

## **INTRODUCTION AND PROCEDURAL HISTORY**

Bernita A. Hawkins (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on January 31, 1999 and August 10, 1999.

The Commission investigated the charges and found probable cause that Robinson Memorial Hospital (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued Complaint #8699 on January 27, 2000 and Complaint #8717 on February 17, 2000.

Complaint #8699 alleges that Respondent subjected Complainant to unequal treatment because of her age. Complaint #8717 alleges that Respondent discharged Complainant because of her disability and in

retaliation for filing a previous charge of discrimination against the Hospital. This complaint also alleges that Respondent denied Complainant reasonable accommodation for her disability.

Respondent filed Answers to the Complaints. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory or retaliatory practices. Respondent denied that the Commission attempted and failed to conciliate these matters. Respondent also pled affirmative defenses.

On April 27, 2000, the Commission filed a motion to consolidate the Complaints for hearing. The Hearing Examiner granted the motion on May 18, 2000.

A public hearing was held on September 5-6, 2000 at the Portage County Department of Human Services in Ravenna, Ohio. During the hearing, the Hearing Examiner left the record open for the potential admission of two exhibits (Exhibits 16 and S) that pertained to

Complainant's mitigation efforts after Respondent discharged her.<sup>1</sup> The Hearing Examiner created a schedule for counsels' review of these exhibits after the hearing.

On September 15, 2000, the Commission withdrew its objection to the admission of Exhibit S. The Commission also withdrew its motion to admit Exhibit 16 into evidence.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 327 pages, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on November 2, 2000 and by Respondent on November 24, 2000, and a reply brief filed by the Commission on December 11, 2000.

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<sup>1</sup> Complainant testified that she maintained a booklet of employers that she contacted as required by the Ohio Bureau of Employment Services (OBES). Complainant testified that she believed that the booklet was at her residence. The Commission requested the opportunity to supplement the record with the booklet once Complainant found it. Respondent moved for the admission of Exhibit S. This exhibit purports to be job listings for pharmacy technician positions from certain web pages and copies of such positions in the want ads of *The Akron Beacon Journal*.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He 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 Hearing Examiner 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 January 31, 1999 and August 10, 1999.

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

3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.<sup>2</sup>

4. Respondent is a hospital located in Ravenna, Ohio. Respondent is an employer. Respondent has various departments and employs personnel on three shifts to serve its patients on a 24-hour basis.

5. Complainant was born on September 21, 1925.

6. Respondent initially hired Complainant in March 1977 as an admitting clerk. She performed that job for three years. She then became a pharmacy technician in the Pharmacy Department.

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<sup>2</sup> Respondent stipulated at the hearing that the Commission attempted conciliation prior to issuing the Complaints. (Tr. 2-3) The Commission's conciliation efforts were unsuccessful.

7. A number of employees work in the Pharmacy Department. At least one pharmacist works on each shift. Most pharmacy personnel are either unit dose technicians or IV technicians.<sup>3</sup> Tina Samblanet supervises them. She works two “office days” as the technician supervisor and three days per week as either a unit dose technician or an IV technician. (Tr. 218) Samblanet reports to Barbara O’Brien, the Director of Pharmacy.

8. Complainant worked as a unit dose technician. Among other things, her duties included filling carts with medication, delivering medication carts to nursing units and other departments, checking expiration dates and stocking pharmacy inventory, and maintaining charges, current patient medication profiles, and other records. The position description listed the following “Minimum Experience Requirements”:

One year pharmacy technician experience or related educational background or related experience. Typing skills required. Ability to lift heavy weights and stay on feet for long periods of time.

(Comm.Ex. 5, R.Ex. C)

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<sup>3</sup> Respondent employed 15 technicians in the Pharmacy Department in 1999. Respondent also employed at least one pharmacy assistant and pharmacy buyer during that time.

9. IV technicians are capable of performing the duties of a unit dose technician.<sup>4</sup> Their primary function, however, is preparing the daily IVs for patients. IV technicians are also required to prepare IVs and other medications for emergency room (ER) patients and other patients who need immediate medical attention.

