

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**TINO RODRIGUEZ**

Complainant

and

**UNITED PARCEL SERVICE, INC.**

Respondent

Complaint #8525

(TOL) B2052798 (23381) 063098

22A-98-7814

**HEARING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATION**

**BETTY D. MONTGOMERY  
ATTORNEY GENERAL**

Susan J. Reynolds, Esq.  
Assistant Attorney General  
Office of the Attorney General  
One SeaGate, Suite 2150  
Toledo, OH 43604-1551  
(419) 245-2550

**Counsel for the Commission**

John M. Stephen, Esq.  
Christopher C. Russell, Esq.  
Porter, Wright, Morris & Arthur  
41 South High Street  
Columbus, OH 43215-6194  
(614) 227-2000

**Counsel for Respondent**

**HEARING EXAMINER'S REPORT BY:**

Tino Rodriguez  
8714 Now Road  
Celina, OH 45822

**Complainant**

Franklin A. Martens, Esq.  
Chief Hearing Examiner  
Ohio Civil Rights Commission  
1111 East Broad Street, Suite 301  
Columbus, OH 43205-1379  
(614) 466-6684

## **INTRODUCTION AND PROCEDURAL HISTORY**

Tino Rodriguez (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on June 30, 1998.

The Commission investigated the charge and found probable cause that United Parcel Service, Inc. (Respondent) (UPS) engaged in unlawful discrimination in violation of Revised Code (R.C.) § 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on April 8, 1999. The Complaint alleged that Respondent denied Complainant reasonable accommodation for his disability.

Respondent filed a timely Answer to the Complaint, admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices.

The parties agreed to submit Stipulations of Fact in lieu of the public hearing. The Stipulations were submitted on October 22, 1999.

The record consists of the previously described pleadings; the Stipulations; exhibits; Complainant's deposition, consisting of 50 pages; and the post-hearing briefs filed by the Commission on November 15, 1999 and by Respondent on December 3, 1999. The Commission filed a reply brief on December 6, 1999.

### **FINDINGS OF FACT**

1. Complainant filed a sworn charge affidavit with the Commission on June 30, 1998.

2. The Commission determined on February 18, 1999 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. § 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer.

5. Complainant has been employed by Respondent from 1982 until the present. From September 1984 he has held the position of utility driver. Complainant's primary duties as utility driver consist of delivering packages to individuals and businesses in Celina, Ohio and some surrounding areas.

6. In November 1996, Complainant injured his right knee stepping off his truck while working. Complainant went to see his family physician, Dr. Hendricks, because he was experiencing severe pain in his knee. Dr. Hendricks referred Complainant to an orthopedic specialist, Dr. John Specca. Dr. Specca performed an MRI and x-rayed Complainant's knee. He concluded that Complainant had a stress fracture somewhere in his right knee.

7. Based on Dr. Specca's diagnosis, Complainant was off work for approximately six months. He was on bed rest for one month and received physical therapy for the remainder of the time he was off work. After the

physical therapy was completed, he returned to work performing the same job he had performed when he went on medical leave.

8. When Complainant returned to work, he was wearing a knee brace. As part of his uniform, he was also wearing shorts. Respondent's uniform policy permits employees to wear shorts to work. However, the policy specifically states that shorts cannot be worn if the employee has a knee brace.

9. On May 27, 1998, Complainant submitted a slip from his doctor asking Respondent to permit Complainant to wear shorts with his knee brace while at work because wearing long pants in the hot weather tended to cause a rash and blisters around the brace. Pursuant to Respondent's uniform policy, Respondent advised Complainant that he could not wear a knee brace and wear shorts.

10. After Complainant was advised by management at UPS that he was not permitted to wear shorts and a knee brace, he began wearing long pants. When he began wearing long pants with his knee brace, Complainant developed a rash and water blisters around the knee brace. After the rash

developed, Complainant put ointment on the rash, and it resolved itself in a couple of weeks. A callus behind the knee joint subsequently developed.

11. Complainant stopped wearing a knee brace in March 1999 and has not worn a knee brace at work since.

## **CONCLUSIONS OF LAW AND DISCUSSION**

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.<sup>1</sup>

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<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Complaint alleged that Respondent denied Complainant reasonable accommodation because of his disability.

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

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the . . . disability, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under Chapter 4112 of the Revised Code. The Commission must prove a violation of Section 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Since Ohio's laws against discrimination are "as broad as, if not broader than," similar federal statutes, federal case law may be used to interpret Ohio law. *Wooten v. City of Columbus, Div. of Water*, 3 AD Cases 631, 635 (Franklin Cty. 1993) (commas inserted). See also *Columbus CSC v. McGlone*, 8 AD Cases 737, 739 (Ohio 1998) ("We can look to regulations

and cases interpreting the federal Act for guidance in our interpretation of Ohio law”). Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the Rehabilitation Act of 1973 or the Americans with Disabilities Act (ADA).

5. The order of proof in a disability discrimination case requires the Commission to prove that Complainant is disabled within the meaning of R.C. 4112.01(A)(13). *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St.3d 279 (1986).

