

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

Jenelle Sajdak
2556 Airport Road #7
Portage WI 53901

Complainant

vs.

United Parcel Service
5002 Pflaum Rd
Monona WI 53716

Respondent

HEARING EXAMINER'S RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20132091

On January 21 and 22, 2015, Hearing Examiner Clifford E. Blackwell, III, held a hearing in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., on the merits of this complaint. The Complainant, Jenelle Sajdak, appeared in person and by her attorney Samuel Owens. The Respondent, United Parcel Service, appeared by its corporate representative, Armando Saucedo, and by its attorney, Christopher Nickels.

Based upon the record of this proceeding, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Jenelle Sajdak, is a female individual who from April, 2008 until October, 2014 was employed by the Respondent.
2. The Respondent is a package handling company which employees in excess of 400,000 individuals and has business facilities within the City of Madison.
3. The Complainant began her employment with the Respondent in Dubuque, Iowa, and moved to work in the Madison facility starting in January of 2010. With the exception of the period from April, 2012 to August, 2012, the Complainant worked in the Madison facility of the Respondent.
4. The Complainant was employed as a part-time supervisor on the early morning shift. This shift is responsible for sorting packages and loading trucks for delivery.
5. In late 2012 through April of 2013, the Complainant experienced a number of events that disturbed and upset her. As a result of these events, the Complainant experienced stress and perhaps anxiety and depression.

6. On May 29, 2013, the Complainant sought an excuse from her treating medical provider, David Eberdt indicating that she was feeling too stressed to go to work. It appears that the Complainant or her medical provider provided this excuse to the Respondent.

7. The Complainant did not return to work for the Respondent.

8. Throughout the summer of 2013, the Complainant sought additional treatment from Eberdt and was provided with notes to provide to the Respondent. Eberdt found that the Complainant reported work stress, but believed that it was of a short duration. Eberdt treated the Complainant's stress with anti-anxiety and anti-depression medications.

9. On July 25, 2013, Eberdt provided the Complainant with a note indicating that she was still experiencing work-related stress and suggesting that reporting to a different supervisor might help the situation.

10. Starting in June of 2013, the Respondent began to attempt to communicate with the Complainant about her various options for a change in her work status. The Respondent advised the Complainant about options for short-term disability (STD) leave and leave under the Family and Medical Leave Acts (FMLA).

11. In July of 2013, the Respondent notified the Complainant that any application for STD had been denied due to a lack of documentation, but provided the Complainant with instructions for seeking leave under the FMLA.

12. In June and July of 2013, the Complainant began a series of jobs other than working for the Respondent. Finally, in the fall of 2013, the Complainant left Wisconsin for South Dakota where she took a position with Verizon Wireless.

13. At no time did the Complainant respond to any of the Respondent's offers of assistance nor did she apply for the leave programs offered by the Respondent.

14. In July of 2013, the Complainant filed the complaint in this matter allegation discrimination on the basis of sex. At or about the same time, the Complainant also filed a complaint seeking benefits under the Respondent's Worker's Compensation program.

15. The Complainant, through counsel, negotiated with the Respondent's Worker's Compensation officials and counsel seeking a return to work under a different supervisor. In August of 2013, the Respondent's counsel representing the Respondent in the discrimination complaint filed by the Complainant sought to discuss with the Complainant the request to return to work under a different supervisor.

16. The Complainant's negotiations with the Respondent's Worker's Compensation counsel did not result in a return to work for the Complainant. The Complainant failed or refused to respond to the Respondent's discrimination counsel's offer to discuss a return to work.

17. In August of 2014, the Complainant experienced the death of a close personal advisor or father figure. This event substantially stressed the Complainant and she left her employment with Verizon Wireless on some form of leave. Her then-treating physician, Brian Kidman, diagnosed the Complainant as having post-traumatic stress disorder (PTSD), anxiety, and depression stemming from several factors, but primarily the loss of her close friend.

