IN THE COURT OF COMMON PLEAS
CARROLL COUNTY, OHIO

COLFOR MANUFACTURING, INC.,	)	
Appellant/Petitioner	)	Case No. 16 CVF 28390
v.	)	JUDGE DOMINICK E. OLIVITO, JR.
OHIO CIVIL RIGHTS COMMISSION, et. al.	)	
Appellees/Respondents	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

For the reasons set forth below, the January 14, 2016, Order of the Ohio Civil Rights Commission is hereby affirmed.

PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

The instant appeal is not a *de novo* review of the facts of the instant matter. Rather, this is an appeal of a final order of the Ohio Civil Rights Commission following a five day evidentiary hearing before a duly appointed administrative law judge. The parties submitted briefs, and the administrative law judge issued a 32 page report of her proposed findings of fact, conclusions of law and recommendations. The Commission then heard objections Colfor filed to that report, but rejected those objections and adopted the report, finding that Colfor violated the law and ordering relief to Mr. Ott.

"Pursuant to R.C. 4112.06(E), a trial court must affirm a finding of discrimination under R.C. Chapter 4112 if the finding is supported by reliable, probative and substantial evidence * * *." *Ohio Civil Rights Commission v. Case Western Reserve Univ.*, 76 Ohio St.3d 168, 177

(1996) A trial court must also give deference to administrative resolution of evidentiary conflicts. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980) "If the findings of the Commission are supported by some reliable, probative, and substantial evidence (albeit disputed evidence), trial courts are not free to set them aside, even if they would have drawn different inferences." *T. Marzetti Co. v. Doyle and Ohio Civ. Rights Comm.*, 37 Ohio App.3d 25, 29-30 (C.A. 10, 1987)

Therefore, this Court will not re-weigh the evidence or make credibility determinations. Instead, the Court will review the record of this case to determine if it includes reliable, probative and substantial evidence to support the Commission's conclusion that Colfor violated the law.

FINDINGS OF FACT

Colfor manufactures steel parts used in cars, tractors and trucks. This process involves taking pieces of steel, known as billets, and putting them through presses that forge them into automotive parts. Those parts are then put into CNC machines, where they are lathed to the proper dimensions for use by Colfor's customers. (Hearing Transcript, pp. (Tr.) 43, 62-63, 99-102, 104-106)

Presses are generally placed in one of two categories: "hot" or "cold." These terms are in common use at Colfor, even by Human Resources personnel. (Tr. 586-587) Hot presses run "hot jobs" while cold presses run "cold jobs." Hot presses would heat a billet to the point where it glowed red with heat and had to be handled with tongs. Cold presses also heated billets, but to a much lower degree, and the billets can be handled without tongs, generally with the use of gloves. When a Forge Press Operator works on a hot press, he is directly exposed to intense heat

when handling the parts as they come off of the press. (Tr. 41-43, 61-62, 78-79, 103-104, 131, 160, 236, 385, 410-411, 420-421, 517-519; Comm. Exh. 44)

Presses are run by individuals with the title of "Forge Press Operator." In 2010 there were both hot and cold presses at the Malvern facility. Some Forge Press Operators at Malvern ran hot presses, others rotated between hot and cold presses, and other Forge Press Operators ran only cold presses. Forge Press Operators also sort through parts that are not properly made and ensure that they are not shipped to customers. (Tr. 46-48, 62, 102-103, 236, 362-363, 701-702)

Daniel Bergman, who worked as a Forge Press Operator at Colfor's Malvern facility for 17 years, testified that "more than half" of the Forge Press Operators at Malvern ran only cold presses. (Tr. 47)

Jason Ott began working for Colfor in 1994, and continued working for Colfor through at least August of 2013. During that time he worked in various positions, including as a Forge Press Operator at Colfor's facilities located in Malvern and Salem, Ohio. (Tr. 98-99, 108-123, 207-210; Comm. Exh. 3-9, 11-12, 31-32)

