

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

CARL CHALMER CALDWELL

Complainant

v.

Complaint No. 07-EMP-CIN-32705
(CIN) B5 (32705) 05142007
22A-2007-05333C

**BELLISIO FOODS, IND. F/K/A/
MICHELINA'S, INC.**

Respondent

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

**MIKE DeWINE
ATTORNEY GENERAL**

Duffy Jamieson, Esq.
Assistant Chief
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 - 466 - 7900

Counsel for the Commission

J. Miles Gibson, Esq.
Gibson Law Office
673 Mohawk Street, 4th Floor
Columbus, OH 43206-2192
614 - 340 - 7460

Counsel for Respondent

Carl Chalmer Caldwell
1105 Ridgeland Road
Jackson, OH 45640-8667

Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 - 466 - 6684

INTRODUCTION AND PROCEDURAL HISTORY

Carl Chalmer Caldwell (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) May 14, 2007.

The Commission investigated the charges and found probable cause that Michelina's, Inc.¹ (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued a Complaint on October 4, 2007.

The Complaint alleged that Respondent refused to hire Complainant because of his disability. Additionally, the Complaint alleged that Respondent made no attempts to accommodate

¹ Respondent underwent a name change prior to the public hearing. Respondent's name is Bellisio Foods, Inc.

Complainant or determine whether a reasonable accommodation would even be necessary for Complainant to perform the essential functions of the job.

Respondent filed an Answer to the Complaint on November 19, 2007. Respondent admitted certain procedural allegations, but denied it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on October 30-31, 2008 at the Jackson County Commissioner's Office in Jackson, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 237 pages; exhibits and stipulated facts admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 20, 2009; by Respondent on December 22, 2009; and a reply brief filed by the Commission on January 8, 2010.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on May 14, 2007.

2. The Commission notified Respondent by letter dated September 13, 2007 it was probable Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

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

4. Respondent operates a food production facility in Jackson, Ohio.

5. Respondent produces frozen food entrees sold under the brand name Michelina's.

6. The Jackson facility houses three (3) production areas and contained within those areas are twenty (20) production lines.

7. The production lines are where the frozen entrees are assembled, packaged, and boxed for shipping. (Tr. 44)

8. Forklifts and pallet jacks are used throughout the plant to transport ingredients, materials, and finished product. (Tr. 46)

9. On February 10, 2007, Complainant applied for an opening as a General Utility Employee (GUE). (Tr. 20-21, Comm. Ex. 6)

10. The GUE is an entry-level position and does not require any prior experience.² (Tr. 19, 21)

11. The minimum qualifications for a GUE include: standing for eight to ten (8 to 10) hours a day, repetitive bending and lifting throughout the day, lifting a minimum of thirty-five (35) pounds, moving repetitively at 120 rotations per minute, and working overtime on weekends. (Tr. 21)

12. GUEs are trained on the job. (Tr. 21)

13. Complainant met the minimum qualifications for the position and was, therefore, scheduled for an interview. (Tr. 21)

² Respondent employs approximately 550 GUEs. (Tr. 39)

14. On February 13, 2007, Human Resources Assistant Sarah Williams (Williams) interviewed Complainant.

15. Complainant is deaf and uses sign language to communicate. In order to facilitate communication Complainant brought an interpreter to the interview. (Tr. 22)

16. Williams determined Complainant met the minimum qualifications and indicated on Complainant's Interview Evaluation Form (IEF) that he should be hired. (Tr. 27, Comm. Ex. 5)

17. After the interview Williams went directly to Safety Manager Jim Harris' (Harris) office.

18. Williams had a five (5) minute conversation with Harris wherein she informed him that Complainant is deaf. (Tr. 25)

19. Harris looked at Complainant's application and then told Williams that Respondent would not hire Complainant because he is deaf. (Tr. 25)

20. Harris then directed Williams to change the IEF to reflect a "do not hire" determination. (Tr. 27)

21. Larry Sprague (Sprague), Vice President for Human Resources, called Complainant's father to inform him that Respondent would not hire Complainant because he is deaf. (Tr. 130)

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. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.³

³ 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 Commission alleged that Respondent did not hire Complainant because he is deaf and that Respondent made no attempts to accommodate Complainant or determine whether a reasonable accommodation would even be necessary for him to perform the essential functions of the job.

2. These allegations, if proven, would constitute violations of R.C. Chapter 4112.02 (A) which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

For any employer, because of the ... disability, ... of any person, ..., 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 R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G), 4112.06(E). The employer bears the burden of showing that the proposed accommodation would cause an undue hardship. *Miami Univ. v. Ohio Civ. Rights Comm.*, (1999), 133 Ohio App. 3d 28, 42 citing

Greater Cleveland Regional Transit Authority v. Ohio Civ. Rights Comm., 50 Ohio App. 3d 20, 24 (Cuyahoga Cty. 1989).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

5. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

- (1) Complainant was disabled under R.C. 4112.01 (A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

Id. at 571 (citation omitted).

