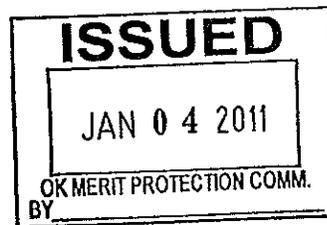


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



LeANNE M. CARAWAY,)
 Appellant)
 vs.)
 OKLAHOMA DEPARTMENT OF)
 LIBRARIES,)
 Appellee.)

CASE NO. MPC 10-231

ORDER ON REMAND

This case comes before the undersigned Administrative Law Judge on remand by the Commission following a hearing and Final Order issued July 8, 2010 denying the appeal and upholding Appellant's discharge for inability to perform the duties of her position, in accordance with Merit Rule 455: 10-11-14, as a result of on-the-job injuries suffered in 2006. On appeal, Appellant alleged that she was treated differently from other employees who were provided with reasonable accommodations but she was not. The Commission remanded the case to the undersigned to reconsider the accommodation issue. Hearing was held on December 15, 2010 at the Merit Protection Commission offices in Oklahoma City, Oklahoma for the limited purpose of presenting evidence and argument concerning the accommodation issue. Appellant, LeAnne Caraway, appeared in person and was represented by Daniel J. Gamino, Esq. Appellee, Department of Libraries (hereinafter referred to as "DOL" or "Appellee"), appeared by and through its Counsel, Richard D. Olderbak, Assistant Attorney General,

Karl Kramer, Assistant Attorney General, and table representative, Susan McVey, Agency Director.

Issues

The issues considered in this remand from the Commission were:

1. Whether accommodation was considered by the agency to allow Appellant to return to work during her period of temporary total disability;
2. Whether such accommodation should have been provided; and
3. Whether such accommodation was considered in this administrative law judge's decision to uphold the discharge.

The record remained open until December 20, 2010 to allow Appellee to file a Reply Brief in response to Appellant's Trial Brief filed after the hearing.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented and made a part hereof. Additionally, all testimony and exhibits previously entered into the record at the June 16, 2010 hearing are incorporated herein and made a part hereof. After careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

All Findings of Fact made in the Final Order issued July 8, 2010 are incorporated herein. Additional and/or restated or summarized facts are stated as follows:

1. Appellant suffered an on-the-job injury to her right arm in June 2006, followed by an on-the-job injury to her right knee in August, 2006 and was on temporary total disability (TTD) until November 5, 2009, when Dr. Remondino declared that she had reached maximum medical improvement (MMI). (Appellee Exhibits 26 and 27)

2. Appellant returned to work on light duty from November 15, 2006 to November 28, 2006; and again from January 5, 2007 to January 16, 2007 but, because of her medical condition, was unable to continue work on light duty after January 16, 2007. (Appellee Exhibit 6)

3. Appellant expressed an interest in a Library Technician, Level II position in the Interlibrary Loan Services, however, at the time of inquiry that position was not available; the position was a higher grade than hers and would have constituted a promotion for Appellant, and that position did not qualify as an accommodation. (See: Appellee Exhibit 9, pages 3-6)

4. By letter dated August 10, 2007, Appellee offered to accommodate Appellant with a transfer to a less physically demanding Administrative Technician, Level II position for which Appellant was eligible for "first preference". (Appellee Exhibit 9) Appellant was not interested in the position. (Appellee Exhibit 9, page 2)

5. By e-mail on June 1, 2009 Appellant responded to Appellee's notice that her leave would expire on June 1, 2009 by suggesting that she would like to return to work with restrictions. Appellee responded, indicating that "light duty" was not available for Appellant's position. (Appellee Exhibit 17)

6. By letter of June 25, 2009, Appellee requested a meeting with Appellant "to discuss the essential functions of [the] job and how [Appellant's] medical restrictions

affect [her] ability to perform these functions, *with or without reasonable accommodation.*" (Appellee Exhibit 18) [*emphasis added*]

7. On July 2, 2009 a meeting was held with Appellant to discuss Appellant's ability to perform the essential functions of her position in light of her medical restrictions, with or without reasonable accommodation. (Appellee Exhibits 18 and 18a)

8. In the July 2, 2009 meeting Appellant acknowledged that the essential functions of her position required constant lifting, pushing and pulling far in excess of her 10-pound weight restriction; that she was unable to perform these functions; that she did not know of any device that might assist her; that she would require someone else to perform the lifting, pushing, and pulling; and that she felt that she was disabled at this time. (Appellee Exhibit 18a)

9. Following the pre-termination hearing on August 11, 2009, Appellant and Appellee agreed to suspend the 10-day deadline for Appellee's decision in order to explore possible accommodations that might allow Appellant to perform the functions of her position with her medical limitations. (Appellee Exhibit 20)

10. Director Susan McVey indicated in her letter of August 12, 2009 to Appellant's attorney:

If Ms. Caraway can demonstrate how she can safely perform the essential functions of her job in light of her medical restrictions, with or without a reasonable accommodation, it would assist me in making my decision on her continued employment.