In 2009, when Mr. Ott was working as a Forge Press Operator in Salem, Mr. Ott's right arm was swelling, so he went to Dr. Masternick for medical treatment. Mr. Ott explained to Dr. Masternick that hot jobs required the operator to use tongs to take the parts out of the machine, which involved an awkward twisting motion. The doctor believed that this twisting motion might be causing the swelling and therefore recommended that Mr. Ott not work hot jobs and be limited to 40 hours a week. These restrictions were honored. (Tr. 127-131, 272-273; Comm. Exh. 2, 14)

Mr. Ott's condition progressed to the point where he was referred to a neurologist, Dr. Stalker. Mr. Ott ultimately was diagnosed with multiple sclerosis (MS), and took time off from

work for several months. (Tr. 131-140, 310-312; Commission Exhibit (Comm. Exh.) 16; Respondent's Exhibit 3, 7)

In July of 2010 Mr. Ott went through the process of returning to work as a Forge Press Operator. Dr. Stalker provided a note to Colfor, which was dated July 28, 2010, stating that Mr. Ott was to work only 40 hours a week and was not to work hot jobs. (Tr. 160-161, 274; Comm. Exh. 19)

Colfor also had Mr. Ott go through a return to work physical. Colfor used Aultworks Occupational Medicine for these physicals, and Dr. Marvin performed Mr. Ott's physical. On July 26, 2010, Dr. Marvin provided a note to Colfor stating that Mr. Ott was to work no more than 40 hours a week and that he was to avoid hot presses. (Comm. Exh. 18) On July 28, 2010, Dr. Marvin also provided Colfor with a detailed report on Mr. Ott's fitness for duty exam, confirming his diagnosis of MS and stating that he was not to work around hot presses because of heat intolerance he had at that point in time. (Tr. 159-160; Comm. Exh. 20)

Specifically, Dr. Marvin's report, which was faxed directly to Colfor's Human Resources, Director Tim Moran, stated as follows:

"Mr. Ott * * * has been diagnosed with multiple sclerosis. * * * Now that Mr. Ott has adjusted his medications, I believe he will be able to return to his normal work activity except for 40 hours a week, and not around hot presses because of the heat intolerance he has at this point in time." (Comm. Exh. 20, pp. 2-3)

In order to keep track of employees with medical restrictions, Colfor had computerized a list of employees with restrictions. Based on the notes submitted regarding Mr. Ott, his restrictions were listed in this system as "40 hr/week, Avoid Hot Presses." (Comm. Exh. 21)

Mr. Ott returned to work in early August of 2010 as a Forge Press Operator in the Salem facility. Colfor honored Mr. Ott's restrictions at that time. (Tr. 159-161, 267-268)

In September of 2010, due to GM filing bankruptcy, which caused Colfor to lose business, Colfor was in the process of shutting down its Salem facility and moving some of the presses at Salem to Malvern. With presses moving from Salem to Malvern, Forge Press Operator positions opened up at Malvern. Ultimately, 4 hot presses and 4 cold presses moved from Salem to Malvern in the latter part of 2010. At the end of that process, there were 20 cold presses and 15 hot presses at Malvern. (Tr. 48, 51-52, 67, 79, 164-165, 242-243, 267-268, 450-453, 500, 562-563, 567-569, 656-657, 697-698; Comm. Exh. 44)

The first group of Forge Press Operator positions created by the transfer of presses from Salem to Malvern was posted on September 14, 2010. 10 positions were posted. Pursuant to the Collective Bargaining Agreement that controlled the bidding process, seniority was a key factor in determining who is a successful bidder. In order for Mr. Ott to retain his position as a Forge Press Operator he knew that he had to bid on these positions. He properly submitted his bid in a timely fashion. However, when the list of successful bidders was posted on September 24, 2010, Mr. Ott's name was not on it. Instead, nine Salem employees with less seniority were successful bidders. A different copy of the bid list was sent to the union than that which was posted. That list noted that Mr. Ott had the second highest level of seniority, but was not being awarded the position.[1] (Tr. 82, 158-159, 164-169, 493-494, 496, 500-502, 588-591, 653-657, 677-678, 681-683, 702-703; Comm. Exh. 17, 22-26; Respondent's Exh. 30-31, 37-39)