18. In September of 2014, the Complainant was evaluated by Dr. Michael Spierer, a licensed psychologist in Madison, Wisconsin. Spierer conducted a file review of the Complainant's medical records, conducted standard evaluative examinations and interviewed the Complainant.

19. Contrary to the conclusion of the Complainant's treating physician, Spierer concluded that the Complainant did not have symptoms that met the definitions of PTSD, anxiety, or depression. He found that the Complainant had likely experienced periods of stress and likely anxiety and depression stemming from a series of events in the Complainant's life but that these conditions did not rise to the level of a mental illness or diagnosable condition. Spierer further found that to the extent that the Complainant experienced anxiety or depression it was of a short duration, most probably less than four months.

20. Spierer also found that the Complainant had likely exaggerated her symptoms when taking the written portions of the examination in an attempt to skew the results. Spierer opined that the Complainant exhibited personality traits of Narcissism and a tendency to believe that things were worse for her than they really were.

21. Though Eberdt treated the Complainant with anti-anxiety and anti-depression medications, he did not, nor could he have made a medical determination that the Complainant was or should be diagnosed with any mental illness or condition other than what the Complainant described to him.

22. After not receiving communication from the Complainant in response to its letters to the Complainant, the Respondent terminated the Complainant's employment in October of 2014.

CONCLUSIONS OF LAW

1. The Complainant does not have a mental impairment as that term is used in the Equal Opportunities Ordinance.

2. The Complainant's alleged impairment did not substantially limit the Complainant in a major life activity.

3. The Respondent did not regard the Complainant as having an impairment or a disability within the meaning of the Equal Opportunities Ordinance.

4. The Respondent did not fail or refuse to reasonably accommodate a disability of the Complainant in violation of the Equal Opportunities Ordinance.

5. The Respondent's termination of the Complainant did not violate the Equal Opportunities Ordinance.

ORDER

The complaint is dismissed. The parties shall bear their own costs and fees.

MEMORANDUM DECISION

This case presents several interesting questions surrounding the area of discrimination on the basis of disability. The basic claims are that the Respondent failed or refused to accommodate the Complainant's alleged disability and ultimately terminated the Complainant because of that alleged disability. The Respondent contends that the Complainant did not have a disability within the meaning of the Equal Opportunities Ordinance and that even if the Complainant were an individual with a disability, the Complainant failed or refused to engage in the interactive process to reach a decision about what might be a reasonable accommodation. Finally, the Respondent asserts that it terminated the Complainant's employment only after it was clear that the Complainant had abandoned her position and did not intend to return to employment with the Respondent.

A claim of discrimination may be presented by using either direct proof or indirect proof. In a claim presented by direct proof, the Hearing Examiner assesses the facts as presented at hearing and without reliance upon inference makes a determination of discrimination or no discrimination. In a case presented by the indirect method, the Hearing Examiner weighs the evidence presented by the parties including any appropriately drawn inferences and then makes his determination of discrimination or no discrimination.

Analysis of claims presented by the indirect method utilize the shifting approach established in the McDonnell Douglas/Burdine burden-shifting paradigm. McDonnell Douglas v. Green 411 U.S. 792 (1973); Texas Dept. of Community Affairs, v. Burdine, 450 U.S. 248 (1981). In this approach, the Complainant must first establish the elements of a *prima facie* claim by the greater weight of the credible evidence. If the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is not a burden of proof, but one of production. If the Respondent carries its burden, the Complainant may still prevail if the Complainant presents credible evidence demonstrating that either the Respondent's proffered explanation is not credible or represents a pretext for an otherwise discriminatory motivation.

The present matter best fits the description of a case presented by the indirect method. Accordingly, the Hearing Examiner will analyze the record utilizing the McDonnell Douglas/Burdine approach.