10. Each morning pharmacy personnel use three carts to deliver medication to patients throughout the hospital. Two of these carts are “large carts” that weigh approximately 360 pounds. The other cart is the “small cart”; it weighs less than 50 pounds.

11. One person pushes the small cart. This person, who is usually an IV technician, makes two trips in the morning. The person first travels to the Intensive Care Unit (ICU) and Coronary Care Unit (CCU) on the first floor. The person then returns the small cart to the Pharmacy Department to pick up medication needed for patients in Mental Health on the third floor. This trip takes approximately 10 to 15 minutes. The trip to Mental

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<sup>4</sup> Unit dose technicians are not necessarily qualified to prepare IVs. Some unit dose technicians have been “cross-trained” and may work as an IV technician. (Tr. 108) Complainant was not one of these employees.

Health and back to the Pharmacy Department takes approximately 5 minutes.

12. Two persons push each large cart. These persons are usually unit dose technicians. One group travels to the second floor; the other travels to the third floor. These trips take approximately 30 minutes each.

13. The large carts are only used once a day at the beginning of the first shift. The small cart is used for six hourly deliveries after the morning chart exchange. (Tr. 161, Comm.Ex. 11) The small cart is also used to make "Stat deliveries" to the ER and other areas of the Hospital. The Pharmacy Department processes these deliveries "right away." (Tr. 162)

14. Beginning in 1994, Complainant's physician, Dr. Mark Meyer, placed work restrictions on her. Dr. Meyer restricted Complainant from working overtime and walking more than 2.5 miles per day. (Comm.Ex. 3) In June 1995, Dr. Meyer restricted Complainant from pushing the large carts due to her complaint of hip pain. (Comm.Ex. 4, R.Ex. A) Dr. Meyer also asked that Respondent place Complainant on "light" duty. *Id.*

15. O'Brien sent Dr. Meyer a letter upon receipt of the June 1995 work restrictions. (Comm.Ex. 5, R.Ex. A) O'Brien asked Dr. Meyer to identify any job duties that Complainant would be unable to perform because of her work restrictions. O'Brien attached a copy of Complainant's job description to her letter to Dr. Meyer. O'Brien also asked Dr. Meyer to indicate the "length of time" that Complainant would have such limitations. *Id.*

16. In response to O'Brien's letter, Dr. Meyer arranged for Rehabilitation Services (a Summa Health System Program) to evaluate Complainant's physical ability to perform her job. Complainant underwent a functional capacity evaluation in July 1995. Rehabilitation Services determined that Complainant did not "demonstrate the tolerance" for pushing a 300 pound cart or lifting more than 10 pounds.<sup>5</sup> (Comm.Ex. 6) Rehabilitation Services recommended that Complainant return to work with the following restrictions:

- (1) Lifting and pulling in the light industrial range (below 150 lbs.);
- (2) Lift in the sedentary to light physical demand level (below 15 lbs); and

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<sup>5</sup> The report from Rehabilitation Services indicated that Dr. Meyer had previously diagnosed Complainant with "Osteoarthritis of [the] hip." (Comm.Ex. 6)

- (3) Equal distribution of standing and sitting time (four hours of sitting & four hours of standing per day).

*Id.*

18. Dr. Meyer considered the recommendations of Rehabilitation Services. On July 26, 1995, Dr. Meyer released Complainant to work with the following restrictions: (1) no pushing of carts over 150 pounds, (2) no lifting of objects over 15 pounds, and (3) required sitting for 10 minutes every hour. (Comm.Ex. 7, R.Ex. A)

19. In August 1995, Respondent agreed to accommodate Complainant's work restrictions including the 2.5-mile walking restriction. O'Brien informed Complainant that she would remain on first shift and deliver the small cart in the morning instead of one of the large ones. Respondent assigned an IV technician and other pharmacy personnel to assist the other unit dose technicians in pushing the large carts. Complainant returned to work and was not required to push the large carts for the next several years.