[1] Providing a different list to the union was not the normal procedure. Mr. Moran created this separate list so that hourly workers would not know that Mr. Ott's bid had been rejected despite his seniority. (Tr. 681-683; Comm. Exh. 25 & 26)

Prior to Mr. Ott being rejected from the position of Forge Press Operator at the Malvern facility in September of 2010, no one contacted him to discuss his restrictions and how they might impact his ability to work as a Forge Press Operator in Malvern. (Tr. 168-169, 685)

Mr. Moran was the sole person who decided to reject Mr. Ott's bid for the Forge Press Operator positions at Malvern. Mr. Moran acknowledged that if Mr. Ott had not had any restrictions due to a medical condition he would have been a successful bidder for a Forge Press Operator position in September of 2010. Mr. Moran assumed that anyone who populated the posted positions would be working a hot job. However, he did not bother to check if this assumption was accurate. (Tr. 560, 583, 593-596, 685)

Mr. Moran did know that Mr. Ott's restriction of not working more than 40 hours a week could have been accommodated. (Tr. 675-676)

Before rejecting Mr. Ott's bid, and deciding to not accommodate Mr. Ott's restriction of not working hot jobs at Malvern, Mr. Moran did not ask Mr. Ott for information on his MS or otherwise seek his input on what his restriction meant or how it could be accommodated. Mr. Moran did not consult with anyone to determine if it would be feasible for Mr. Ott to work as a Forge Press Operator at Malvern. He did not observe Mr. Ott's work as a Forge Press Operator at Salem, did not speak with anyone at Salem about Mr. Ott, nor did he check to see how Mr. Ott's restrictions were being accommodated at Salem where he was continuing to work as a Forge Press Operator. Furthermore, Mr. Moran did nothing to explore which cold presses might be available at Malvern. (Tr. 68, 168-169, 174-175, 245, 424-425, 664, 675, 685-687)

Mr. Ott asked his foreman, Paul Miller, if he knew why Mr. Ott did not receive one of the Forge Press Operator positions. Mr. Miller conveyed this question to Mr. Moran, causing Mr. Moran to write Mr. Ott a letter explaining why he rejected Mr. Ott's bid. In his letter, Mr. Moran

stated that "you were not successful in being awarded the (Forge Press Operator) position based on 'permanent' work restrictions, which restricts you from operating 'hot' jobs." This was the only reason Mr. Moran gave for rejecting Mr. Ott's bid for the open Forge Press Operator positions. (Tr. 169-170, 270-271, 590; Comm. Exh. 27; Respondent's Exh. 32)

Mr. Ott contacted Alva Powell, who was the Union President, to try and get the union to help him. This resulted in a few conversations with management that did not resolve the issue. Mr. Powell then arranged for a meeting with Mr. Moran, Mr. Ott and union representatives. (Tr. 177, 449, 462, 513-515, 520-521, 592-594; Respondent's Exh. 21-22; Comm. Exh. 45, 49-50)

In preparation for the meeting, on October 13, 2010, Mr. Ott worked with his sister to generate a letter that Mr. Ott intended to hand to Mr. Moran setting out a formal request for accommodations under the Americans with Disabilities Act (ADA) and providing information on Mr. Ott's condition, restrictions and requested accommodations. Mr. Ott generated a letter, and his sister generated a similar letter as well. (Tr. 177-178, 183-184; Comm. Exh. 28, 29)

This meeting took place on October 21, 2010. Mr. Ott first stated that he was requesting an accommodation pursuant to the ADA. When Mr. Ott tried to discuss his MS and explain how it affected him, Mr. Moran refused to let him do so, saying that he would not discuss any medical issues during the meeting. When Mr. Ott attempted to hand Mr. Moran documents regarding his condition, restrictions and requested accommodations, including the October 13, 2010, letter Mr. Ott had generated, Mr. Moran refused to accept them. (Tr. 177-179, 184-188, 194-195, 212, 462, 465-466, 520, 523-524, 597-598, 709, 713-714, 716, 767-768; Comm. Exh. 28, 49-50; Respondent's Exh. 23)

Mr. Moran then said that accommodating Mr. Ott's heat restriction would have been unfair to the other Forge Press Operators, such as those working the Upsetters, which are a group of 4 hot presses that had recently transferred from Salem to Malvern. (Tr. 196-197)

