STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR No. 17 EPD 189 EEOC No. 16J-2017-00112

Paul Sweeney
Complainant

v. **DECISION AND ORDER**

Universal Auto Sales, Inc.
Respondent

INTRODUCTION

On August 23, 2017, Paul Sweeney (Complainant) filed a charge with the Rhode Island Commission for Human Rights (Commission) against Universal Auto Sales, Inc. (Respondent). Complainant alleged that Respondent terminated his employment due to a perceived disability and in retaliation for requesting a reasonable accommodation. On August 23, 2017, Preliminary Investigating Commissioner Cynthia M. Hiatt assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that Respondent violated the provisions of the Fair Employment Practices Act (FEPA), Title 28, Chapter 5 of the General Laws of Rhode Island, and the Rhode Island Civil Rights of People with Disabilities Act (CRPDA), Title 42, Chapter 87 of the General Laws of Rhode Island, as alleged in the charge.

On January 23, 2018, a Complaint and Notice of Hearing issued. The Complaint alleged that Respondent terminated Complainant due to disability and in retaliation for requesting a reasonable accommodation. On February 13, 2018, Respondent filed an Answer to the Complaint and denied Complainant's allegations.

A hearing on the Complaint was held on September 25, 2018 before Commissioner Angelyne E. Cooper. Both parties were represented by counsel. On November 16, 2018, Complainant filed Complainant's Post-Hearing Brief and Respondent filed Respondent's Post-Hearing Memorandum.

JURISDICTION

Respondent is a corporation that employed four or more employees within the State of Rhode Island at the time of the events in question and thus is an employer within the definition of R.I. Gen. Laws § 28-5-6(8). Respondent was an entity doing business within the State of Rhode Island at the time of the events in question and is thus subject to the prohibitions of the CRPDA. Respondent is therefore subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. Complainant began working for Respondent as a mechanic on August 8, 2016. Hearing Transcript, September 25, 2018 (Trans.) 13:13-20, 48:17-21.

2. Complainant was hired by Manager Manny Furtado. Trans. 13:21-22, 46:16-24, 47:1.

3. On November 1, 2016, while working for Respondent, Complainant was swinging a hammer, trying to remove a ball joint from an automobile, and a chunk of the hammer broke off and entered Complainant's right thumb. Trans. 15:3-5, 15:8-15.

4. Thereafter, Complainant sought treatment for his work-related injury at Kent County Hospital. Trans. 15:16-19. Complainant received a note from the hospital taking him out of work until November 4, 2016, which he gave to Mr. Furtado. Trans. 16:5-7, 16:24, 17:1-13; Exhibit (Ex.) 1.

5. After visiting the hospital, Complainant returned to work to finish his shift because he was told by Mr. Furtado that he needed to finish the day or pack his things and go home. Trans. 17:14-23.

6. While finishing his shift, Complainant's injury impeded his ability to do his job, as he was unable to close his hand or grasp with his thumb. Trans. 18:4-10.

7. At the end of his shift, Complainant told Mr. Furtado he could not come in and needed to go back to the hospital. Trans 18:11-20. Complainant returned to the hospital and was treated for an infection. Trans. 18:21-24, 19:1-3.

8. On November 11, 2016, Complainant saw Dr. Anderson at Pawtucket Orthopaedics. Trans. 19:4-5; Ex. 2. Dr. Anderson examined Complainant's injury and prescribed Physical Therapy. Trans. 19:8-15; Ex. 2. Dr. Anderson provided Complainant with a note, stating that Complainant was unable to work until further evaluation. Trans. 19:15-18, 20:1-5; Ex. 2.

9. Complainant went to Universal Auto Sales as soon as he left Dr. Anderson's office and gave Dr. Anderson's note to Manager Vincent Cambio, who looked at the note, laughed, and said "okay". Complainant's hand was wrapped in a splint. Trans. 20:6-15, 22:16-24, 23:1, 46:16-20, 47:7-14.

10. In Complainant's estimation, he was unable to work on November 11, 2016. Trans. 23:2-4.

11. On December 11 or 13, 2016, Complainant received a call from Kevin, a salesman for Respondent, who informed Complainant he was terminated because Respondent was going to send all its mechanic work to an outside shop. Trans. 23:5-15, 34:2-24, 35:1-17, 48:22-23; Ex. A.

12. The only other mechanic employed by Respondent, Michael Zabatta, was terminated in early December of 2016. Trans. 14:2-24, 15:1-7, 48:7-16, 48:24, 49:1-5.