6. There is no dispute that Complainant was disabled under R.C. 4112.01(A)(13) or that Respondent refused to hire Complainant because of his disability.

7. Respondent disputes that Complainant could safely and substantially perform the essential functions of the job of GUE with, or without, accommodation.

Accommodations for handicapped employees are unreasonable only if they place an undue hardship on the employer and the burden of showing undue hardship is on the employer.

Martinez v. Ohio Dept. of Admin. Serv., (1997), 118 Ohio App. 3d 687, 693 N.E. 2d 1152.

8. Specifically, Respondent asserts there is no reasonable accommodation that would: (1) decrease the safety risks to Complainant from the motorized vehicles which have audible signals that are used to transport product within the facility and, (2) enable Complainant to know when production lines need to be halted because the signals are audible.

9. When an accommodation is requested, O.A.C. 4112-5-08 (E)(2) gives examples of what types of accommodations are to be considered by the employer:

Accommodations may take the form, for example, of providing access to the job, *job restructuring, acquisition or modification of equipment or devices, or a combination of any of these*. Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules.
(...)

10. Complainant came to the interview with an interpreter. On his application he wrote the following: "Would like a chance to be employed. I'm deaf/But I hope your company can find a job for me. Thanks for taking time to read & view this." (Jt. Ex. 6)

11. Complainant did not identify the specific type of accommodation that would help him perform a job within Respondent's facility. He indicated that he is deaf and hoped that the employer would be able to find a job for him.

12. A reasonable inference can be drawn from Complainant's presence with an interpreter, and his hope that Respondent can find a job for him, that he was requesting Respondent provide a reasonable accommodation for his deafness in order to work as a GUE.

13. The Commission alleges Respondent failed to engage in an interactive process with Complainant to determine available reasonable 75 F.3d 1130 accommodations.

14. EEOC regulations state it "may be necessary" for the employer to initiate "an informal, interactive process" with the disabled employee to determine possible reasonable accommodations. 29 C.F.R. § 1630.2(o)(3). The steps of this process are provided in the *EEOC Interpretive Guidance*:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the person to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

EEOC Interpretive Guidance, at §1630.9, ("Process of Determining the Appropriate Reasonable Accommodation").

15. The determination of whether an accommodation is possible is *fact-specific issues*.

The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

Hall v. United States Postal Serv., 857 F. 2d 1073, 1079 quoting *School Bd. of Nassau County v. Arline*, 772 F.2d 759, 764-65 (11th Cir. 1985) (citations omitted), *aff'd*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

16. In making a determination regarding what the essential functions of a particular job position are, 42 U.C.S. § 12111(8) provides that:

(...) consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

17. The regulations implementing the ADA define essential functions as "those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation." 29 C.F.R. 1630.

18. It is plain enough what "accommodation" means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work. *Vande Zande v. Wisconsin Dep't. of Admin.*, 44 F.3d 538 at 542, 543.

19. Complainant's employment application initiated the process of requesting an accommodation.

20. The Commission's expert witness, Jenna Tudela (Tudela), has a Master's Level Engineering degree with a focus on rehabilitation engineering. (Tr. 83)

21. Tudela has been a rehabilitation engineer for eleven (11) years and specializes in assessing work environment to determine whether and how a person with a disability can be accommodated. (Tr. 84)

22. Tudela has experience in accommodating people who are deaf in industrial and factory environments. (Tr. 86-87)

23. Tudela provides rehabilitation engineering consulting services in the areas of work site accommodations, ergonomics, home accessibility, mobility seating, computer access, sensory disabilities, environmental control units and custom design devices. (Tr. 83-84, Comm. Ex. 1)

24. Tudela is employed by MJT Engineering Services, LLC, State of Ohio as an Engineering Engineer and Ergonomist.

Tudela holds a B.S. in Engineering with a Biomedical Concentration and an M.S. in Engineering, with a concentration in Rehabilitation Engineering from Wright State University.

25. The evidence introduced by Respondent regarding the occupational hazard defense was based on the testimony of their expert witness, Gary Curren (Curren).

26. I found Curren's testimony to be unpersuasive.

27. Curren does not have any experience in providing workplace accommodations for people who are deaf. (Tr. 217)

28. Curren does not have any experience with the current devices and technology used to assist people who are deaf in the work environment. (*Id.*)

29. Curren's expertise is in the area of workers' compensation issues and a majority of Respondent's affirmative defense

was based on citing the OSHA and Workers' Compensation regulations.

30. O.A.C. 4112-5-08(D)(3) states that only those OSHA requirements that are "not correctable by reasonable accommodation" may support an occupational hazard defense.

31. Curren's expert opinion regarding the occupational hazards associated with employing a deaf person in Respondent's work environment were based on speculation about the risk instead of objective factors.