Mr. Ott pointed out that the other employees did not have MS while he did. Mr. Moran countered that he did not feel Mr. Ott's condition fell under the ADA and that to look at Mr. Ott, he appeared to be fine. Mr. Moran stated that he would only accept further clarification of Mr. Ott's condition and what jobs he could perform from Mr. Ott's doctor. Mr. Moran also said during the meeting that Mr. Ott's neurologist had not been at the Malvern facility, so Mr. Moran did not understand how he could know what "hot jobs" were. (Tr. 197-198, 478-479, 523-524, 544, 716-717; Respondent's Exh. 23)

Mr. Moran then said that the majority of the jobs at Malvern were hot jobs, so it would create a problem to not assign Mr. Ott to hot jobs. Mr. Ott told Mr. Moran that he had spent ten years at Malvern so he knew what sorts of jobs were available, and there were plenty of jobs he could perform. Shortly after Mr. Ott made this statement Mr. Moran ended the meeting. (Tr. 200-202, 717)

While Mr. Moran contended that he did not know what Mr. Ott's neurologist meant by the term "hot job," he correctly identified hot jobs that Mr. Ott could not perform and claimed that the majority of jobs were hot jobs that Mr. Ott could not perform. Mr. Ott was also being accommodated while working at Salem by not being assigned hot jobs, and there was no evidence that there was uncertainty about what Mr. Ott's neurologist meant at that time. Furthermore, this same term was used by Dr. Marvin, who conducted Mr. Ott's return to work physical. The finder of fact did not credit Mr. Moran's assertion that he was uncertain what Mr.

Ott's neurologist meant by the term hot job, and this Court will not question the Commission's assessment of Mr. Moran's credibility.

On November 4, 2010, Mr. Powell showed Mr. Moran Colfor's Equal Employment Opportunity policy and discussed his handling of Mr. Ott's bid for Forge Press Operator in light of that policy. Mr. Moran told Mr. Powell that he did not feel that Mr. Ott had a disability. The next time Mr. Powell spoke with Mr. Ott, he told Mr. Ott that he didn't see how Mr. Ott could feel that what had happened could be considered any sort of disability discrimination. As Mr. Powell was speaking as the union President, this left Mr. Ott to conclude that the union was siding with Colfor. (Tr. 204, 527-528, 532-533; Comm. Exh. 51)

Mr. Ott's sister mailed her version of the October 13, 2010, letter to Mr. Moran in November of 2010. Mr. Moran mailed a response to Mr. Ott on November 12, 2010, again stating that any additional information as to Mr. Ott's medical condition, work restrictions or disability had to come from Mr. Ott's doctor. This letter noted that Mr. Ott's doctor had not seen Colfor's operations, which cast doubt on his ability to know what the term "hot job" meant. (Tr. 211-212; Comm. Exh. 29, 36)

Mr. Ott bid on a group of eight Forge Press Operator positions in early November, 2010. Mr. Moran rejected his bid, again due to his restriction of not working hot jobs. (Tr. 209-210, 531-532, 745-746; Comm. Exh. 33, 52)

When Mr. Ott talked to Dr. Stalker, he asked Dr. Stalker if he could come to the plant so he could observe the presses and provide more specific information on which presses Mr. Ott could work and which ones he could not work. Dr. Stalker explained that he wasn't an industrial expert, so his looking at the presses would not be helpful. Mr. Ott told his foreman and the plant

manager that his doctor was not going to be able to come to the plant and point to specific presses that Mr. Ott could or could not work. (Tr. 205-206, 372-373, 388)

Some of the Salem employees who successfully bid onto Forge Press Operator positions at Malvern did not go to hot jobs. There was no evidence that it would have been a hardship to have Mr. Ott assigned to cold jobs if he had been one of those employees. (Tr. 51, 86-87, 210-211)