20. In the latter part of 1998, Complainant wrote O'Brien a note about her walking restriction. (Comm.Ex. 10, R.Ex. B) Complainant indicated that she discovered an accurate method of measuring the amount of walking she did at work. Complainant also indicated her walking at work exceeded the 2.5-mile restriction according to her calculations.

21. Complainant later met with O'Brien about her walking restriction. Complainant expressed concern about exceeding this restriction. Complainant also informed O'Brien that she had hypertension and a problem with her left eye. (Comm.Ex. 11, R.Ex. C)

22. In mid-January 1999, O'Brien provided Complainant a letter that requested an update on her medical condition and a physician's opinion about whether she was physically capable of performing her job. *Id.* Attached to the letter was a copy of the job description for pharmacy technician, an "[a]pproximate breakdown" of the time spent daily on the primary duties of the position, and a description of the physical requirements of these duties. *Id.*

23. Complainant forwarded the letter to Dr. Meyer. He arranged for Complainant to undergo a physical capacity evaluation at Edwin Shaw Hospital. The evaluation occurred on March 22, 1999.

24. Complainant received the results of the evaluation in early April 1999. (Comm.Ex. 12, R.Ex. F) The testing showed that Complainant had the ability to lift up to 40 pounds during “ground to waist lifts . . . [and] waist and shoulder lifts.” *Id.* The testing showed that Complainant could push 200 pounds and pull 100 pounds occasionally (1-33% of work day or 1-100 reps per day). The evaluator concluded that “no restrictions to walking or standing should be observed”, but he encouraged Complainant to take her assigned breaks and limit herself to working 40 hours per week. *Id.* Overall, the evaluator concluded that Complainant “meets the physical demands necessary to perform her usual and customary job duties as a pharmacy technician.” *Id.*

25. On April 20, 1999, Complainant provided O’Brien a copy of the evaluation. O’Brien met with Complainant two days later. O’Brien told Complainant that, according to the evaluation, her work restrictions were lifted except for working more than 40 hours per week. Complainant

indicated that she “still had some concerns about pushing the large carts.” (Tr. 136) O’Brien advised Complainant that she needed to provide a medical statement that restricted her from performing that task.

26. On June 18, 1999, Complainant provided O’Brien a physician’s statement from Dr. Meyer. The statement indicated that Complainant has “Osteoarthritis of the hips” and requested that Complainant be restricted from pushing 300-pound carts. (Comm.Ex. 1E, R.Ex. I)

27. O’Brien replied to this statement on July 8, 1999. O’Brien indicated that Respondent could no longer excuse Complainant from pushing the large carts because of “the needs of the department.” (CommEx. 1F, R.Ex. J) O’Brien further indicated that pharmacy technicians had “to perform the full responsibilities of the position and rotate through all the assignments on an equal basis.” *Id.* O’Brien suggested that Complainant should be able to meet these requirements since her work hours had been reduced to 32 hours per week.<sup>6</sup>

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<sup>6</sup> Complainant voluntarily reduced her work hours to 32 hours per week as of June 1, 1999. Complainant worked 32 hours per week from this date until her discharge.

28. In late July 1999, Complainant wrote O'Brien a letter asking her to reconsider the decision that Complainant had to perform all of the duties of unit dose technician including pushing the large carts. O'Brien replied to the letter on August 2, 1999. O'Brien provided Complainant a more detailed explanation of Respondent's reasons for requiring her to push the large carts. O'Brien cited the increased workload of the Pharmacy Department, the change in delivering medication directly to patients' rooms, and the planned reduction in staff. O'Brien also wrote:

Our concern is that the IV technicians (which have different skill sets than your position) cannot be tied up outside the department for the length of time required to deliver the large carts. This is the same concern that prompted your change to afternoon shift on the weekends five years ago. Before you had restrictions about taking large carts, the IV techs always took the small carts. This allowed them to return to their work in the IV room more quickly. This is still the way things are done on your days off and on the weekends. The resulting workflow is much smoother and more efficient.<sup>7</sup>

(Comm.Ex. 1H, R.Ex. L)

Lastly, O'Brien advised Complainant that she had until August 5, 1999 to decide whether she would assist other unit dose technicians in pushing large carts at the beginning of first shift.

