

**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

A.J. BEAVER,)	
Appellant,)	
)	
v.)	Case No. MPC 08-092 ⁰⁷²
)	
OKLAHOMA TAX)	
COMMISSION,)	
Appellee.)	

FINAL ORDER

This matter comes on for hearing on the 24th day of February, 2009, before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, A. J. Beaver, appears personally and by and through his attorney, Richard A. Mildren. The Appellee, Oklahoma Tax Commission appears by and through Assistants General Counsel, Guy L. Hurst and Julie M. Ezell. Also present for Appellee was Table Representative, Kanda Woods.

Appellant is a permanent, classified employee alleging a violation of the Oklahoma Personnel Act regarding a claim of discrimination based upon his physical handicap. Specifically, Appellant appeals the Appellee's denial of a reserved, designated handicapped parking space at the Connors Building in Oklahoma City.

Prior to the date of the hearing, Appellee filed a Motion to Dismiss as well as a Motion for Summary Judgment. The Motion to Dismiss was considered and denied as set forth in the Status Order issued August 14, 2008. Prior to the start of the evidentiary hearing, this Administrative Law Judge took the Appellee's Motion for Summary Judgment under advisement. As a result of the entry of this Final Order, Summary Judgment is denied.

Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellant offered Exhibits No. 1 through 13 which were admitted with no objection. The Appellee offered Appellee's Exhibit No. 1 which was admitted with no objection. Accordingly all exhibits presented and admitted are incorporated herein and made a part of the record.

After careful consideration of the record, including all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Background of Case

Appellant A. J. Beaver (hereinafter "Beaver") is a classified employee of the Appellee Oklahoma Tax Commission (hereinafter "OTC"). Beaver is employed as a Taxpayers Service Representative in the M.C. Connors Building at the Capitol complex. Beaver's job duties include answering telephone inquiries. Beaver is under certain medical restrictions. Since 1999, Beaver had been authorized by OTC to park in one of the designated handicap parking spaces nearest the building. There are 186 employee parking spaces adjacent to the Connors Building and 101 of those spaces are provided for employees with handicap placards. Twelve spaces are individually assigned and the other 89 spaces are available to disabled employees on a "first-come, first-serve" basis. Of the 12 spaces that are reserved, six of those spaces are assigned to individuals using wheelchairs, canes, crutches or walkers. The remaining six spaces are vacant or used for temporary situations. The remaining employee parking is located west of the Connors Building across Lincoln Blvd. and accessible via a "walk-over" passageway.

On August 31, 2007, Beaver requested that OTC provide him with a specific reserved handicap space. He provided a letter from his physician, J. Patrick Livingston, M.D. which stated that the current parking access that Beaver had been given "still required him to park a long distance away and to climb stairs". (Exhibit 1, page 3) On September 14, 2007, Beaver's request was denied. (Exhibit 1, page 4). Beaver filed an internal grievance on October 4, 2007 as a result of OTC's refusal to issue him a reserved parking space. The Grievance Decision Maker, Tony Mastin, denied the grievance on October 25, 2007, finding no evidence to sustain the grievance. (Exhibit 2).

On November 13, 2007, Beaver filed an appeal with the Oklahoma Merit Protection Commission (hereinafter "MPC") alleging that OTC violated the Americans with Disabilities Act and was discriminating against him by refusing to provide a reasonable accommodation of a reserved parking space. The matter was investigated at MPC, with a recommendation that the matter be dismissed due to Beaver's failure to provide sufficient evidence that his existing

accommodation of first-come, first-serve parking was not effective. Beaver requested reconsideration of the decision. MPC further investigated the matter and again recommended dismissal of the appeal. The MPC Executive Director found that there was sufficient information to set it for further proceedings and a negotiation conference was ordered. The Order further provided that if the parties were unable to reach an agreement at the negotiation conference, then the case should be set for hearing on the merits. The matter was scheduled for hearing and a full evidentiary hearing was held on February 24, 2009. The parties were given additional time to provide written trial briefs/summations, which were due on March 13, 2009. Following receipt of those documents, the record was closed.

The Testimony

The record includes the testimony of two (2) witnesses; namely, A. J. Beaver and Kanda Woods.

A.J. Beaver testified that he had worked for the State of Oklahoma for over 22 years, with 11 years at the Connors Building in Oklahoma City. Beaver stated that he was a disabled veteran with a 60% disability rating from the VA. He stated that his military injuries were to his back, knee, and skin. Beaver testified that he fell at work in June, 2007 and re-injured his back, twisted his knee and ankle and twisted his shoulder. He had a knee replacement in June of 2008 and is still under the care of a physician but had no current documentation. Beaver stated that he filed this action because others at OTC had reserved parking places and he was entitled to one also. Beaver testified regarding the photographs in Exhibit 12 which show the “walk-over” passage from the regular employee parking lot to the lot adjacent to the building. The photographs show the length of the passageway and the stairs on each side of the street. On cross-examination, however, Beaver admitted that he had never parked in the west lot or used the “walk-over” because of his previously granted accommodation of a space in the east or adjacent lot. Beaver testified that he could not remember ever having to park farther than the first 5 or 6 spaces. Beaver also could not identify a single time where he had to park farther than 200 feet from the entrance. Beaver testified that he had been provided all of the other accommodations that he had requested in order to do his job, including being provided a \$2000.00 ergonomic chair. Beaver could not provide any evidence that his work performance suffered because he did

not have a reserved parking space. He stated that he was never late for work, that he had never been subject to any disciplinary actions and that his evaluations were satisfactory.