Mr. Ott successfully bid on a CNC Machine Operator position at the Malvern facility that was posted in November of 2010. He began working as a CNC Machine Operator on November 15, 2010. The temperature in the area with the CNC Machines was as hot as, or even hotter than, the locations of many of the cold presses. There was no evidence that anyone was concerned about Mr. Ott working in Malvern, that his being a CNC Machine Operator created any unsafe condition, that Mr. Ott was injured by working in the Malvern plant, or that Colfor has suffered any liability because Mr. Ott has been working in Malvern. (Tr. 54, 66-67, 72, 74, 89-91, 171-174, 207-210, 332-334, 431-434, 741-743; Comm. Exh. 30-32, 34; Respondent's Exh. 44)

Mr. Ott continued working as a Forge Press Operator in Salem with the same restrictions he had when Mr. Moran rejected his bid for a Forge Press Operator position in Malvern from August 2, 2010, through November 14, 2010. There was no evidence that his restrictions created any confusion or difficulty for Colfor.

In December of 2010 Mr. Ott retained an attorney to represent him. Mr. Ott's attorney mailed Mr. Moran four letters between December 10, 2010, and January 6, 2011. These letters provided additional information as to Mr. Ott's restrictions, asked for information from Mr. Moran, included a release for Mr. Ott's medical information and requested that Mr. Moran respond regarding placing Mr. Ott in the Forge Press Operator position. This included an office

note from Dr. Stalker dated November 18, 2010, which stated that Mr. Ott could work in environments with temperatures up to 90 degrees. (Tr. 293, 621, 730-731; Comm. Exh. 39; Respondent's Exh. 15) Mr. Moran did not respond to Mr. Ott or his attorney, nor did he make any effort to secure additional information from Mr. Ott's neurologist. (Tr. 204-205, 212-216, 725-732, 740-741; Comm. Exh. 37-40)

CONCLUSIONS OF LAW

R.C. 4112.02(A), states that it is an unlawful discriminatory practice for an employer to discriminate against any person with respect to any matter related to employment based on disability. The law requires employers to provide disabled individuals with reasonable accommodations that allow them to be fully employed to the best of their abilities. Ohio Admin. Code 4112-5-08(E)

In order to prove a case of disability discrimination when the employee is asserting that his employer failed to accommodate him, the first step is generally establishing a *prima facie* case of discrimination. This requires proof that (1) the employee was disabled; (2) that the employer was aware of the disability; and (3) that the employee met the qualifications for the job and could perform the essential functions of the job with a reasonable accommodation. *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 663 (C.A. 10, 2000) The burden of proving a *prima facie* case of disability discrimination is not an onerous one. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)[2]

[2] Decisions interpreting the Federal anti-discrimination law may be applied to help interpret Ohio's anti-discrimination law. *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573 (1998) Furthermore, "(a) claim for failure to provide reasonable accommodation under Ohio law is analyzed similarly to a claim brought under the ADA." *Garlock v. The Ohio Bell Telephone Co., Inc.*, 2015 WL 5730665, p. 5 (N.D. Ohio, 2015)

When an employee seeks an accommodation for a disability, that employee must first ensure that his employer is notified that he has a medical condition requiring an accommodation. *Shaver*, 138 Ohio App.3d at 668; *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996); *Merry v. A. Sulka & Co., Ltd.*, 953 F. Supp. 922, 927 (N.D. Ill. E.D. 1997) Third parties associated with the employee, such as a health care professional, may request the accommodation on the employee's behalf. *Shaver*, 138 Ohio App.3d at 668; *Taylor v. Phoenixville School Dist*, 184 F.3d 296, 313 (3rd Cir. 1999); *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996)

The request for an accommodation "does not have to be in writing, does not have to mention the ADA, and does not have to invoke the words 'reasonable accommodation' so long as the notice makes it clear that the employee desires assistance for his or her disability." *Shaver*, 138 Ohio App.3d at 668 "What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation." *Taylor*, 184 F.3d 296 at 313 "The ADA does not require that any talismanic language be used in a request for reasonable accommodation." *White v. Honda of America Mfg., Inc.*, 191 F. Supp.2d 933, 950 (S.D. Ohio 2002)

A doctor providing a form notifying the employer of the disabled employee's restrictions is sufficient to meet this burden. *Garlock*, 2015 WL 5730655, p. 7

