

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

RAYMOND F. PANDELLI

Complainant

v.

LAND O'LAKES, INC.

Respondent

Complaint No. 9842
(AKR) B3041904 (28705) 04232004
22A-2004-02095C

Complaint No. 9961
(AKR) B3040105 (29885) 04272005
22A-2005-02567C

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

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Raymond F. Pandelli (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on April 23, 2004 and April 25, 2005, respectively.¹

The Commission investigated the charges and found probable cause that Land O'Lakes, Inc. (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 Complaints on March 17, 2005 and November 17, 2005, respectively.

Complaint No. 9842 alleged on or about April 23, 2004, and continuing thereafter, Respondent failed and refused to continue reasonably accommodating Complainant's disability, and placed him on inactive status.²

¹ Parties filed a Joint Motion to Stay and Consolidate regarding Complaint No. 9842. The Motion was granted. On January 9, 2006, the Commission filed a Motion to Lift Stay and Consolidate Complaint Nos. 9842 and 9961. The Motion was granted.

² The Commission filed a Motion to Amend Complaint No. 9842 on March 26, 2006. Respondent filed an Amended Answer to Complaint No. 9842 on April 5, 2006.

Complaint No. 9961 alleged Respondent failed and refused to reasonably accommodate Complainant, and transfer him, for reasons not applied equally to all persons without regard to their disability status.

Respondent filed Answers to the Complaints on April 25, 2005 and December 27, 2005. 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 May 1-3, 2007, at the Lausche State Office Building, 615 West Superior Avenue, Cleveland, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 656 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on September 23, 2008; by Respondent on November 25, 2008; and a reply brief filed by the Commission on December 11, 2008.³

³ On December 18, 2008, Respondent's filed a Motion for Leave to File Surreply Instantly. On December 29, 2008, the Commission filed a Memorandum in Opposition. Under the Commission's rules the briefing of legal arguments by the parties pursuant to an administrative hearing does not include a sur-reply by Respondents. Respondent's Motion is, therefore, denied.

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 sworn charge affidavits with the Commission on April 23, 2004 and April 25, 2005, respectively.

2. The Commission determined on October 7, 2004 and August 4, 2005 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 Complaints after conciliation failed.

4. Respondent is a farmer-owned cooperative and a leading marketer of dairy-based products.

5. The facility located in Kent, Ohio manufactures spreads and operates three shifts:

- 7:00 a.m. to 3:00 p.m.
- 3:00 p.m. to 11:00 p.m. and
- 11:00 p.m. to 7:00 a.m.

(Tr. 112)

6. The employees at the Kent facility are represented by the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local #70.

7. The Collective Bargaining Agreement (CBA) that covered employees at the Kent facility for the period of June 8, 2002 to June 8, 2005 required Respondent follow a specific procedure in forcing employees to work overtime. (Comm. Ex. 43)

8. Complainant first started working at Respondent's Kent facility in 1985 as a Maintenance Mechanic. The position was later reclassified as Certified Mechanic with no change in job duties.

9. A few months after Complainant started working for Respondent he went to second shift.

10. A Certified Mechanic at the Kent facility is a specially trained maintenance individual who keeps the lines and equipment properly maintained. (Tr. 557)

11. Complainant assisted operators, and maintained and repaired equipment and packaging materials for butter and margarine products.

12. Complainant was responsible for taking care of the building, pumps and other equipment.

13. Occasionally, he assisted vendors with vehicles and provided emergency response for product releases. (Tr. 251)

14. Complainant also completed preventive maintenance programs to discover parts that were failing on equipment and replaced them to prevent a problem before it happened, ensuring the machinery continued to work uninterrupted. (Tr. 255)

15. The number of mechanics at the Kent facility during the relevant time periods was approximately 13 to 15. Seven mechanics worked first shift, three or four worked second shift, and three or four worked third shift. (Tr. 112)

16. Article 12, Section 1 of the CBA states:

(d)epending upon operational requirements, employees may be expected to work more than 8 (eight) hours per day or forty (40) hours in a given week.

Mandatory overtime is in effect when all departments are scheduled full. Overtime will not be charged when all departments are scheduled full (sixth and/or seventh day), in which case all employees must work.

Employees are required to be available to work four hours before and four hours after their shift and on weekends.