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<sup>7</sup> All IVs are prepared in a sterile environment. This requirement made it more difficult for only one IV technician to prepare IVs and handle other duties such as getting drugs out of the refrigerator or answering telephones.

29. Complainant reported to work on August 5, 1999. Complainant took the small cart on its rounds and then performed her unit dose duties. Later that morning, O'Brien asked Complainant if she took one of the large carts. Complainant answered, "No". (Tr. 55, 95) Complainant told O'Brien that she refused to push a large cart "against her physician's orders." (Comm.Ex. 11; R.Ex. M) O'Brien advised Complainant that she would be discharged.

30. O'Brien called Complainant into her office that afternoon.

O'Brien gave Complainant the option of retiring rather than being discharged. Complainant rejected this option. O'Brien then handed Complainant written notice of her discharge. (Comm.Ex. 1, R.Ex. N)

## 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.

1. The Commission alleges in the Complaint #8717 that Respondent denied Complainant reasonable accommodation and discharged her because of her disability.

2. These allegations, if proven, would constitute violations R.C. Chapter 4112 and the Commission's rules embodied in the Ohio

Administrative Code (Ohio Adm.Code). 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.

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. Ohio Adm.Code 4112-5-08(E)(1).

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) and 4112.06(E).

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 that:

- (1) Complainant is 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).

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 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.<sup>8</sup>

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<sup>8</sup> The ADA's definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13).

7. It is undisputed that Complainant's doctor diagnosed her with "Osteoarthritis of [the] hip" as early as 1995. Although this condition is a physical impairment, the first part of R.C. 4112.01(A)(13) requires the Commission to show that Complainant has an actual disability.<sup>9</sup> The Commission must prove that 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).

8. Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty."

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<sup>9</sup> The Commission does not argue that Complainant had a record of a substantially limiting impairment. Nor does the Commission argue that Respondent perceived Complainant to have such an impairment. There is insufficient evidence to prove that Complainant is protected under these parts of the statute's definition of disability.

*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.” *Id.*, (legislative citations omitted); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (1998) (“As the use of the term ‘such as’ confirms, the list is illustrative, not exhaustive”).

9. 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).

This determination, which must be made on a case-by-case basis, requires comparison with the abilities of 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.

*EEOC Interpretive Guidance*, at § 1630.2(j).

10. The Commission offered Complainant's testimony to prove that her condition substantially limited a major life activity. Complainant testified that she has been "extremely active" most of her life; however, she has "gradually" foregone certain activities due to her condition. (Tr. 17) For example, Complainant testified that she could no longer mow her lawn, perform "strenuous" cleaning, plant small trees, or play golf. (Tr. 18, 19, 98) Complainant also testified that she has difficulty climbing stairs in her house.

11. Based on Complainant's testimony, the Commission argues that Complainant is substantially limited in her ability to perform manual tasks and "the basic chores of housework" such as sweeping, mowing, mopping, scrubbing, and painting.<sup>10</sup> (Comm.R.Br. 5) The Commission contends that these activities are major life activities under R.C. 4112.02(A)(13). See *Wooten v. Columbus, Div. of Water* (1993), 91 OhioApp.3d 326 (court

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<sup>10</sup> The Commission does not argue that Complainant's condition substantially limits the major life activity of working. Even if the Commission made this argument, the record lacks evidence that Complainant's condition significantly restricted her 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." 29 C.F.R. § 1630.2(j)(3)(i).

found that carrying groceries, mowing lawn, bathing dog, and changing tires are major life activities under the Rehabilitation Act).<sup>11</sup>

12. In deciding what constitutes a “major life activity”, the relevant inquiry is whether a particular activity is “a significant one” within the contemplation of the statute, rather than whether the activity is important to the complainant in question. *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642, (2d Cir. 1998). For example, the Supreme Court in *Bragdon* determined that reproduction is a major life activity without considering whether that activity was an important aspect of the individual’s life.