The Hearing Examiner will first address the Complainant's claim of a failure to accommodate the Complainant's disability. In order to prevail on this claim, the Complainant must first establish that she is a person with a disability, the Respondent knew of the Complainant's disability, the Respondent was aware of the need for an accommodation and that the Respondent failed or refused to make a reasonable accommodation or to engage in an interactive process to establish the terms of a reasonable accommodation of the Complainant's disability.

The threshold question in this analysis is whether the Complainant is an individual with a disability. The Equal Opportunities Ordinance defines disability to mean with respect to a person, "a physical or mental impairment which substantially limits one or more of such person's major life activities; or having a record of such an impairment; or being regarded as having such an impairment..." This definition changed the Equal Opportunities Ordinance from following the definition found in the Wisconsin Fair Employment Act to following that found in the Americans with Disabilities Act.

The first question is whether the Complainant is an individual with an impairment either physical or mental. The Complainant asserts that she suffers from post-traumatic stress disorder (PTSD), anxiety, stress and depression. The Respondent contends that the symptoms experienced by the Complainant from time to time do not rise to the level of an impairment.

That a "mental" condition or illness can be an impairment is well settled. In Nichols v. Buck's Madison Square Tavern, MEOC Case No. 20033011 (Ex. Dec. 11/08/2005) and Nichols v. Mental Health Center of Dane County, MEOC Case No. 20053145 (Ex. Dec. 08/06/2009), the Complainant's several conditions, which included Post-Traumatic Stress Disorder, Social Anxiety, General Anxiety and other related conditions, were accepted to be impairment. Beyond those conditions being deemed impairments, the record established that those conditions substantially limited the Complainant's major life activities, including being able to work or to be in the public. In those cases, the Complainant had been diagnosed by medical professionals with those conditions and had received treatment for them over a protracted period of time.

In both Nichols cases, the issue of whether the Complainant's conditions constituted a disability were not central to the outcomes of those cases. In fact, the question of whether the Complainant was a person with a disability was pretty much conceded by the Respondent. The only case of record in which the Equal Opportunities Commission addressed the issue of whether a condition constituted a disability is Lewis v. Creative Community Living Services, Inc., MEOC Case No. 21063 (Comm. Dec. 4/14/93, Ex. Dec. 09/28/1992). In Lewis, the Complainant was the Administrator of the Respondent's facility and had broken her arm falling from a tree stand. The Hearing Examiner, in his Recommended Findings of Fact, Conclusions of Law and Order, found that the Complainant was an individual with a disability because the Respondent regarded the Complainant's broken arm to be a disability. The Hearing Examiner dismissed the complaint for reasons not related to the Complainant's broken arm. The Equal Opportunities Commission overruled the Hearing Examiner's findings and reached a conclusion on the grounds that a broken arm is a temporary condition and, as such, does not constitute an impairment that can be the basis for finding an individual to be disabled.

The Equal Opportunities Ordinance does not contain a definition of impairment, but given the decision in the Lewis case and by referencing other similarly intended laws and decisions, it can be generally presumed that temporary conditions that last six months or less do not represent the type of condition that qualifies as an impairment. Some types of mental impairments recognized by the ADA are "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." This list is not intended to represent an exhaustive enumeration of conditions that might be considered a mental impairment. However, the list is illustrative. Again, these conditions must be ones expected to exist for more than a short period of time such as six months.

In the present matter, the Complainant asserts that she has the mental impairments of PTSD, anxiety, and depression. To prove her condition, the Complainant relied upon the testimony of Dr. Michael Spierer and Physician's Assistant David Eberdt. Spierer is a licensed psychologist and was retained by the Complainant for purposes of assessing her condition and presenting testimony on the same at hearing. Eberdt's testimony was intended to demonstrate that he was treating the Complainant in the summer of 2013 for work-related stress through the prescription of anti-anxiety and anti-depression medications.

At hearing, Spierer testified that as of September, 2014, when he examined the Complainant, he could not conclude that the Complainant met the clinical definition of having PTSD, anxiety, or depression. He did testify that the Complainant might fit the definition of having Atypical Anxiety Disorder and that she may well have experienced symptoms of anxiety and depression in the past. However, Spierer qualified his findings by indicating that those symptoms or Atypical Anxiety Disorder were only short-term conditions and he would have expected them to be present for less than four months.