(Comm. Ex. 43, 55)

17. If not enough employees made themselves available to work on a voluntary basis, the employee with the least amount of seniority within the classification on the shift scheduled to work who had not worked eight hours of overtime was "forced" to work.

18. Employees avoided being forced to work overtime if they were qualified to work outside their classification on their shift, provided this did not cause any other employee to be forced in their classification.

19. Employees who were unavailable to work due to medical restrictions were not included in the calculation when rolling back the eight hours to zero.

20. In 1990 Dr. Jose Rafecas (Dr. Rafecas) diagnosed Complainant with narcolepsy.

21. Narcolepsy is a neurologic disease and a sleep disorder. It is a condition where the brain control systems that keep an individual awake are not functioning properly. As a consequence the symptoms manifested by the condition are excessive sleepiness and occasional muscle paralysis which relates to abnormal dream sleep physiology. (Tr. 25)

22. Individuals who have narcolepsy may have a sleep attack. Sleep attacks happen as a result of excessive sleepiness caused by a sleep disorder. When individuals with narcolepsy get sleepy they struggle to fight off the sleepiness and the onset of sleep. (Tr. 26)

23. In 1997 Complainant returned to Dr. Rafecas because Complainant noticed when he worked overtime until 3:00 a.m. he did not feel well rested no matter how late he slept the next day.

24. Complainant presented a letter to Respondent from Dr. Rafecas, dated June 26, 1997, which identified Complainant's condition as narcolepsy and set forth work restrictions.

25. The letter advised Complainant's condition causes sleep attacks, and further advised Complainant should not work past 2:00 a.m. Daylight Savings Time (DST) or 1:00 a.m. Eastern Standard Time (EST). (Comm. Ex. 8)

26. Because Complainant worked between 3:00 p.m. and 11:00 p.m. and overtime for Certified Mechanics could include four hours before or after their shift, Complainant's restrictions required an accommodation between 1:00 a.m. and 3:00 a.m.

27. Respondent accommodated Complainant by excusing him from working overtime after 1:00 a.m. or 3:00 a.m. (Tr. 267)

28. Complainant returned to Dr. Rafecas because he noticed when he reported to his regular work shift after working overtime in the early morning hours he experienced the symptoms of not feeling well rested.

29. In October of 2000, Dr. Rafecas extended Complainant's restrictions to not working between 1:00 a.m. and 6:00 a.m.

30. Denise Rice (Rice) became the Human Resources Manager at the Kent facility in March of 2002. Rice reported to Karen Darwin (Darwin), the General Manager of the plant.

31. Rice determined there was a problem with how employees' medical restrictions affected the process of overtime. (Tr. 383)

32. She concluded from her investigation of the issue there were an unusually high number of employees who had medical work restrictions. The employees were never asked to update their medical restrictions.

33. Rice decided to create the Transitional Work Policy (TWP), at least in part, to address this situation.

34. The TWP set forth the process for accommodating an employee with a temporary or permanent medical restriction, effective January 1, 2004. (Comm. Ex. 36)

35. Under the TWP an employee with a temporary restriction would have their restriction honored for up to ninety (90) days.

36. If a restriction exceeded ninety days, the employee's physician needed to classify the restriction as permanent, or else the employee would be taken off of work.

37. If the restriction was classified as permanent the restriction would be reviewed to determine if the employee could be accommodated on a permanent basis.

38. On March 25, 2004, Complainant met with Rice and Daniel Cornelius (Cornelius), Maintenance Manager. He was told if he did not get a change to his work restriction he would no longer be working for Respondent.

39. On April 21, 2004, Complainant submitted a Patient Visit Form (PVF) to Respondent which stated he had a permanent work restriction between 1:00 a.m. and 6:00 a.m.

40. Respondent made the decision it would not accommodate Complainant's permanent restriction.

41. By memo dated April 23, 2004, Rice informed Complainant as of that date she had not received any updated medical information that changed his ability to perform the essential functions of his position. (Comm. Ex. 38)

42. On May 1, 2004, Complainant reported to work but Rice would not allow him to work without a change to his work restriction.

43. Complainant went to Dr. Rafecas' office and wrote a note which asked his restriction be changed so he could work until 3:00 a.m. on a "trial" or "temporary basis" until he could resolve his "employer HR issues". (Comm. Ex. 40)

44. Dr. Rafecas' nurse practitioner received the request and decided the negative impact of Complainant not working would be greater than the negative impact of changing his restriction to allow him to work until 3:00 a.m.