The plain meaning of the word ‘major’ denotes comparative importance and suggests that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.

*Id.*, at 2205 (citation, brackets, and some internal quotation marks omitted).

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<sup>11</sup> The court also found that Wooten’s ability to work was substantially limited by his 20-pound lifting restriction. Lifting is a major life activity under the ADA. In interpreting the ADA, several federal courts have found that a 25-pound lifting restriction does not significantly limit one’s ability to lift, work, or perform any other major life activity. See, e.g., *Thompson v. Holy Family Hospital*, 121 F.3d 537 (9<sup>th</sup> Cir. 1997); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4<sup>th</sup> Cir. 1996). In this case, Complainant has the ability to lift up to 40 pounds; her inability to lift more than that weight does not establish a substantial limitation in the major life activity of lifting. See *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237 (10<sup>th</sup> Cir. 2001) (evidence of 40-pound lifting restriction, by itself, is insufficient to show substantial limitation in major life activity of lifting).

13. In this case, Complainant's inability to paint her house, mow her lawn, plant trees, and play golf are clearly not major life activities. *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7<sup>th</sup> Cir. 2000) (bowling, camping, restoring cars, and mowing the lawn are not major life activities under the ADA); *Weber v. Strippit, Inc.*, 186 F.3d 907 (8<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 794 (2000) (shoveling snow, gardening, and mowing the lawn are not major life activities within the ADA's meaning of major life activities); *Colwell, supra* at 642 (golfing, painting, plastering, moving furniture, doing yardwork, and "performing [other] housework other than basic chores" are not major life activities as defined by the ADA). Likewise, Complainant's inability to perform heavy or strenuous cleaning, such as "mopping and scrubbing and washing walls", are also not major life activities. (Tr. 92) These are not the basic household chores subsumed within the major life activity of caring for one's self. *Marinella v. City of Erie, Penn.*, 216 F.3d 354 (3<sup>rd</sup> Cir. 2000) (washing the floor does not fall within meaning of caring for one's self).

'Cleaning' is only considered a major life activity to the extent that such an activity is necessary for one to live in a healthy or sanitary environment.

*Id.*, at 362-63.

14. Complainant's testimony demonstrates that she is capable of maintaining a habitable living environment and otherwise caring for herself. Although Complainant may be unable to perform heavy or strenuous cleaning without assistance, she "can go around and give the house a pretty fair cleaning" by herself. (Tr. 92) Complainant testified that she has to limit her cleaning to doing "one thing" at a time. (Tr. 19) In other words, Complainant has to pace herself to avoid overexertion. This is not a substantial limitation when compared to the average person's ability to perform basic household chores.

15. Complainant's testimony also demonstrates that she is capable of performing manual tasks. Complainant gave the following testimony on this issue:

Q: And in fact, I believe you testified earlier you have artistic abilities. You can draw, correct?

A: Yes.

Q: So you can manipulate your hands and your arms? There is no problem with that?

A: Yes.

(Tr. 60)

16. Although the Commission does not specifically allege that climbing stairs is a major life activity, the Hearing Examiner considered this issue in light of Complainant's testimony that this activity was one of her "big problems." (Tr. 20) Complainant testified that climbing stairs at her home caused her to bear weight on her hips every time she engaged in that activity. Complainant testified that she climbs stairs "many times a day." (Tr. 20)

17. In some cases, federal courts have focused on whether the impairment substantially limits or only moderately limits the person's ability to climb stairs. In *Weber*, the appellant testified that he had difficulty walking long distances and climbing stairs without becoming fatigued. The court concluded that "these moderate limitations" did not constitute a disability under the ADA. *Id.*, at 914; *See also Kelly v. Drexel University*, 94 F.3d 1996 (3<sup>rd</sup> Cir. 1996) (employee's post-traumatic hip injury that required him to move slowly and hold handrail while climbing stairs did not substantially limit his ability to walk).

