

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & JEFFREY PERRY,
Complainants

v.

DOCKET NO. 05-BEM-02495

THOMAS O'CONNOR &
COMPANY, INC.¹
Respondent

Appearances:

Chester L. Tennyson, Jr., Esquire for Complainant Jeffrey Perry
John J. McNaught, Jr., Esquire for Respondent

I. PROCEDURAL HISTORY

On or about September 1, 2005, Complainant Jeffrey Perry filed a complaint with this Commission charging Respondent Thomas O'Connor & Company with discrimination on the basis of handicap. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on April 5, 2010. After careful consideration of the evidence before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Jeffrey Perry ("Complainant") resides in Rumford, Maine. Perry has been a boilermaker by trade since 1975. He is a member of the Boilermakers Union Local 29. ("the union")

¹ Now known as The O'Connor Companies

2. Respondent Thomas O'Connor & Company, Inc., now known as The O'Connor Companies, consists of four companies; O'Connor Constructors, O'Connor Safety Company, O'Connor Corporation and Beacon Piping. Leon Danielson has been Manager of Construction Services for Respondent Thomas O'Connor & Company, Inc. for 20 years, and is the Manager of O'Connor Safety Company, which provides safety workers and conducts inspections of job sites for all the O'Connor companies.

3. Boilermakers engage in heavy industrial work, including building and repairing power plants. Complainant testified that the term boilermaker encompasses a variety of tasks, including all work associated with welding and grinding. Boilermakers work in the construction field building power boilers and perform tasks such as mechanic, steward, foreman, plate welder and common arc welder.

4. Throughout his career, Complainant has received his work assignments through the Boilermaker's union. His assignments take him to many locations, sometimes requiring him to stay overnight in a hotel, rather than return to his home in Maine each night.

1986 Worker's Compensation claim and subsequent events

5. On September 6, 1986, while working a job for Respondent, Complainant was hit on the side of the head by some planks, injuring his neck and back. Complainant was initially treated at a hospital and thereafter was followed by Dr. Victor Parisien of Lewiston Orthopaedics, located in Lewiston, Maine. Complainant was out of work for a period of time and in 1987 or 1988, Complainant was released to "light duty" and worked in a convenience store for six or seven months where his duties included pumping gas and stocking shelves while he received workers' compensation benefits.

6. On October 19, 1988, in connection with Complainant's workers' compensation claim, Dr. Parisien testified at a deposition that Complainant should refrain from lifting above shoulder level, should avoid lifting more than 30 pounds and avoid long distance driving. Parisien felt that Complainant's complaints of soreness and stiffness after his job of pumping gas and stocking coolers were consistent with the type of cervical disc injury that he had incurred. (Ex. R-6) During the workers' compensation process, Parisien recommended Complainant re-train for lighter work.

7. Complainant testified that after his accident he received workers compensation benefits for four years, and on August 3, 1990, he agreed to a lump sum workers' compensation settlement with Respondent and its insurer, GAB Business Services. (Ex. R-2) Complainant testified that at the time of the settlement he continued to have stiffness and soreness in his back and wasn't sure whether he would be able to return to the position of boilermaker.

8. One month later, on September 5, 1990, Dr. Parisien completed a form letter addressed only "To whom it may concern." On the form, Parisien checked off that Complainant would be able to return to work on August 20, 1990 with "no restrictions" and "normal working hours." (Ex. C-1) Respondent received the letter on October 29, 1990.

9. On October 29, 1990, the union assigned Complainant to work for Respondent in Cousins Island, Maine. Complainant testified that when he arrived at the worksite the superintendent told him that his name was on an "ineligible for hire" list and he was escorted off the property and not allowed to work. Complainant testified that at the time, he complained to his union about Respondent's refusal to hire him but claimed that he

never learned the outcome of his complaint. I credit his testimony that he complained to the union, but I do not credit his testimony that he never learned the outcome of the complaint.

10. For the past 15 years, Leon Danielson has had sole responsibility for determining whose names are placed on, and removed from, Respondent's ineligible for hire list. Danielson testified that he did not understand why Dr. Parisien released Complainant to work in 1990 immediately after Complainant received a lump sum workers' compensation settlement and after Parisien provided information at the workers compensation hearing that Complainant had ongoing work restrictions and could not perform the job of boilermaker. Danielson placed Complainant on the ineligible for hire list because he believed he should not put Complainant to work until learning more about Complainant's physical condition from Dr. Parisien.