(Appellee Exhibit 20)

11. On August 31, 2009 Appellant indicated by letter that she was immediately ready to return to full-time employment in the mailroom without need for accommodation. (Appellee Exhibit 21)

12. By letter dated September 14, 2009, Appellee continued to raise the need to determine how Appellant might safely perform her job, "as well as what accommodations may need to be made," and recommended obtaining the assistance of an ergonomic consultant. (Appellee Exhibit 22, page 4) See also Appellee's letter of January 11, 2010. (Appellee Exhibit 31)

13. In her January 4, 2010 letter and again in her January 25, 2010 letter to Appellee, Appellant indicated that she was immediately ready to return to full-time employment in the mailroom and that she needs no accommodations. (Appellee Exhibits 29 and 32)

14. Appellee has provided accommodations to employees with temporary restrictions relating to ancillary functions of their positions, who otherwise were able to perform the essential duties of their position. Appellee has provided such accommodations to Appellant, as well, in regard to both her past injuries as well as her current injuries. Some examples of accommodations provided include: (1) relocation of an office from the third floor to the first floor for an employee with an ankle injury; (2) allowed an employee recovering from foot surgery to elevate her foot at various times during the day; (3) provided a flexible work schedule for a cancer patient requiring frequent medical treatments; (4) mailroom employee recovering from back surgery allowed to work the switchboard; (5) diabetic employee provided with a larger screen and magnifying glass; (6) temporary mailroom employee unable to drive had other employees drive him to deliver mail. (Appellee Exhibit 34, page 4)

15. Reference was made in the Final Order to the accommodation issue on pages 6, 7, 8, 11, 12, and 13 of the Order. Specifically, the Final Order addresses

Appellant's allegation that she was treated differently from other employees who were provided with accommodations:

Appellant alleges that she was treated differently from other employees because other employees have been provided reasonable accommodation and she was not. This is a disingenuous and bogus accusation. Throughout their discussions, Appellee continually raised the question of what reasonable accommodations might be provided to assist Appellant in performing her job. Several times during the July 2, 2009 meeting, Appellee asked this question of Appellant. Appellant could think of none other than to have a person available to provide assistance with boxes, mail, etc. weighing more than 10 lb. In each correspondence with Appellant, Appellee invites discussion of what reasonable accommodation can be made to assist Appellant in performing the essential functions of her job. Appellant has continually denied the need for any accommodation. In the August 31, 2009 letter from Appellant to Appellee, and again in the January 4, 2010 letter from Appellant, an entire paragraph is devoted to telling Appellee various accommodations that are NOT needed. Never has Appellant suggested or requested any accommodation nor responded affirmatively to Appellee's inquiries about accommodations.

Final Order, pages 12 – 13.

16. In summary, the evidence in this case indicates that:

(a) Appellee considered the issue of accommodation for Appellant throughout Appellant's period of TTD;

(b) Appellee provided Appellant with light duty accommodation from November 2006 through January 16, 2007, but Appellant was unable to perform the duties of her light duty assignment;

(c) In August, 2007 Appellee offered "first preference" to transfer Appellant to another position as an accommodation, but Appellant refused;

(d) From June 2009 until January 2010 Appellee continually raised the issue of accommodation with Appellant;

(e) From June 2009 until January 2010 Appellant rejected Appellee's attempts to discuss the need for any accommodation;

(f) The undersigned administrative law judge considered and discussed the issue of accommodation in the Final Order, and rejected Appellant's argument that she was treated differently from other employees who were provided with reasonable accommodation, while she was not.

Based upon a preponderance of the evidence presented in the June 16, 2010 hearing and in the December 15, 2010 hearing pursuant to the Commission's remand, this administrative law judge finds that just cause exists for Appellee's discharge of Appellant, that Appellee provided Appellant with reasonable accommodation opportunities during her period of TTD and beyond, but Appellant was unable to perform the early light duty assignments and rejected every other attempted accommodation offered by Appellee.

CONCLUSIONS OF LAW

1. Any findings of fact that are properly conclusions of law are incorporated herein as conclusions of law.

2. Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for inability to perform the duties of the position in which employed.

3. Merit Rule 455:10-9-2(f)(1) states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken.

4. 75 O.S. § 840-2.21 F. states that if an employee becomes medically able with reasonable accommodation to perform the duties of her original position, she shall

be returned to the position. If not, but she can perform the duties of any other position in the agency for which she is qualified, and appointment does not constitute a promotion, she shall have "first preference" for the position which comes vacant.

5. Appellee, Oklahoma Department of Libraries, has met its burden to prove, by a preponderance of the evidence, that Appellant, LeAnne Caraway, was unable to perform the duties of her position as Mail/Supply Supervisor, that she was offered reasonable accommodation to perform the duties of her position and rejected such accommodation, that she was offered first preference for a comparable position and rejected that position, and that under the circumstances of this case just cause exists for her discharge.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that upon reconsideration of this matter pursuant to remand by the Commission, the Final Order issued July 8, 2010 is confirmed, the petition of Appellant is **DENIED** and the discharge of Appellant by Appellee is upheld.

DATED this 31st day of December, 2010.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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