18. Other federal courts have found that climbing stairs is not a "sufficiently significant or essential" function to ever qualify as a major life

activity under the ADA. *Piascysk v. City of New Haven*, 64 F.Supp.2d 19, 26 (D. Conn. 1999); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5<sup>th</sup> Cir. 1996); See also *Richardson v. William Powell Co.*, 1994 WL 760695 (S.D. Ohio 1994) (plaintiff's degenerative arthritis in her hip causing her to limp and experience difficulty climbing stairs does not interfere with a major life activity).

19. Even if the Hearing Examiner assumes, without deciding, that climbing stairs is a major life activity, the Commission failed to show that Complainant's condition substantially limits her ability to perform that activity.<sup>12</sup> Complainant did not specify how, and to what extent, her hip condition limits her ability to climb stairs. Thus, there is no evidence to compare Complainant's ability to climb stairs with the average person's ability to perform the same activity.

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<sup>12</sup> The only medical evidence, even remotely related to this issue, is contained in Complainant's 1999 functional capacity evaluation. (Comm.Ex. 12, R.Ex. F) The evaluator concluded that Complainant had the ability to climb occasionally. The evaluation also shows that Complainant completed a "two-stage submaximal step test" apparently without any difficulty. Although the purpose of this test was to estimate Complainant's level of cardiovascular fitness, it did require her to step up and down from a height of 12 inches for a period of time.

20. After a careful review of the entire record, there is insufficient evidence to conclude that Complainant has an impairment that substantially limits a major life activity. Since the Commission failed to prove that Complainant has a disability under the statute, she is not entitled to reasonable accommodation. Therefore, both allegations relating to Complainant's alleged disability must be dismissed.

### **RETALIATION**

21. The Commission also alleges in Complaint #8717 that Respondent discharged Complainant in retaliation for filing a previous charge of discrimination against the Hospital. 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:

- (I) For any person to discriminate in any manner against another person because that person . . . has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

22. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) Respondent knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

*Hollins v. Atlantic Co., Inc.*, 188 F.3d 652 (6<sup>th</sup> Cir. 1999).

23. The Commission established the first three elements of a *prima facie* case of unlawful retaliation. Complainant filed a charge of discrimination with the Commission on January 31, 1999. The evidence shows that the Commission notified Respondent about the charge in mid-February 1999. (Comm.Ex. 14) Respondent took an adverse employment action against Complainant by discharging her on August 5, 1999.

24. However, the Commission failed to provide sufficient evidence to infer a causal connection between Complainant's discharge and her filing of a charge of discrimination. *Cf. Nguyen v. City of Cleveland*, 229 F.3d 559 (6<sup>th</sup> Cir. 2000) (court upheld ruling that employee failed to present any evidence to infer a causal connection between the City's failure to promote him and his various filings with the EEOC). Neither the temporal proximity of these events (more than 6 months) nor any other evidence raises such an inference.<sup>13</sup> The evidence shows that Respondent discharged Complainant because she refused to assist other unit dose technicians in pushing large carts at the beginning of first shift.

25. The Commission argues that Respondent's treatment of Complainant "worsened after she filed her Charge, and *especially after she requested that her original 2.5 mile walking restrictions (sic) be observed.*" (Comm.Br. 25) (Emphasis added.) The evidence shows that Complainant wrote O'Brien a note about exceeding her walking restriction in November

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<sup>13</sup> The factfinder may infer a causal connection from evidence that the adverse employment action closely followed the protected activity. *Nguyen, supra* at 567. The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes. The factfinder must consider all of the evidence, including temporal proximity, in determining whether a causal connection exists.

1998. (Comm.Ex. 10, R.Ex. B) O'Brien then met with Complainant about her walking restriction. This meeting occurred before January 14, 1999—the date that O'Brien requested an update on Complainant's medical condition from her physician. (Comm.Exs. 1A, 11, R.Ex. C) All of these events occurred *before* Complainant filed her charge on January 31, 1999; this fact is conclusive evidence of a lack of causal connection between these events and Complainant's filing.

26. The Commission further argues that, but for Complainant's filing of a charge of discrimination, she would not have been required to undergo a new medical evaluation, and Respondent would not have refused to continue her accommodation of taking the small cart. The evidence does not support either of these contentions.