6. R.C. 4112.01(A)(13) defines “disability” as a:

. . . physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

7. Anatomical loss affecting the musculoskeletal system is a physical impairment. Orthopedic disease is also a physical impairment. R.C. 4112.01(A)(16).

8. Complainant's condition may be an impairment. However, "not every impairment qualifies as a disability . . ." *McKay v. Toyota Mfg.*, 6 AD Cases 933, 936 (6<sup>th</sup> Cir. 1996).

9. Whether an impairment is a disability must be determined on a case-by-case basis. "The inquiry is an 'individualized one', not one that can be made by looking only at the type of injury." *Desai v. Tire Kingdom, Inc.*, 6 AD Cases 143, 146 (M.D. Fla. 1996) (citation omitted).

10. The key is whether the impairment *substantially limits a major life activity*. Three factors "should be considered" when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) the nature and severity of the impairment;
- (2) the duration or expected duration of the impairment; and
- (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

*Interpretive Guidance of Title I of the Americans with Disabilities Act, (EEOC Interpretive Guidelines)*, 29 C.F.R. 1630 App. Sec. 1630.2(j).

11. An impairment must be *substantially* limiting. This means that it must be significant when compared to the average person.

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the [three factors], does not amount to a significant restriction when compared with the abilities of the average person.

*Id.*

12. Based on the foregoing discussion, as a matter of law, Complainant was never disabled. His major life activities were only substantially limited for a brief period of time when he was on bed rest. Once he was off bed rest, he was not working, but he was otherwise leading a normal life while he was receiving physical therapy. He was able to perform his everyday activities.

13. Assuming that some of Complainant's major life activities were significantly restricted when compared with the abilities of the average person while he was recuperating from his knee injury, the impairments did not last beyond the six-month period that Complainant was off work. When Complainant returned to work in May, there were no restrictions on his

activities at work or his activities when he was not at work. The problems Complainant had with his knee were not chronic. There was no permanent, long-term impact.

14. The federal courts that have considered similar or more serious medical conditions under more exacerbated circumstances have reached the same conclusion. *See, e.g. Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1025 (5<sup>th</sup> Cir. 1999) (holding that a leg deformity which caused moderate difficulty in walking and a limp resulting in walking at a “significantly slower pace than the average person” were not substantial limitations in the major life activity of walking); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5<sup>th</sup> Cir. 1999) (chronic ankle problems including gout, bone spurs, and ligament damage that required plaintiff to miss more than one year of work were not severe or chronic enough to qualify as a disability).

15. Complainant’s condition was temporary. The courts and the EEOC do not consider persons with temporary impairments to be disabled. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(j) (“temporary, non-chronic impairments of short duration, with little or no long term or permanent impact,

are usually not disabilities”); *Huff v. UARCO, Inc.*, 122 F.3d 374 (7<sup>th</sup> Cir. 1997) (temporary condition not disability under the Act); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1354 (9<sup>th</sup> Cir. 1996) (plaintiff’s four-month temporary impairment was too brief to be a “disability”); *Vande Zande v. Wisconsin Dept. of Administration*, 44 F.3d 538, 544 (7<sup>th</sup> Cir. 1995) (“intermittent episodic impairments are not disabilities”); *Evans v. City of Dallas*, 861 F.2d 846, 852-53 (5<sup>th</sup> Cir. 1988) (knee injury not a disability).

16. The ADA was never intended to cover persons with temporary impairments.

The ADA simply was not designed to protect the public from all adverse effects of ill-health and misfortune. Rather, the ADA was designed to assure that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. Extending the statutory protections available under the ADA to individuals with broken bones, sore muscles, infectious diseases, and other ailments that temporarily limit an individual’s ability to work would trivialize this lofty objective.

*Halperin v. Abacus Technology Corp.*, 7 AD Cases 406 (4<sup>th</sup> Cir. 1997) (citation omitted).

17. My conclusions about Complainant’s impairment and its temporary nature are based on his deposition testimony. He returned to work with no restrictions six months after his injury. He was able to work from eight to ten

hours per day delivering packages which required him to step on and off a truck 70 to 100 times a day.<sup>2</sup> Complainant also follows a vigorous exercise regimen. He works out twice a week. He swims, jogs on a treadmill, and lifts weights.<sup>3</sup>

18. Since the Commission was unable to prove that Complainant was disabled, it is not necessary to consider whether Respondent had to reasonably accommodate Complainant by allowing him to wear shorts while he was wearing a knee brace.

### **RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8525.

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<sup>2</sup> *Smith v. United Parcel Service*, 50 F.Supp 2d 649 (S.D. Texas 1999) (package car drivers are required to make 70 to 100 stops per day).

<sup>3</sup> The Commission offered Complainant's physician's statement (a questionnaire that the physician filled out for the Commission) as evidence that Complainant is substantially and permanently impaired because of his knee condition. The physician's statement was contrary to Complainant's testimony and was not credible. Furthermore, the physician was equivocal. He stated Complainant's condition was "potentially permanent". He stated that Complainant's condition will "probably get worse over time". However, the evidence showed that Complainant's condition was never serious, and he made a full recovery.

FRANKLIN A. MARTENS  
CHIEF HEARING EXAMINER

March 24, 2000