45. Complainant submitted the PVF to Respondent with the revised restriction on May 3, 2004. Complainant was allowed to return to work.

46. In February of 2005 Complainant bid on a first shift Certified Mechanic position.

47. Under the CBA if multiple people bid on the same position the person with the most seniority received the position.

48. Although Complainant was the most senior employee bidding on the open position he did not receive the job because of his restriction. (Tr. 168)

49. In March of 2005 another first shift Certified Mechanic position was open. Complainant bid on that position and was the most senior applicant but was rejected because of his restriction. (Tr. 172-173)

50. Complainant bid for the open position of DAF Operator. The position was posted on May 26, 2005.

51. DAF Operators operate the waste water treatment facilities for the plant.

52. The DAF Operator position is the only position in the Maintenance Department that works the second shift.

53. Complainant was awarded the position.

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.⁴

⁴ 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 on or about April 23, 2004, and continuing thereafter, Respondent failed and refused to continue reasonably accommodating Complainant's disability, and placed him on inactive status. Additionally, the Commission alleged Respondent failed and refused to reasonably accommodate Complainant, and transfer him, for reasons not applied equally to all persons without regard to their disability status.

2. These allegations, if proven, would constitute violations of R.C. Chapter 4112 and the Commission's rules embodied in the Ohio Administrative Code (O.A.C.). R.C. 4112.02 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's rules require an employer to reasonably accommodate an employee's disability unless the employer demonstrates that such accommodation would impose an undue hardship on the employer's business. O.A.C. 4112-5-08(E)(1); see also *Greater Cleveland Regional Transit Authority v. Ohio Civ. Rights Comm.*, 55 FEP Cases 826 (Cuyahoga

Cty. 1993) (the employer bears the burden of showing undue hardship).

4. 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).

5. 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.

6. 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.

McGlone, supra at 571 (citation omitted).

7. 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 one's self, 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.⁵

8. The Commission presented testimony from Dr. Jose Rafecas, Complainant's treating physician, about Complainant's narcolepsy.

9. Narcolepsy is a neurologic disease and a sleep disorder.
(Tr. 25)

⁵ The ADA's definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13). 42 U.S.C. § 12102(2) provides:

The term "disability" means, with respect to an individual—

- (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) being regarded as having such an impairment.

10. Although Complainant has narcolepsy, the first part of R.C. 4112.01(A)(13) requires the Commission to show that Complainant has an actual disability. The Commission must prove Complainant's condition substantially limits one or more major activities.

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities ... The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual.

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

11. Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." *EEOC Interpretive Guidance*, at § 1630.2(i). Such activities include, but are not limited to:

caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, ... working, ... sitting, standing, lifting, and reaching.

Toyota Motor Mfg. v. Williams, 534 U.S. 184 at 197-198 (Legislative citations omitted).

12. 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.

29 C.F.R. § 1630.2(j)(2).

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.

EEOC Interpretive Guidance, at § 1630.2(j).

The Commission alleges Complainant is substantially limited in the major life activities of learning, reading, the manual task of driving, and working.

13. The substantial limitation of a major life activity applies to the entire range of the life activity, not merely to one sub-class of that activity. *Id.*

14. Major life activities constitute tasks central to most people's daily lives, and include "speaking, *learning*, and working."; *Swanton v. Univ. of Cincinnati*, 268 F.3d 307, 314 (6th Cir. 2001) (citing 29 C.F.R. § 1630.2(i) [emphasis added]).

15. When determining whether someone is substantially limited in the ability to learn, courts look at the effect an impairment has on memory, the ability to learn new things, succeed in school and concentrate. *Mulholland v. Pharmacia & Upjohn, Inc.*, (6th Cir. 2002), 52 Fed. Appx. 641, 645-646.

16. Because medical diagnoses can describe a wide range of people with differing levels of actual impairment, a court must make an individualized assessment the plaintiff is actually impaired. *Toyota, Id.* at 198-199.