Once the employee proposes an accommodation, "(t)he employer bears the burden of proving that any proposed accommodation is unreasonable." *Shaver*, 138 Ohio App.3d at 670 "Accommodations for handicapped workers are unreasonable only if they place an undue

hardship on the employer. The burden of showing *undue hardship* is on the employer." *Wooten v. Columbus Division of Water*, 91 Ohio App.3d 326, 334 (C.A. 10, 1993) (emphasis in original)

Once the employer is informed about an employee's medical condition and the employee's need for an accommodation, "an employer is obligated to participate in the interactive process of seeking an accommodation." *Shaver*, 138 Ohio App.3d at 669 *See, also Feliberty v. Kemper Corporation*, 98 F.3d 274, 280 (7th Cir. 1996) *citing Beck v. Univ. of Wisconsin Bd. Of Regents*, 75 F.3d 1130 (7th Cir. 1996); *White v. Honda of America Mfg., Inc.*, 191 F. Supp.2d 933, 950-951 (S.D. Ohio 2002); *Thompson v. E.I. DuPont Denemours & Co.*, 140 F. Supp.2d 764, 773-774 (E.D. Mich. 2001)

Furthermore, the employer has the duty to not only engage in, but also to initiate, the interactive process once it is notified of an employee's disability and need for an accommodation. *Canteen Corp. v. Pennsylvania Human Relations Commission*, 814 A.2d 805, 813 (Comm. Ct. of Pa, 2003)

With regards to the interactive process "both parties bear responsibility for determining what accommodation is necessary." *Bultemeyer*, 100 F.3d at 1285 "The determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 Both parties must be flexible and operate in a cooperative fashion. *Merry*, 953 F. Supp. at 927 "The employer has at least some responsibility in determining the necessary accommodation." *Beck*, 74 F.3d at 1135 "Resolving a request for reasonable accommodation generally requires substantial communications between the employee and the employer." *Zamudio v. Patla*, 956 F. Supp. 803, 808 (N.D. Ill. 1997)

The employee's input is very important, as the employee "has first-hand knowledge of both his disability and his job * * *." *Feliberty*, 98 F.3d at 280; *Scheer v. City of Cedar Rapids*, 956 F. Supp. 1496, 1501 (N.D. Iowa, 1997) Therefore, employers must interact with "the employee" in determining if an accommodation is feasible. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998) The requirement that an employer be flexible during the interactive process means that it cannot ignore or discount the input that the employee himself may have. "'The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability.'" *White*, 191 F. Supp.3d at 950, citing 29 C.F.R. pt. 1630 App. §1630.9

Furthermore, simply because an employer communicated with an employee's union and participated in a grievance proceeding does not mean that it met its obligation to engage in the appropriate interactive process. *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1117-1118 (N.D. Ind. 1998) "Put more simply, the union is an insufficient proxy for the employee in the enforcement of that employee's rights under the ADA, including engaging in the interactive process." *Id.* at 1118

Additionally, Ohio's "handicap discrimination law does not permit the requirement that every employee must be able to perform every conceivable function of every job." *Miami Univ. v. Ohio Civ. Rights Comm.*, 133 Ohio App.3d 28, 41 (C.A. 12, 1999) In determining whether a disabled employee can reasonably be accommodated, an employer must consider the availability of other employees to cover job duties that the disabled employee cannot. *Miami*, 133 Ohio App.3d at 39

If an employer fails to engage in the interactive process following notification that an employee has a disability requiring accommodation, this places a heavy burden on the employer

if the employer argues that no accommodation was possible. "The interactive process would have little meaning if it was interpreted to allow employers, in the fact of a request for accommodation, simply to sit back passively, offer nothing, and then, in * * * litigation try to knock down every specific accommodation as to burdensome." *Taylor*, 194 F. 3d at 315 "(W)hen an employer fails to participate in good faith in the interactive process of reaching a reasonable accommodation, it precludes consideration of possible alternatives for an accommodation. Thus, the employer must have participated in the process to some extent before it can argue that a reasonable accommodation is not possible." *Shaver*, 138 Ohio App.3d at 670 (citations omitted)

