

MEMORANDUM #22, 2009

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission
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MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: SJC decision in Foresta v. Contributory Retirement Appeal Board

DATE: May 14, 2009

The Supreme Judicial Court (“SJC”) has issued its much-anticipated decision in the case of Foresta v. Contributory Retirement Appeal Bd., 493 Mass. 669, 2009 WL 10876787 (4/24/09). The SJC was called upon to determine whether an employer may modify the job duties and job description of an injured employee, such that the revised job description and duties may be used in determining whether said employee is eligible for accidental disability retirement. The SJC has decided that, subject to certain conditions discussed below, the answer to this question is yes.

Background

Mr. Foresta worked for the Massachusetts Turnpike Authority (“MTA”) as a safety inspector. His work involved a lot of traveling, a lot of driving, and a fair amount of lifting. He would remove defective fire extinguishers from their location and transport them back to the repair shop where other employees would fix them. After he had worked about 12 years, he hurt his back lifting while on the job. Subsequent to his injury, he still worked in the MTA Safety Department, but in a largely administrative capacity. Various accommodations were made, such as a computer he could stand up at, and an unfettered ability for him to take breaks when necessary.

Mr. Foresta applied for accidental disability retirement after working at the accommodated job for some time. While the Medical Panel answered all three questions in the affirmative, they based their decision upon his original, not modified, job description. The MTA sought clarification from the Medical Panel, sending them the accommodated job description, and the Panel changed their opinion and found that Mr. Foresta was able to perform the essential duties of the modified job. The MTA then voted to approve his application for retirement and forward it to PERAC for its Section 21(1)(d) review. PERAC remanded the application for lack of a positive medical panel. The MTA took no further action. The process of administrative appeal began.

The Division of Administrative Law Appeals (“DALA”) held a hearing and found that a public employee is entitled to disability retirement benefits under Section 7 of Chapter 32 if he can no longer perform the essential duties of his original job, that is to say, the job held at the time of the injury. Although the Contributory Retirement Appeal Board (“CRAB”) adopted all the findings of fact made by the DALA Magistrate, it rejected her conclusion, and decided that an employer has wide latitude in modifying an employee’s job description to keep an injured employee on the job, and a person will be entitled to accidental disability retirement benefits only if he or she is unable to perform the essential duties of the modified job. As such, CRAB determined that Mr. Foresta could not receive accidental disability retirement benefits because he was capable of “performing the sedentary tasks required of him by the MTA as of” the date of his application. Mr. Foresta appealed to Superior Court, which upheld CRAB’s determination. The MTA then requested that the SJC take the case for ultimate determination.

The holding in *Foresta*

Mr. Foresta maintained that since he was unable to perform the essential duties of the original job he held on the date of his injury, he should get ADR benefits. The SJC disagreed, deciding that an injured employee's modified job duties must be used in an ADR application when certain conditions, as discussed below, are met.

The "Similar in Responsibility and Purpose" Test

The SJC found that the modified job description should be used in an ADR application "when, as in this case, the essential duties of the job as modified are similar in responsibility and purpose to those performed by the employee at the time of injury, and result in no loss of pay or other benefits." CRAB had made a broader finding, that the employer even had the right to assign "the employee to different duties altogether within his or her abilities and with no loss of pay or other benefits." The SJC rejected this, finding that:

The essential duties of the job as modified must be **similar in responsibility and purpose** to those performed by the employee at the time of injury, and must result in no loss of pay or other benefits. We draw no bright line to be followed in every case, nor can we, **for the determination whether a job is similar in responsibility and purpose necessarily depends on the particular factual circumstances of the employment.** (Emphasis supplied.)

The 30 day test

The SJC based its determination, in large part, on the 1996 amendments to Chapter 32. In the SJC's view, these amendments were meant to limit the Commonwealth's liability for accidental disability retirement benefits. Among these amendments was the addition of Section 5B of Chapter 32, which mandates the establishment of an early intervention plan. That plan "shall be implemented whenever a member has been absent from work for 30 work days or more as the result of a work related injury..." Apparently on the basis of this section:

We therefore conclude that the "essential duties of his job" under § 7 must be determined after the employer has had a reasonable opportunity to accommodate the injury and, if appropriate, provide medical or vocational rehabilitation to allow the employee to continue to work, which generally will be the date of the application for disability.

Thus, the SJC limits this holding to those who have been out injured 30 days or more. As a practical matter, people applying for accidental disability retirement will satisfy this requirement at the outset of their application for benefits.

Footnote 11

To prevent public employees from racing into the retirement offices after they are injured and before the employer has had the opportunity to attempt to accommodate their limitations, the SJC in Footnote 11 in Foresta goes so far as to say that in those cases where an employer has not had a chance to consider accommodations which would permit the employee to keep working, "the employer should do so within a reasonable time, after consultation with the employee, and submit a description of the job responsibilities, as modified, to the regional medical panel appointed by PERAC to examine the employee. The modified job description would then be considered by the medical panel in determining whether, under § 7, the employee is "unable to perform the essential duties of his job and that such inability is likely to be permanent."

Further information

Attached to this memorandum are guidelines for the implementation of the Foresta criteria in accidental disability retirement cases. If you would like a copy of the decision in Foresta, please contact Susan Childs at Extension 904.

[Return to PERAC Home Page](#)