17. Dr. Rafecas testified how the condition generally affects individuals without explaining how Complainant was specifically affected by the condition. (Tr. 30-32, 50-52)

18. Complainant testified how his condition affected his ability to read, concentrate, and learn, and was based on generalized recollections. (Tr. 244-247, 269-270)

19. Complainant recalled that he was unable to complete sustained reading for course work at Kent State University (KSU) in 1990. When Complainant was attending KSU in 1990 he was working from 3:00 p.m. to 11:00 p.m. (sometimes longer), and then going to school from 7:00 a.m. to 2:00 p.m. Complainant admitted anyone would be overwhelmed with this schedule. (Tr. 353)

20. The testimony of Complainant regarding the effect of the narcolepsy on his reading and learning does not amount to a significant restriction when compared with the abilities of the average person.

21. The Commission also alleged that Complainant is substantially limited in the manual task of driving.

22. Complainant testified he drove home the wrong way numerous times while he was working on second shift. (Tr. 344)

23. Courts have concluded the task of driving is one of a list of manual tasks performed by an individual, in addition to other manual tasks, such as typing, writing, grocery shopping, making beds, doing laundry, and dressing oneself. *Sanders v. First Energy Corp.*, (Jefferson Cty., 2004) 157 Ohio App. 3d 826.

24. Driving is the only manual task Complainant testified he had trouble performing.

25. The evidence in the record does not support a determination Complainant's condition interfered with his ability to perform a broad range of manual tasks:

... plaintiff's impairment fell "short of substantially limiting the major life activity of performing manual tasks" because the plaintiff admitted he could perform daily activities such as dressing himself, driving, and working with a computer. *Id.* The court concluded "a plaintiff must demonstrate that he is substantially limited *in a range of manual tasks rather than a narrow category thereof.*"

Chandra v. Engelhard/ICC, 234 F.3d 1219, 1223 (11th Cir. 2000). [Emphasis added.]

... plaintiff failed to demonstrate a substantial limitation when, although she could not type or write for long periods of time, she could perform "a wide range of manual tasks, including grocery shopping, driving, making beds, doing laundry, and dressing herself."

Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 797 (9th Cir. 2001).

26. Dr. Rafecas testified individuals with narcolepsy tend to fall asleep or lose focus while performing sedentary activities, but more physically active endeavors enable them to remain awake and function.

27. Complainant's inability to drive is one sub-set of a range of manual tasks, only one of which he cannot perform. Therefore, Complainant is not restricted in the major life activity of being able to perform manual tasks.

28. The Commission posits Complainant's ability to drive only short distances before he becomes sleepy and disoriented results in a substantial limitation in the major life activity of working.

29. The Commission's argument is well taken.

With respect to the major life activity of working ... [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. Section 1630.2.

30. Truck driving constitutes a class of jobs and the courts have held that a person who is unable to work as a truck driver is substantially limited in the major life activity of working. *Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997); see also *DePaoil v. Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147, 1152-53 (7th Cir. 1998).

31. The credible testimony in the record supports the finding that the effect of narcolepsy on Complainant's ability to perform the manual task of driving would prevent him from working at any job which would require him to drive more than fifteen (15) minutes at a time. This is one of those cases in which the effect of Complainant's impairment on his ability to drive is so severe that his substantial foreclosure from the job market is obvious.

REASONABLE ACCOMMODATION

32. The next step in the analysis is to determine whether Complainant can perform the essential functions of the job with or without accommodation.

33. Because Complainant worked on the second shift (3:00 p.m. to 11:00 p.m.) his restriction (not working overtime from 1:00 a.m. to 6:00 a.m.) only prevented him from working four hours overtime at the end of the shift. Respondent asserts eight hours of overtime both before and after a shift is an essential function of the job of a Certified Mechanic.

34. The ADA's implementing regulations provide the term "essential functions" means "the fundamental job duties of the employment position the individual with a disability holds or desires," and "does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1).

35. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1305.

36. In making this determination, the statute provides:

... 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.

42 U.C.S. § 12111(8); see also *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997).

37. The ADA regulations provide other factors to consider are:

- (1) the amount of time spent on the job performing the function,
- (2) the consequences of not requiring the incumbent to perform the function,
- (3) the terms of the collective bargaining agreement,
- (4) the work experience of past incumbents in the job, and
- (5) the current work experience of incumbents in similar jobs.

Davis, supra, citing 29 C.F.R. § 1630.2(n)(3).

38. The CBA states mandatory overtime is in effect when all departments are scheduled full sixth and/or seventh days, in which case all employees must work. (Comm. Ex. 43, p. 7)

39. In a forced overtime situation all overtime offered but not work is charged to the employee who did not work the overtime.