Kanda Woods is the Director of Human Resources at OTC and was offered by the Appellee. Woods testified that the agency began to review the parking situation in 1995. They requested assistance from the Office of Handicap Concerns, who recommended that the reserved spaces be eliminated over time and that all spaces be assigned on a first-come, first-serve basis. As a result, they were not willing to assign a reserved space to Beaver. She admitted that they had granted a reserved space to one employee who was confined to a wheelchair and had been reassigned to the Connors Building in 2007. She confirmed that Beaver was never tardy, had never been subject to any disciplinary actions and that his evaluations were satisfactory. She also testified that Beaver had no job duties which required him to travel or drive. Woods also testified that from her office, she frequently observes Beaver entering and exiting the building. She stated that he often uses the stairs rather than the ramp, and appears to do so without a problem.

ISSUE

Does the Appellee's denial of a reserved parking space violate the Americans with Disabilities Act and/or discriminate against the Appellant?

DISCUSSION

The burden of proof in an alleged violation appeal lies with the Appellant to prove that a violation of the Oklahoma Personnel Act has occurred. The Appellant must prove by the preponderance of the evidence that a violation has occurred. There has been considerable argument about parking being a condition of employment and driving and parking being a personal choice. For purposes of deciding this case, neither makes a difference. Appellant has failed to provide any evidence that he has suffered any adverse employment action as a result of the denial of a reserved parking space. Further, Appellant has failed to meet his burden of proof regarding the ineffectiveness of the existing accommodation.

The provisions of the Oklahoma Personnel Act dealing with discrimination provide that no person in the state service shall be “*appointed to or demoted or dismissed from any position in the state service, or in any way favored or discriminated against with respect to employment in the state service*” by reason of any handicap. The administrative rules provide essentially the same language. The record is completely devoid of any evidence of discrimination against Beavers with respect to his employment. In fact, the evidence clearly supported OTC’s argument that Beavers has not suffered any adverse employment action, which is a pre-requisite to this discrimination action.

Even if Beaver was correct that the parking was a “condition of employment”, Appellant has failed to provide evidence that the alternative existing accommodation provided by OTC is inadequate. The medical reports and letters provided by Appellant contain the same statement that Beaver “has to park a long distance away and to climb stairs” and that is why he needs a reserved parking space. (Exhibit 1, pages 3 and 5, and Exhibit 10). These statements by his medical providers are based upon incorrect information, apparently supplied by Beaver. Furthermore, all of the medical information in the record is from 2007, with no additional or updated documentation.

The evidence herein clearly shows that Beaver is virtually always able to park on a first-come, first-serve basis in the closest of the parking spaces. He couldn’t remember ever having to walk over 200 feet and had never had to park in the lower parking lot or the west lot across Lincoln Blvd. His claim that his existing accommodation is insufficient is based upon a possibility of something that may or may not occur in the future. This possibility has not come to fruition in the year and a half since he made his request. In fact, Appellant offered no current medical information to show that his condition has worsened or that the current parking situation was aggravating his condition. Simply because the existing accommodation is not the one favored by the Appellant does not make it unreasonable. To the contrary, the accommodation provided by OTC of providing 89 designated handicap parking spaces on a first-come, first-serve basis is reasonable and the evidence shows overwhelmingly that it is sufficient to meet Beaver’s needs.

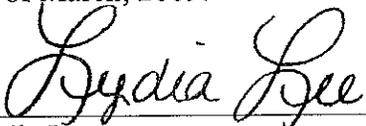
CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above entitled cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
4. The Appellant in this case had the burden of proof having alleged a violation of the Oklahoma Personnel Act. Specifically, Appellant asserted that Appellee violated the Americans with Disabilities Act and discriminated against him by denying him a requested reasonable accommodation.
5. 74 O.S. §840-2.9 and OAC 455:10-3-5 prohibit appointment, demotion or dismissal from any position in the state service, and discrimination in any way with respect to employment in the state service by reason of any physical handicap.
6. 74 O.S. §840-6.6 provides for appeal of alleged violations of the Oklahoma Personnel Act to the Oklahoma Merit Protection Commission.
7. OAC 455:10-9-2 (f) (2) places the burden of proof in an alleged violation appeal upon the Appellant who must prove his or her case by a preponderance of the evidence.
8. The preponderance of evidence does not support a finding of a violation of the Oklahoma Personnel Act or that Appellee discriminated against the Appellant as alleged. Appellant has failed to prove by a preponderance of the evidence that Appellee violated the Americans with Disabilities Act or that the accommodation provided by the Appellee was insufficient to meet the needs of the Appellant as stated herein.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant A. J. Beaver, MPC 08-072 be DISMISSED.

This Order entered this 30th day of March, 2009.



Lydia Lee
Administrative Law Judge