Spierer further testified that he found evidence in the screenings that he administered to the Complainant that the Complainant had intentionally attempted to exaggerate her symptoms. He attributed this conduct on the part of the Complainant to personality traits that approached Narcissism and a tendency to see the events that did not favor the Complainant as being much worse than the average, reasonable person would. He did not find these traits to rise to the level of a mental illness or similar condition.

Eberdt's testimony indicated that as a Physician's Assistant, he did not have the training or experience to make assessments of psychological illness. He primarily found that his role was to report accurately what the patient, in this case the Complainant, described to him as what she was experiencing. His observations of the Complainant's stress were that he believed it was a temporary condition and that it improved as the Complainant was absent from the Respondent's workplace. While Eberdt prepared notes or work excuses for the Complainant, he did not take any steps to send those notes to the Respondent and indicated that was the Complainant's responsibility.

Eberdt did treat the Complainant with prescriptions of anti-anxiety and anti-depression medications, but he did not make a diagnosis of any long-term condition requiring those medications.

The Complainant relies particularly on Eberdt's note of July 25, 2013 in which he wrote that the Complainant continued to experience work-related stress and that assignment to a different supervisor might help with that condition. It must be noted that the Complainant had not worked at the Respondent's facility for almost two months when Eberdt wrote that note. The record does not clearly demonstrate when, if ever, the Respondent received a copy of this note from either Eberdt or the Complainant.

The Complainant might point to one additional piece of evidence to establish that she had a mental impairment. During his testimony and in his report to the Complainant, Spierer notes that the Complainant's then-treating physician, Brian Kidman, diagnosed the Complainant as having PTSD, anxiety, and depression. It is noted that this diagnosis came in September of 2014 and seems to be linked to the death of an important figure in the Complainant's life in the middle of August 2014.

The Respondent contends that nothing in this record establishes the Complainant as having had a diagnosed mental impairment during the critical period of the summer of 2013 or thereafter. The Respondent points to Spierer's conclusion that he did not find the Complainant to have any condition that met the clinical definitions for PTSD, anxiety, or depression. The Respondent also points to Spierer's testimony that he believed that the Complainant was attempting to influence the outcomes of the examination in her favor by exaggerating her symptoms.

The Respondent argues that Eberdt did not possess the medical qualifications to diagnose any mental illness of the Complainant. The Respondent also asserts that Eberdt was only acting as a stenographer for the Complainant and that he was recording the Complainant's complaints and her observations rather than making an informed medical judgment.

Bearing in mind that it is the Complainant's burden to establish by the greater weight of the credible evidence that she has or had a mental impairment during the critical periods of this matter, the Hearing Examiner concludes that the Complainant has failed to meet this burden. The Hearing Examiner found both Spierer and Eberdt to be very credible and that he can rely upon their conclusions. Those conclusions, in the mind of the Hearing Examiner, are that the Complainant was experiencing some level of stress during the period of May 29, 2013 to September, 2014, but that it was sporadic and failed to rise to the level of a permanent or long-term impairment. In reaching this conclusion, the Hearing Examiner relies on Spierer's conclusion that, at best, the Complainant experienced conditions that would be expected to last no more than four months. Eberdt expressed a similar opinion that he believed that the Complainant's stress was temporary in nature.

Even if the Complainant's condition rose to the level of an impairment, she must additionally demonstrate that the impairment substantially limited the Complainant in a major life activity. The Hearing Examiner will return to this element in a moment.

The Complainant also sought to establish that even if she did not actually have an impairment, the Respondent regarded her as having an impairment. The Complainant points to a salary printout for May 29, 2013, in which it appears that the Respondent lists the Complainant as being partially or totally disabled. The exhibit does not indicate why the Complainant was listed as being in this status nor did any witness provide a reason for that status. This listing is sufficient to create an inference that the Respondent regarded the Complainant as being disabled.