40. To read the CBA in the manner the Commission suggests would render the language in Article 12 as being voluntary. The language of the CBA and the testimony of Respondent's witnesses, in addition to the testimony by Complainant, require a different outcome.

41. Under mandatory overtime employees are required to work more than a 40 work week. If additional work is needed during mandatory overtime, the company first posts a sign-up sheet for overtime. If not enough employees sign-up in a classification on the shift for overtime, then overtime is offered to the employee that is qualified to perform the work in the department on the shift.

42. If not enough employees make themselves available for mandatory overtime then an employee can be forced to work overtime based on seniority.

43. Employees cannot be forced to work more than four hours before or four hours after the end of their shift. Respondent also provided credible evidence the operation of the Kent facility from 2002 through 2006 included the working of overtime hours by employees.

44. Overtime is an essential function of the job of a Certified Mechanic at Respondent's Kent facility. Because the plant runs a 7 day, 24 hour operation and Certified Mechanics are responsible for making sure the production lines and equipment are operating, overtime is an essential function of the job of a Certified Mechanic.

45. Although the job description does not list overtime as an essential function of the job of a Certified Mechanic at Respondent's Kent facility, Complainant admitted he was aware employees at the facility were required to work overtime.

46. On the other hand, to read the CBA in the manner Respondent suggested would render the language regarding overtime calculation and medical restrictions under Article 12 meaningless.

47. The CBA allows employees who are on medical restrictions to avoid the accounting consequences of not having their overtime hours rolled back associated with the failure to work forced overtime. (Kunich Tr. 30-33, Comm. Ex. 43, p. 10)

48. The last step of the analysis is whether Complainant can perform the essential functions of the job of Certified Mechanic with a reasonable accommodation.

49. Complainant continued to work with his restriction when the CBA came into effect in June of 2002 until April of 2004.

50. Karen Darwin has worked for Respondent in several different positions since 2000:

Mr. Greenburg: What did you do at Land O'Lakes the two years, three years prior, '00, '01 and '02? What did you do for the company in the three years prior?

Ms. Darwin: I started out I was a what they call a strategic operations director on the operations team that mainly looks at operational efficiencies for different businesses. I was in the retail business and I did that for about nine months. After that I was the director of food safety and quality systems for about another nine months or so and my third assignment with Land O'Lakes was as the plant manager at the Kent facility.

(Tr. 519-520)

51. In regards to whether overtime was an issue at the Kent plant when she was the plant manager at the Kent facility:

Mr. Greenburg: Well was there a mandatory overtime requirement?

Ms. Darwin: Yes as business needs supported that, yes.

Mr. Greenburg: Was it part of the collective bargaining agreement?

Ms. Darwin: Yes.

Mr. Greenburg: Was there an overtime issue at this plant?

Ms. Darwin: What do you – was there an –

Mr. Greenburg: Was there a problem with overtime at the plant?

Ms. Darwin: No. It was a necessary business process to run the facility.

Mr. Greenburg: Was there a problem staffing or having enough workers to do the overtime that was required?

Ms. Darwin: I would say not for the most part, no.

Mr. Greenburg: Um, do you remember whose idea it was to revise this transitional work policy?

Ms. Darwin: I don't remember a specific person, I think there was more of a business need to do that.

Mr. Greenburg: What was the business need?

Ms. Darwin: The business need was that we needed to make sure that obviously that there was adequate staffing for the plant and we had to staff the facility and we needed a way to make sure that work restrictions were dealt with in a fair manner and that had a program to deal with that. Have some time limit to the amount of time that could be associated with a work restriction.

(Tr. 523-525)

52. A part of Darwin's professional expertise was operational efficiencies. When she was asked if overtime was a problem at the plant she responded in the negative.

53. 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.

54. Usually, an employer does not have to accommodate a disabled employee if the accommodation would violate a CBA. In other words, a proposed accommodation is unreasonable if it conflicts with a *bona fide* seniority system established under a CBA. *Willis v. Pacific Mountain Assoc.*, 8 AD Cases 1632 (9th Cir. 1998); *Marcum v. Consol. Freightways*, 9 AD Cases 1484 (N.D. Ohio 1999).

55. The accommodation asked for by Complainant when he was working the second shift was to not work overtime four hours after the shift. Complainant could work overtime four hours before the shift.