32. The Commission provided credible evidence of how job restructuring and mechanical devices could assist Complainant in performing the essential functions of the job of a GUE. (Tr. 61-68, 96-97, 104-109, 110-112)

33. In passing the ADA in 1990, the inclusion of the affirmative duty to provide a reasonable accommodation to a qualified disabled person was explained in *Vande Zande supra* at 542, (citing § 12112(b)(5)(A)) in the following manner:

The more problematic case is that of an individual who has a vocationally relevant disability--an impairment such as blindness or paralysis that limits a major human capability, such as seeing or walking. In the common case in which such an impairment interferes with the individual's ability to perform up to the standards of the workplace, or increases the cost of employing him, hiring and firing decisions based on the impairment are not "discriminatory" in a sense closely analogous to employment discrimination on racial grounds. The draftsmen of the Act knew this. But they were unwilling to confine the concept of disability discrimination to cases in which the disability is irrelevant to the performance of the disabled person's job. Instead, they defined "discrimination" to include an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the ... [employer's] business."

34. If Respondent asserts that Complainant cannot be reasonably accommodated, the Commission's rules place the burden upon Respondent to affirmatively demonstrate that the requested accommodation would create an occupational hazard to Complainant and other employees:

(...) whether one is a direct threat to the safety of himself or others is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm.

Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 at 764 (5th Cir. 1996).

35. Curren was not asked by Respondent to observe the plant and determine how Respondent could accommodate a person who is deaf prior to Respondent's decision not to hire Complainant. (Tr. 220)

36. The GUEs perform a variety of jobs including: Product Inspection, Dumping Pasta, Wiping, Sauce Inspector, Line Supplier, Relief Crew, Ingredient Prep, and Pack Out. (Comm. Ex. 4)

37. A job duty is essential if the reason the position exists is to perform the job function; and/or the function is highly specialized such that the reason the person is hired is for his or her

expertise. *Miami Univ. v. Ohio Civ. Rights Comm.*, (1999), 133 Ohio App. 3d 28, 38-40, *citing* 29 C.F.R. 1630(n).

38. All GUE's do not perform all of the tasks that are set forth in the position description. Some of the tasks are only done on "particular lines". (Comm. Ex. 4)

39. Therefore, all tasks described in the GUE list of tasks are not performed on every production line.

40. The facility houses twenty (20) production lines. (Tr. 43)

41. Tudela determined that with reasonable accommodation, Complainant can work four (4) of the GUE job functions: Product Inspection, Wiping, Sauce Inspector, and Packout. (Tr. 110-111)

42. Tudela determined that the remaining tasks relate to Complainant's ability to communicate and minimize interactions with forklift traffic:

Ms. Terrell: And uh I think you've mentioned this before, but how could job restructuring accommodate Mr. Caldwell?

Ms. Tudela: Well just in looking at the general utility position, eliminating certain positions where they may be involved in areas where there's much higher traffic. So eliminating those specific positions, but still giving them four or five positions where they can rotate through so they meet the goal of not working in one position all day long and could accumulate some type of repetitive trauma disorder. Say the question again.

Ms. Terrell: I think you answered it but just how job restructuring can be used as an accommodation.

Ms. Tudela: I just want to say that in other job positions or other companies that I've worked with, that can be an accommodation. It's not just about technology. You know it can be administrative controls. So it can be additional training but it can be kind of carving out a job for that person so that they are still valuable to the company but there are certain set positions that will greatly reduce the chance of injury and of errors.

(Tr. 109-110)

43. Since all GUEs are not required to perform all of the tasks in the job description, Tuleda's recommendation regarding job restructuring would not fundamentally alter the position. *Id.* at 40.

44. When Respondent denied Complainant employment due to his disability on February 13, 2007 it did not undertake a

careful and open-minded weighing of the risks and alternatives in determining whether or not a reasonable accommodation could be identified that would enable Complainant to safely and substantially perform the essential functions of the job of a GUE.

45. Respondent has engaged in discriminatory conduct, and Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

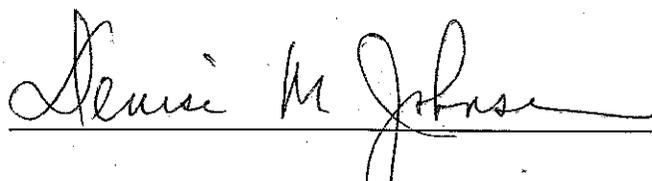
For all of the foregoing reasons, it is recommended in Complaint No. 07-EMP-CIN-32705 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to make an offer of employment to Complainant within ten (10) days of the Commission's Final Order for the position of General Utility Employee. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage he would have been paid had he been employed as a General Utility Employee on February 10, 2007 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within ten (10) days of the offer of employment a certified check payable

to Complainant for the amount he would have earned had he been employed as a General Utility Employee on February 10, 2007 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less interim earnings, plus interest at the maximum rate allowed by law.⁴

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 10, 2012

⁴ Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.