11. Danielson testified that in October 1990, he spoke to an assistant in Dr. Parisien's office who told him that Complainant had not appeared for his scheduled appointment on October 1, 1990. Danielson subsequently spoke to Dr. Parisien who informed him that Complainant had medical limitations but did not explain the inconsistencies between his previous evaluation of Complainant and his letter releasing Complainant to work without restrictions.

12. In November 1990, Danielson corresponded with union representative Larry MacAdams in response to MacAdams' inquiry as to why Respondent would not employ Complainant. Danielson explained to MacAdams the inconsistencies between the restrictions Dr. Parisien had placed on Complainant at the worker's compensation hearing and his subsequent letter of September 1990, and informed MacAdams about his

discussions with Parisien. Danielson told MacAdams that Respondent had no positions that would accommodate Complainant's limitations, as known to Respondent, but if Complainant provided a medical release form, Respondent would continue to seek further information on Complainant's medical condition. (Ex.R-4; testimony of Danielson)

13. After receiving a medical release form from Complainant, on December 26, 1991, Danielson wrote to Dr. Parisien:

...During Mr. Perry's workers compensation claim your deposition and letters presented facts that directly relate to [Complainant's] ability to perform the essential functions of a boilermaker...

-MRI shows disc herniation C5-6, permanent impairment of the neck.

-Permanent disability of shoulder and must avoid reaching above shoulder level and refrain from doing heavy lifting of more than 30 pounds.

-Your recommendation that Mr. Perry retrain for lighter work

The above information appears to conflict with the general work release without restriction given to Mr. Perry by your office on September 5, 1990. Was this release for heavy boilermaker work or other light duty work Mr. Perry was performing during this September 1990 period? Has his disc herniation been repaired? Have permanent disabilities improved? Medically has something occurred that changed your recommendation to retrain for lighter work? Your assistance answering these questions and the expeditious release of Mr. Perry's medical files is greatly appreciated.

(Ex.R-9)

14. Danielson testified that Dr. Parisien would only release Complainant's records upon receipt of a fee of \$25.00. Respondent told the union's business manager that Complainant would need to pay the fee. Complainant testified at the public hearing that he had no knowledge of the fee and would have paid it, had he known about it. I do not credit Complainant's testimony that he did not know about the fee.

15. Complainant testified that he has known since 1991 that Respondent utilized an ineligible for hire list and has asked the union for assistance with resolving the issue. Complainant testified that he was aware that the union asked Respondent to remove his name from the ineligible for hire list but claimed that he never received any

communication from the union about this issue and did not pursue the matter with the union. I do not credit Complainant's testimony that the union never communicated with him about the matter. He testified that he never bothered to contact the union about the matter because he was working for other contractors.

16. Complainant testified that he returned to work as a boilermaker in 1990 and has worked for numerous employers from 1990 to 2009. His testimony is supported by the business records of the union's "dispatch history" for Complainant, consisting of a computer printout listing of the jobs to which the union referred Complainant. (C-2) According to the document, Complainant worked briefly for Respondent at the James River paper mill in Old Town, Maine from September 17 to 20, 1990. He cannot remember what job he did at this location. According to Danielson, Respondent maintained a satellite office in Maine at the time and Complainant was hired out of that office. Complainant received this assignment prior to Respondent receiving the letter from Dr. Parisien and before Respondent placed Complainant's name on the "ineligible for hire" list. Complainant also worked about 60 hours for Sullivan and Merritt in September and October 1990.

17. The union was required to refer Complainant to any available job, including jobs with Respondent, when his name came to the top of the list and the union often referred him to Respondent as a courtesy.

18. In 1995 the union referred Complainant to a job with Respondent as a common arc welder at the SEMass Plant in Rochester, MA, but he was refused employment. Complainant complained to the union, and the union's assistant business manager Paul Meade wrote to Danielson on January 9, 1995 requesting a reason for

Respondent's refusal to hire Complainant. (Ex. R-10). Danielson wrote to Meade on January 16, 1995, enclosing his 1990 letter to MacAdams and stating that Respondent's reasons for not hiring Complainant had not changed. (Ex. R-11) Complainant testified that again he did not hear back from the union and the matter was not resolved. He did not press the union about the matter because he was able to obtain work elsewhere.