27. The evidence shows that Complainant's physician arranged for Complainant to undergo another physical capacity evaluation in response to O'Brien's January 14<sup>th</sup> letter. As the Commission acknowledges, the results of this independent evaluation "stripped" Complainant of "most of her previous accommodations." (Comm.Br. 26) O'Brien testified that she

relied on these results in concluding that Complainant could perform her job without any restrictions except working more than 40 hours per work. (Tr. 135) The results of this evaluation obviously impacted Respondent's decision to no longer excuse Complainant from pushing the large carts.

28. Assuming for purposes of argument that the Commission established a *prima facie* case of unlawful retaliation, the Commission failed to prove that Respondent refused to allow Complainant to take the small cart for retaliatory reasons. Respondent provided plausible explanations for its decision that the workflow in the Pharmacy Department was "much smoother and more efficient" with an IV technician taking the small cart in the morning. (See Findings of Fact, ¶ 28) Without evidence of a retaliatory motive, employers may discontinue employees' work accommodations that they were not legally required to provide in the first place.

## AGE DISCRIMINATION

29. The Commission alleges in Complaint #8699 that Respondent subjected Complainant to unequal treatment because of her age. Specifically, the Complaint alleges that Complainant's coworkers "repeatedly" asked Complainant about her retirement, and Respondent required Complainant to stock the Surgery Center and local paramedic boxes (EMS boxes) more than other pharmacy technicians.

30. In regards to the latter allegation, the record is void of any evidence that Respondent treated younger employees more favorable than Complainant.<sup>14</sup> The only evidence on this issue shows that Complainant filled the Surgery Center and EMS boxes proportionally less than other pharmacy technicians from October to December 1998 and May to July 1999. (R.Ex. R, Tr. 149-50)

31. The Commission offered Complainant's testimony to show that she was harassed because of her age. Complainant testified that two

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<sup>14</sup> The Commission abandoned this allegation in its post-hearing brief.

coworkers, both IV technicians, were the main perpetrators. Complainant testified that these employees asked questions and made comments about her retirement and ability to perform her job at her age. Complainant testified this questioning and commentary “became persistent.” (Tr. 51) Complainant testified that she “said something” to Samblanet about this behavior, and “mentioned it” to O’Brien on one occasion but neither took any action. (Tr. 50, 51)

32. Samblanet and O’Brien testified about this issue at the hearing. Both denied that Complainant ever complained to them about age-related questions or comments from her coworkers. The Hearing Examiner credited their testimony on the issue.<sup>15</sup>

33. Assuming for purposes of argument that Complainant, in fact, complained to either Samblanet or O’Brien about age-related questions and comments from coworkers, the evidence does not support a hostile work environment claim. For example, even if Complainant disliked or

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<sup>15</sup> Although verbal complaints of harassment are generally sufficient for notice purposes, the Hearing Examiner considered that Complainant wrote O’Brien a number of notes regarding her work restrictions. Yet Complainant never placed her concerns about age harassment in writing to either Samblanet or O’Brien.

found these questions or comments unwelcome, the Commission failed to show that Complainant's work environment was one that a reasonable person would find hostile or abusive. This questioning and commentary, though age-related, was not objectively indicative of age-based animus, and certainly did not rise to the level of "discriminatory intimidation, ridicule, and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); See *Crawford v. Medina General Hosp.*, 96 F.3d 830, 836 (6<sup>th</sup> Cir. 1996) (supervisor's alleged comments that "old people should be seen and not heard" and that women should retire by age 55 were mere offensive utterances and, therefore, insufficient to create a hostile work environment under the ADEA). On the whole, there is insufficient evidence to conclude that the alleged harassment was "sufficiently pervasive or severe" to alter Complainant's conditions of employment and create a hostile work environment as a matter of law. *Meritor, supra* at 67.

## **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue Dismissal Orders in Complaint #8699 and 8717.

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**TODD W. EVANS  
HEARING EXAMINER**

June 8, 2001