56. The CBA does not penalize employees with medical restrictions who do not work forced overtime hours.

57. Complainant's medical restriction prohibited him from working four hours after his shift.

58. Although Respondent keeps records of the amount of overtime worked by employees, it does not keep records regarding how much of the overtime, if any, was forced overtime.

59. Respondent offered no credible evidence that the efficiency of the Kent facility was based on the need for every Certified Mechanic to work four hours before and four hours after the shift.

60. As with many of the multiple issues often in dispute in disability cases, an intensive inquiry and analysis is required and more often than not the "devil is in the details".

61. The question of what constitutes reasonable accommodation requires a “fact-specific, case-by-case” analysis. *Eckles v. Consolidated Rail*, 4 AD Cases 1134, 1141 (S.D. Ind. 1995) (legislative citation omitted).

62. The Commission has the initial burden of proposing a reasonable accommodation and proving Complainant is capable of performing the essential functions of the job with the proposed accommodation. *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996).

[I]f the employer claims that a proposed accommodation will impose an undue hardship, the employer must prove that fact. If the employer claims instead that the disabled employee would be unqualified to perform the essential functions of the job even with the proposed accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation.

Monette, supra at 1184.

63. Generally, a request for an accommodation from a disabled employee triggers the need for the employee and employer to interact with the common goal of determining the appropriate reasonable accommodation. See *Beck v. University of Wisc. Bd. of Regents*, 5 AD Cases 304 (7th Cir. 1996) (employer has some responsibility in determining necessary accommodation of

disabled employee; however, EEOC regulations envision an interactive process that requires participation by both parties).

64. There was no credible evidence presented by Respondent that requiring every Certified Mechanic to work four hours of overtime before and after shift violated a long-standing practice. Before the implementation of the Transitional Work Program, Respondent accommodated Complainant's medical restriction with no problem.

65. Respondent can accommodate the essential job requirement of working overtime by not requiring Complainant to work four hours of overtime after his shift where the working of overtime would fall within Complainant's medical restrictions.

INTERACTIVE PROCESS

66. The Commission argues Respondent failed to engage in an interactive process with Complainant to determine available reasonable accommodations. *See Beck v. University of Wisc. Bd. of Regents*, 5 AD Cases 304 (7th Cir. 1996) (employer must make a reasonable effort to determine appropriate accommodation in an interactive process that requires participation by both parties). 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").

67. The language of 29 C.F.R. § 1630.2(O)(3) suggests this interactive process is not necessary in all cases. As the last step indicates, the primary goal of this process is to identify the reasonable accommodation that is most appropriate for both the employer and the employee. See *Sieberns v. Wal-Mart Stores*, 6 AD Cases 403, 409 (N.D. Ind. 1996) ("[t]he entire purpose of the

interactive process is to find a reasonable accommodation if one exists”).

68. The testimony from Denise Rice and Mark Kunick regarding the process used by Respondent in determining whether Respondent could reasonably accommodate Complainant’s medical restriction was vague and not specific.

69. Respondent went from a lax policy where little or no evaluation was performed regarding the legitimacy of work accommodations based on medical restrictions to the opposite extreme where no real evaluative process was used to determine whether employees’ medical restrictions could be reasonably accommodated.

70. Complainant had the most seniority of all employees who bid on the two open positions for first shift Certified Mechanic; however, he was denied both positions because he could not work eight hours of overtime.

71. Although overtime is an essential function of the job of Certified Mechanic, reducing the amount of overtime Complainant was required to work is a reasonable accommodation. Respondent engaged in discriminatory conduct when it failed to provide a reasonable accommodation to Complainant so he could work the third shift and first shift with his medical restriction.

RECOMMENDATIONS

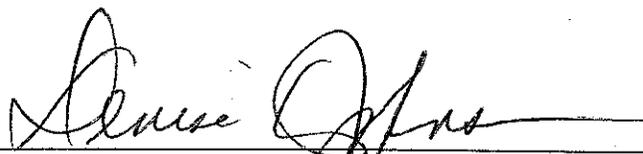
For all of the foregoing reasons, it is recommended in Complaint No. 9842 and Complaint No. 9961 that:

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 Certified Mechanic. 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 Certified Mechanic in February of 2005 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 Certified Mechanic in February of 2005 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.⁶

A handwritten signature in cursive script, appearing to read "Denise Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 17, 2011

⁶ 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.