19. In February 2004, the union sent Complainant to a job with Respondent at Schiller Station in Portsmouth, N.H. where the superintendent for Respondent refused to hire him. Danielson testified that at that time, Respondent received an inquiry from the union regarding Complainant's status to which Danielson responded by requesting medical releases and the names of all Complainant's treating physicians. Danielson again wrote to Dr. Parisien seeking information about Complainant's status, but received no response. (Ex. R-14)

20. Complainant's work is seasonal and he does not work every day. His ability to work depends upon his position on the union list. Complainant testified that when he is at the top of the list and is rejected for a job by Respondent, he continues to remain at the top of the list. He also testified that union members are permitted to refuse one job and still remain at the top of the list, but will be placed at the bottom of the list if they refuse a second job.

Job that is the subject of the current complaint

21. On July 25, 2005, the union sent Complainant for a job as a mechanic for Respondent at the Brayton Point power plant in Somerset, Massachusetts where Respondent had been performing environmental modification of the plant since May 2005. Complainant testified that by showing up for this job he was hoping Respondent

would “see past what went on before” and hire him for the position. Respondent’s superintendent saw that Complainant was on an “ineligible for hire” list and called Danielson, who instructed the superintendent not to hire Complainant. Complainant was not given an application form at Brayton Point, because he was still on the ineligible for hire list.

22. Complainant testified that he has never contacted any doctor in order to attempt to clarify his medical status. He testified that after the worker’s compensation settlement he had no further communications with Dr. Parisien and he believed that Dr. Parisien retired in 1991 or 1992. Complainant stated he has not seen a doctor since 1991, except for treatment of an unrelated cardiac problem that occurred in November 2009 and kept him out of work until March 2010.

23. Danielson testified that the “ineligible for hire” list is “not a black list” and placement on the list is “not a life sentence.” Other than medical limitations, placement on the do-not-hire list include failing a drug test, which can be resolved by the employee going to EAP and having a negative drug test and for behavioral problems.

24. Danielson testified that he did not know that Complainant had been working as a boilermaker for other employers between 1990 and 2005. He stated that the union would not have allowed him to review the union’s dispatch history (Ex. C-2) without a subpoena, and he has never reviewed the list with the union. He never asked anyone from the union whether Complainant could perform certain jobs because it was not within the purview of his duties as manager of construction services. Danielson never called any other company to ask whether Complainant was able to perform the duties of a boilermaker and even if he had done so, he did not believe that other companies would

have provided such information to him. I credit Danielson's testimony that in 2005, he did not have detailed information about Complainant's work history. However, I find it implausible that Danielson had no sense at all that Complainant was working in the field for other employers, given that Danielson communicated with the union and likely with other contractors over the years and would have some general knowledge about Complainant's work.

25. Danielson has never received any medical documentation from Complainant's physician detailing Complainant's abilities and limitations, and was unable to reconcile the discrepancy between Parisien's testimony and his letter releasing Complainant to full duty. Danielson believed Complainant could therefore not perform the functions of a boilermaker and for this reason Respondent would not re-hire Complainant. I credit this testimony.

26. Danielson testified that he never receives advance notice as to whom the union is sending to a job site and would not know who Respondent hired or did not hire unless a problem arose.

27. Complainant testified that since Respondent refused to hire him at Brayton Point, he has continued to work as a boilermaker for other employers. After Respondent rejected him for employment at Brayton point, Complainant worked from August 15 to August 25, 2005, at Stone and Webster as a plate welder in Somerset, MA. He stated that he is able to perform the job of boilermaker without restriction and states he would have had had more work if he had been able to obtain employment with Respondent because Respondent is a large employer of boilermakers.

III. CONCLUSIONS OF LAW

M.G.L. c.151B, sec. 4(16) makes it unlawful to discriminate in employment on the basis of handicap. In order to come within the protection of the statute, the Complainant must establish that he is a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities; has a record of having such an impairment; or is regarded as having such an impairment. M.G.L. c. 151B, sec. 1(17). A qualified handicapped person is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap. M.G.L. c. 151B § 4(16). An employer may inquire of an employee regarding his limitations, when "... an employee wishes to return to work after an injury or illness and the employer wants to determine the employee's ability to perform the essential functions of the job without risk of harm to the employee or others." MCAD Guidelines: Employment Discrimination of the Basis of Handicap VI, B, 6. See, e.g., MCAD & Anna Todesca v. American Airlines Inc. (27 MDLR 202 (2005)) Massachusetts Commission Against Discrimination and Cindy Bullock v. Wintergreen Kennels, et al, 27 MDLR 270 (2005)

Complainant alleges that Respondent regarded him as handicapped when it refused to hire him for the Brayton Point project in 2005, notwithstanding that he can perform and has been performing the full duties of a boilermaker for many years.²