The Respondent attempts to rebut this inference by pointing to a series of exhibits identified as Respondent's Exhibits 12-19. These exhibits are letters addressed and presumably sent to the Complainant indicating initially that the Respondent believed the Complainant to be submitting a short-term disability leave application or a request for leave pursuant to the federal or state Family and Medical Leave Act. Respondent's Exhibit 13, in particular, indicates that any claim to short-term disability leave was being denied and that the Complainant needed to submit additional documentation in order to qualify for FMLA leave. The remaining exhibits in the series demonstrate that the Complainant was informed of how to secure some form of medical leave, but that she did nothing to perfect those options. The final two exhibits in the series indicate that unless the Complainant took some action as outlined in the documents, she would be subject to termination, and then that she was finally being terminated.

The Hearing Examiner finds that the Respondent conclusively rebutted any inference as to whether the Respondent regarded the Complainant as being disabled. The Hearing Examiner concludes that the Complainant has failed to carry her burden of proof with respect to this claim.

As noted previously, even if the Complainant had convinced the Hearing Examiner that she had a mental impairment, she must still demonstrate that the Complainant's impairment substantially limited the Complainant in a substantial life activity. The Complainant really does not describe any major life activity which her alleged impairment limited her. At best, the Complainant argues that she was limited from returning to work for the Respondent by her stress, anxiety and depression. However, she asserts that she could have returned to work with the Respondent if she was assigned to a different supervisor.

The problem with the Complainant's premise is that in order for the major life activity of work to be substantially limited, one must demonstrate that he or she is prevented from working in some category of jobs, not one job in particular. The fact that the record demonstrates that the Complainant worked successfully for the Respondent in the months of April and May of 2013 and in various other jobs from June or July 2013 through September of 2014 indicates that the Complainant was not substantially limited in the major life activity of work.

Unfortunately, the Complainant does not identify any other major life activity that may have been substantially limited by her alleged impairments of PTSD, anxiety, or depression. Though she briefly indicated some interpersonal relationship difficulties and concerns about operating a motor vehicle, the record lacks any definition of these issues and provides no support for a finding that the alleged impairments were the causative factor in these problems.

As the Hearing Examiner finds that the Complainant has failed to carry her burden of proof as to whether she is an individual with a disability, the Hearing Examiner need not address the remaining issues of reasonable accommodation or termination because of disability. The Hearing Examiner will offer several observations with respect to these matters, however.

With respect to the claim that the Respondent failed or refused to grant the Complainant a reasonable accommodation, the record is extremely complicated. It appears that Complainant's counsel was seeking to address the issue of accommodation with the Respondent's officials and counsel for the Respondent's Worker's Compensation program. The Worker's Compensation claim process is one that is very much different from that of a claim of discrimination. The burdens applying to that process do not easily track with those in the discrimination process. The Hearing Examiner makes no finding as to whether the Complainant's contacts with the Respondent's Worker's Compensation officials can be found to represent a request for a reasonable accommodation in the discrimination context.

What is clear from the record is that when the possibility of a reassignment of the Complainant to a different supervisor was broached with the Respondent's discrimination counsel, Courtney Heeren, the Complainant failed to respond or to follow up in any way with the Respondent's request to further discuss possible accommodations or assignment changes. The Hearing Examiner is not privy to counsel's theory or strategy, but the Hearing Examiner finds the outward manifestations of that strategy to be unusual at best.

With respect to whether the Respondent terminated the Complainant because of her alleged disability, the Hearing Examiner makes no finding. However, the record does appear to demonstrate a substantial effort on the part of the Respondent to retain the Complainant despite a demonstrated lack of interest or cooperation on the part of the Complainant. The Hearing Examiner orders the complaint dismissed.

Signed and dated this 14th day of December, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Samuel L Owens
Christopher L Nickels