. CSR § 5-84 E; Turner v. City and County of Denver, 2011 WL 1595981, at *3 (D. Colo. Apr. 27, 2011).

Potential reasonable accommodations were not discussed during the interactive process. The letter closing the process states that Murphey considered one possible accommodation: a transfer to a clerical position requiring no filing. She testified that on one occasion she looked for an ASA vacancy, but did not continue the search because she believed reasonable accommodation of a field position was "impossible". [Murphey, 2/25/11, 11:52 am.] Murphey also suggested to the Agency that it consider granting Appellant additional leave, but the Agency did not offer a leave of absence offer to Appellant. [Iverson, 3/3/11, 10:36 am.] Murphey acknowledged at hearing that use of a grabber, a mechanical device that picks up items from the ground without bending, would be one type of reasonable accommodation, but it was not considered. [Murphey, 2/25/11, 12:46 pm.]

In its decision to disqualify Appellant, the Agency did not make separate findings on the disability and reasonable accommodation issues, relying instead on Murphey's findings during the interactive process. [Woods, 3/3/11, 4:14 pm.] Murphey found Appellant was disabled, but had not communicated her finding to the Agency. As a result, the Agency failed to comply with the Career Service Rules' mandate that "the agency must have attempted to make a reasonable accommodation" under the ADAAA prior to disqualification. CSR § 14-21. The Agency also failed to work with Appellant to identify potential accommodations needed to perform his essential functions, as required by CSR § 5-84 E.1. and 4.

2. Did the Agency's disqualification discriminate against Appellant based on his disability?

Appellant claims also that the Agency's disqualification action discriminated against him on the basis of disability by virtue of its failure to reasonably accommodate his physical limitations.

The 2009 amendments to the Americans with Disabilities Act, 42 USCA § 12101 et. seq., were enacted to reject the restrictive standards adopted by the U.S. Supreme Court in Sutton v. United Airlines and Toyota Motor Manufacturing v. Williams, which "eliminat[ed] protection for many individuals whom Congress intended to protect". 42 USCA § 12101(a). The law set forth rules of construction "in favor of broad coverage" for the definition of disability. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 USCA § 12102(3)(B); (4)(A), (D). The purpose of the law was

to convey congressional intent that the standard created [in the above Supreme Court cases] has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . .

42 USCS § 12101(5).

A person is disabled under the ADAAA if he has "(a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment." 42 USCA 12102(1). Major life activities include performing manual labor, lifting and bending. 42 USCA 12102(2)(A). A person is regarded as having such an impairment if he proves the employer took action against him because of either an actual or perceived physical impairment, "whether or not the impairment limits or is perceived to limit a major life activity." 42 USCA 12102(3)(a); 29 CFR § 1630.1(c)(4). Under the ADA, discrimination can include "not making reasonable accommodations to the known physical ... limitations of an otherwise qualified individual" and thus "a separate claim of discrimination can be stated under the ADA for failing to provide a reasonable accommodation." Smith v. Midland Brake, Inc., 180 F.3d 1154, 1168 (10th Cir. 1999) (quoting 42 U.S.C. § 12112(b)(5)(A)).

Here, Murphey determined Appellant was disabled because he was unable to perform the physical tasks listed in Exh. 11-3. She found also that there could be no reasonable accommodation because his was a field position and there were no clerical positions that did not require filing available. Murphey therefore terminated the interactive process. The Agency relied on those findings in its disqualification action, and made no separate determinations on the disability and reasonable accommodation issues.

An employee asserting an ADAAA claim bears the burden of showing that he is disabled but nonetheless able to perform the essential functions of his job, with or without reasonable accommodation. Hennagir v. Utah Dept. of Corrections, 587 F.3d 1255, 1262 (10th Cir. 2009.) If the employee makes that showing, the employer then has the burden of proffering evidence that demonstrates that reasonable accommodation would be an undue burden on the operation of the employer. The employee has the ultimate burden of persuasion to rebut that evidence. Felix v. City and County of Denver, 729 F.Supp.2d 1243, 1262 (D. Colo. 2010).

The interactive process with the employee "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation" to a qualified disabled individual". 29 CFR 1630.2(o)(3), (4). "When a disabled employee has established a prima facie case under the ADA, the burden shifts to the employer to prove by a preponderance of the evidence that it either offered reasonable accommodation or that such accommodation was an undue hardship." Community Hosp. v. Fail, 969 P.2d 667, 669 (Colo. 1998). The Agency failed to rebut the evidence by proving that reasonable accommodation would be an undue hardship.

As determined above, the evidence showed that Appellant is disabled. The Agency does not dispute that Appellant is disabled by virtue of his back injury, resulting in substantial limitations in the performance of the major life functions of performing manual tasks, lifting, and bending. [Murphey, 2/25/11, 2:41 pm.] Appellant must still prove he is a qualified disabled person under the ADAAA, which requires that he is able to perform the essential functions of his position, with or without accommodation. 42 USCA § 12111(8). Appellant testified without rebuttal that he is able to perform the physical duties of his position by use of equipment the Agency already owns, a mechanical grabber, and by using authority he already has to request assistance of others to lift heavy objects. All operations supervisors who testified agreed that they use other employees when needed to help with unwieldy or heavy objects. The Agency did not offer contrary or additional evidence on the subject, or argue that the requested accommodations would be an undue burden to the City or Agency. The Agency claims only that it was required to disqualify Appellant unless he provided a full return-to-work release. Based on all the evidence, I find that Appellant established that he is a qualified disabled person within the meaning of the ADAAA.

Disability discrimination can include failing to make a reasonable accommodation to the known physical limitations of an otherwise qualified individual. Thus, a separate claim of discrimination can be stated under the ADA for failing to provide a reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A). As determined above, the Agency failed to make a reasonable accommodation or engage in the interactive process to identify reasonable accommodations, during both the IAP meeting and the disqualification process. I therefore find that the disqualification action constituted disability discrimination under the ADAAA.

3. Did the Agency discriminate against Appellant based on his race?

Discrimination is proven by evidence that an employee 1) was a member of a protected class, 2) was qualified to hold his position, 3) suffered an adverse employment action, and 4) that action occurred under circumstances demonstrating willfulness. In re Wehmhoefer, CSA 02-08, 1-2 (2/14/08); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

The undisputed evidence is that Appellant was disqualified based on his failure to produce a full return-to-work release. The Agency hired Appellant and employed him for 19 years, which is some evidence tending to show it did not intentionally seek to discriminate against him based on his race. Where the evidence as a whole proves that the Agency disqualified Appellant for one, non-discriminatory reason, evidence that he was the only operations supervisor who was African American is not enough to satisfy his burden of proof that the Agency disqualified Appellant because of his race.

ORDER

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The Agency's disqualification action dated June 16, 2010 is REVERSED.
2. By virtue of the June 16th disqualification action, the Agency discriminated against Appellant on the basis of his disability.
3. Appellant's race discrimination claim is DISMISSED.

DONE June 16, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

I certify that on June 16, 2011 I delivered a copy of this Decision and Order to the following in the manner indicated:

Vern Howard, P.O. Box 200488, Denver, CO 80220	(via U.S. mail)
Whitney Traylor, Esq., wtraylor@traylorlawgroup.com	(via email)
City Attorney's Office at Dlefilng.litigation@denvergov.org	(via email)
HR Services, HRServices@denvergov.org	(via email)