The injury Complainant sustained in 1986 while working as a boilermaker for Respondent is the genesis of this case. Complainant did not perform any substantial

² In contrast, Complainant alleged in his MCAD complaint that he is actually impaired, but that his impairment does not prevent him from performing the essential functions of the boilermaker position.

work as a boilermaker for the following four years and received workers' compensation throughout that period until he ultimately received a lump sum settlement award of his worker's compensation claim from Respondent's insurer in August of 1990. Shortly after the lump sum payment was made, Complainant's treating physician completed a form wherein he checked off a box stating that Complainant was fit for work without restrictions. Respondent justifiably believed that the statement made by Complainant's physician on this form was inconsistent with the limitations that his physician had testified to and placed on Complainant throughout the pendency of his workers' compensation claim. As a result, Respondent refused to authorize Complainant's return to work obtaining a more detailed medical report. Respondent made an immediate, but unsuccessful attempt to obtain further information from Respondent's physician that would clarify Complainant's status. Respondent co-operated with the union in attempting to resolve the matter and each time the matter was raised over the years, Respondent sought medical evidence that would support Complainant's return to work for the company without any restrictions. Respondent repeated the same procedure, seeking medical verification that Complainant could work without any restrictions, whenever Complainant attempted to work at its sites and whenever the union inquired about Complainant's status.

Over a period of 19 years, Complainant took no steps to resolve the conflicting information about his medical status and to this day, Respondent has never received any clarification regarding Complainant's medical condition and his ability to return to work with or without restrictions, despite his articulated desire to work for Respondent again. If, as he stated, he was working as a boilermaker for other employers in 2005 without

restrictions, he should have had no problem getting a physician to certify his ability to do so for Respondent. There is no credible explanation for why he did not do so.

Complainant testified that he has not been examined by any physician since 1991 or 1992 until developing heart problems in 2009.

Complainant argues that because he was not determined to be permanently and totally disabled as a result of his workers' compensation injury, Respondent should have accepted his physician's cursory note clearing him for work. Complainant also argues that Respondent should have acknowledged that by working as a boilermaker for other employers, Complainant was presumptively cleared to return to work for Respondent. However, Respondent's witness testified that he did not know about Complainant's employment with other companies.

I am not persuaded by Complainant's arguments. Regardless of the severity and duration of Complainant's injury, Respondent's request for more detailed documentation supporting Complainant's claims that he could perform boilermaker work was reasonable and justified under the circumstances. See, MCAD & Todesca v. American Airlines, supra (when contradictory medical information provided by employee led employer to request further medical information, which was not forthcoming, Respondent was justified in not rehiring employee.) In addition, the evidence supports an inference that Respondent justifiably began to suspect that Complainant and Parisien may have exaggerated the extent of Complainant's injuries for purposes of the workers' compensation claim when, on the heels of the workers' compensation settlement, Complainant was immediately eligible to work without restrictions. I believe that Respondent's suspicions deepened when Complainant refused to provide Respondent

with the requested documentation clarifying his medical status. While Respondent may not have had detailed knowledge of Complainant's work as a boilermaker for other employers since 1990, I believe Respondent likely had a general sense through its work with the union and with other contractors that Complainant was working in the field. Nonetheless, the issue clearly became one of principle for Respondent and the matter could easily have been resolved by Complainant's providing the medical status update that Respondent sought indicating that Complainant could do the essential functions of the boilermaker position

Based on the above, I conclude that Respondent's refusal to remove Complainant's name from the ineligible for hire list was based on legitimate, non-discriminatory reasons; its desire to clear Complainant medically before returning him to work and its suspicion that Complainant's failure to provide it with medical documentation were indicative of an exaggerated workers compensation claim.

I conclude that, based on the narrow and unusual facts of this case, Respondent denied Complainant employment not because of discriminatory animus, but out legitimate, non-discriminatory reasons stated above. I conclude that Respondent acted in accordance with M.G.L.c.151B §4(16) and the Commission's handicap guidelines and therefore, it did not engage in unlawful discrimination on the basis of handicap or in violation of M.G.L. c. 151B §4(16)³

³ This decision applies only to the narrow facts of this case and is in no way intended to suggest that employers may keep employees who have sustained on the job injuries on a permanent do not hire list.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B, §5, it is hereby ordered that the complaint in this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 24th day of September 2010.

JUDITH E. KAPLAN
Hearing Officer