Another doctrine of disability law is that an employer is not required to retain a disabled person in a position that he or she cannot safely perform. R.C. 4112.02(L); Ohio Admin. Code 4112-5-08(D)(3) & (4) This is generally known as the "direct threat" defense. Employers are required to engage in an individualized assessment of a disabled individual before they can use this defense. Ohio Admin. Code 4112-5-08(D)(3)(a) & (4); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); *Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468, 481 (5th Cir. 2006); *Kapche v. City of San Antonio*, 304 F.3d 493, 498 (5th Cir. 2002); *Nichols v. City of Mitchell*, 914 F. Supp.2d 1052, 1063 (D. South Dakota, 2012), citing *EEOC v. Wal-Mart Stores, Inc.*, 447 F.3d 561, 571 (8th Cir. 2007); and *EEOC v. American Tool & Mold, Inc.*, 21 F. Supp.3d 1268, 1285 (M.D. Fla. 2014)

As a defense, the employer bears the burden of proof that an employee would be a danger to himself or others if he worked in a particular job. *Nichols v. City of Mitchell*, 914 F. Supp.2d 1052, 1063 (D. South Dakota, 2012); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-572 (8th Cir. 2007)

Even an honest belief that an employee could not safely perform a particular job is not enough to justify an adverse employment action if it is not based on the required individualized assessment. *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 29 (1st Cir., 2002) The danger is that such a belief may be based on stereotypes, generalizations and fear rather than on an accurate consideration of the individual employee and the environment at issue. *Id.*

DETERMINATIONS

The Commission established a *prima facie* case of disability discrimination.

Colfor does not dispute that Mr. Ott's MS is a disability. (Appellant's Brief, p. 33, fn. 12) Therefore, the first prong of the *prima facie* case has been met.

Colfor was informed that Mr. Ott had a medical condition that required accommodation of no hot jobs and no more than 40 hours a week in the Fitness for Duty Exam from Dr. Marvin, as well as by notes submitted by both Mr. Ott's primary physician and his neurologist verifying that he had a medical condition that required accommodation. When Mr. Ott returned to work on August 2, 2010, Colfor was aware of, and honored, his restriction of not working hot jobs while he worked as a Forge Press Operator in Salem. Therefore, Colfor was notified that Mr. Ott had a medical condition that required an accommodation. This meets the second prong of the *prima facie* case.

As to the final prong, Mr. Ott met the qualifications for the Forge Press Operator position. Mr. Ott was, in fact, working as a Forge Press Operator in Salem when his bid to work that same position in Malvern was denied. Mr. Moran acknowledged that but for his restriction against operating hot presses he would have received the position. Mr. Ott could have performed

the duties of a Forge Press Operator so long as he did not have to work more than 40 hours a week or on hot presses. This meets the third prong of the *prima facie* case.

The key issues in dispute between the parties are (1) who was responsible for the failure of the interactive process; (2) whether Mr. Ott's restriction against working hot jobs could have been reasonably accommodated; and (3) whether Mr. Ott's vulnerability to heat left him able to safely work as a Forge Press Operator in Malvern.

This Court finds there is reliable, probative and substantial evidence that Colfor is responsible for failing to properly engage in the required interactive process.

As of September of 2010, when Mr. Ott bid on the open Forge Press Operator positions in Malvern, Colfor had been notified of his condition and the need for accommodation. Therefore, Mr. Ott had met his obligation under the law, and when Mr. Moran received Mr. Ott's bid for the Forge Press Operator position and he saw that Mr. Ott had a medically-related restriction against operating hot presses, Mr. Moran had the obligation to either honor that restriction or, at a minimum, initiate the interactive process with Mr. Ott. He did neither. Instead, Mr. Moran simply assumed that all employees who were going to transfer from Salem to Malvern were going to be required to operate hot jobs and rejected Mr. Ott's bid. Before doing so, Mr. Moran did not communicate with Mr. Ott in any way or request additional information from anyone.

As set forth above in the Findings of Fact, Mr. Ott made numerous attempts to communicate with Mr. Moran to explain more about his condition, what jobs he could perform, and how he could be accommodated. Mr. Moran refused to take any responsibility for determining if Colfor could accommodate Mr. Ott, and refused to accept any input from Mr. Ott

on this issue. It was Colfor that had the initial obligation to begin the interactive process once it was notified about Mr. Ott's condition and restrictions. Mr. Moran failed to meet this obligation.

There is reliable, probative and substantial evidence in the record to support the Commission's conclusion Mr. Moran failed to understand and accept the responsibility to engage in the required interactive process with Mr. Ott.

The Court also finds that there was reliable, probative and substantial evidence to support the conclusion that Mr. Ott could have been accommodated.[3]

Mr. Ott had successfully been performing the position in Salem with the restrictions outlined by his primary physician, his neurologist and the doctor Colfor sent Mr. Ott to see for his return-to-work physical. There was also testimony that employees who successfully bid for the positions which Mr. Ott was denied in September and November of 2010 never worked a hot press after their transfers. While Mr. Moran may have believed that every Forge Press Operator at Malvern had to work a hot press, he was incorrect.

Finally, as to Colfor's attempted "direct threat" defense, there is reliable, probative and substantial evidence in the record that contradicts Colfor's claims.

Beginning in November of 2010, Mr. Ott worked as a CNC Machine Operator in Colfor's Malvern facility. He continued to work there through the hearing date, and there was no evidence that he suffered from any injury in doing so, that Colfor faced any liability from this, or that anyone else was injured because Mr. Ott could not withstand the heat to which he was exposed in this position. Based on testimony from multiple witnesses and a set of temperature readings taken by Colfor's Environmental Health and Safety Leader, the temperatures Mr. Ott was exposed to as a CNC Machine Operator were equivalent to, and in many cases greater than,

[3] There was no dispute that Mr. Ott's 40 hour a week restriction could have been accommodated, and Mr. Moran did not reject Mr. Ott's bid for the Forge Press Operator position for that reason.

the temperatures to which Forge Press Operators who worked cold presses at Malvern were exposed.

The Commission's determination that Colfor engaged in unlawful disability discrimination is supported by reliable, probative and substantial evidence. As such, that determination must be affirmed.

REMEDIES

R.C. 4112.05(G)(1) states that, upon finding a violation of law the Commission shall take any affirmative action to effectuate the purpose of the statute, including hiring a person who applied for a job and backpay. The Commission properly ordered those remedies in this instance.

Colfor must place Mr. Ott in the next available Forge Press Operator position, accommodating his restriction of not working a hot press and his work hour restriction.

Because Mr. Ott did bid on, and receive, the job of CNC Machine Operator, his earnings in that position must be subtracted from his backpay award. Mr. Ott began working as a CNC Machine Operator on November 15, 2010, earning $15.60 an hour, which was the maximum hourly rate for that position. He had been earning $17.35 an hour, and would have continued to earn that amount had he been transferred to Malvern as a Forge Press Operator. Therefore, he was paid $1.75 an hour less. He should receive the difference in pay at a rate of $70.00 a week from November 15, 2010, until he is offered a Forge Press Operator and either declines the offer or begins work as a Forge Press Operator. (Tr. 165, 207-210, 228-229, 332-333, 500-501, 741-743, 747-748; Comm. Exh. 30-32, 34, 35, 42-43)

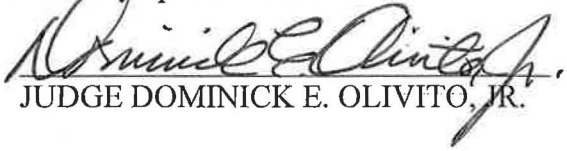
IT IS SO ORDERED.

JUDGE DOMINICK E. OLIVITO, JR.
COURT OF COMMON PLEAS
CARROLL COUNTY, OHIO

THERE BEING NO JUST REASON FOR DELAY,
THIS JUDGMENT IS FINAL AND APPEALABLE

TO THE CLERK:

Pursuant to Civil Rule 58(B), the Clerk is directed to serve upon the parties a notice of the filing of this Judgment Entry and the date of entry upon the Journal.



JUDGE DOMINICK E. OLIVITO, JR.

CC: Gust Callas, Esq.
David A. Oppenheimer, Esq.
Jason Ott