13. The decision to terminate Complainant and Mr. Zabbata was made by Respondent's Owner and President, Melissa Faria, as well as Mr. Furtado and Mr. Cambio. Trans. 49:17-18. The decision was based on Respondent's decision to outsource its mechanic work based on the belief that Respondent would save money and better serve its customers if it outsourced its mechanic work. Trans. 49:6-16.

14. Respondent utilized outside companies for its mechanic work for six to eight weeks. Trans. 49:19-21, 50:2-4. Respondent stopped outsourcing its mechanic work because it ended up being more expensive than employing in-house mechanics and Respondent had less control over the work. Trans. 50:5-12.

15. Respondent did not consider re-hiring Complainant when it stopped outsourcing its mechanic work. Trans. 50:18-21. The decision not to offer Complainant the job was made by Ms. Faria, Mr. Furtado and Mr. Cambio. Trans. 53:6-16. Ms. Faria did not consider offering Complainant the job because he only worked for Respondent for a few months and she believed he would resent having been terminated. Trans. 50:22-24, 51:1-2.

16. Complainant saw Dr. Anderson again on December 13, 2016. Trans. 24:24, 25:1-2; Ex. 3. Dr. Anderson provided Complainant with a note clearing Complainant to return to work and recommending completion of hand therapy. Trans. 25:3-5, 25:19-24; Ex. 3.

17. Following Complainant's second visit with Dr. Anderson, he continued hand therapy for about one month. Trans. 26:1-6. After completing hand therapy, Complainant continued to have issues with his hand. Trans. 26:4-8. Complainant would feel a shock up his whole arm and his hand would open involuntarily when he squeezed something too hard, when he tried to pick something up and when his daughter pulled on his thumb. Trans. 26:9-18.

18. After being cleared to return to work, Complainant worked for UPS loading trailers until around the end of January of 2017. Trans. 27:20-24, 28:1-6. Thereafter, Complainant worked for Papa Gino's until he found work as a mechanic. Trans. 28:10-20.

19. Complainant found a job as a mechanic in October of 2017. Trans. 27:19-22. Complainant had to adjust how he worked as a mechanic because, due to continuing issues with his hand, the vibrations created by power tools would cause him to drop the tools. Trans. 27:23-24, 28:1-7.

CONCLUSIONS OF LAW

Complainant did not prove by a preponderance of the evidence that he was terminated due to a perceived disability or in retaliation for engaging in protected activity.

DISCUSSION

The Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964." Ctr. for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (citing Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897-98 (R.I. 1984)).

COMPLAINANT DID NOT PROVE THAT RESPONDENT DISCRIMINATED AGAINST HIM ON THE BASIS OF DISABILITY

The FEPA and the CRPDA prohibit termination on the basis of disability. R.I. Gen. Laws § 28-5-7 provides, in relevant part, that:

> It shall be an unlawful employment practice:

(1) For any employer:
(i) To refuse to hire any applicant for employment because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin;
(ii) Because of those reasons, to discharge an employee . . . ;

Similarly, R.I. Gen. Laws § 42-87-3(2) provides that:

Notwithstanding any inconsistent terms of any collective bargaining agreement, no otherwise qualified person with a disability shall, solely on the basis of disability, who with reasonable accommodation and with no major cost can perform the essential functions of the job in question, be subjected to discrimination in employment by any person or entity receiving financial assistance from the state, or doing business within the state. The provisions of this subsection apply to the following activities:

. . . .

(ii) . . . termination . . . ;

In assessing Complainant's claims, the Commission must first determine whether Complainant has made a prima facie case. A prima facie case of termination due to disability requires a showing that: (1) the employee is disabled; (2) the employee is a qualified individual; and (3) the employer terminated the employee, in whole or in part, because of a disability. E.g. DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13, 25 (R.I. 2005) (citing Equal Emp't Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 141 n. 2 (1st Cir. 1997)).

Complainant failed to establish a prima facie case because he did not prove that he was disabled as defined by the FEPA and the CRPDA.

The CRPDA defines disability as follows[1]:

(1) "Disability" means, with respect to an individual:
(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(ii) A record of such impairment; or
(iii) Being regarded as having such an impairment (as described in paragraph (4));

. . . .

(4) "Regarded as having such an impairment" for purposes of paragraph (1)(iii) means:
(i) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.
(ii) Paragraph (1)(iii) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six (6) months or less.

R.I. Gen. Laws § 42-87-1. This definition is essentially identical to that within the Americans with Disabilities Act. 42 U.S.C. § 12102.

[1]The FEPA adopts the definition of disability in the CRPDA. R.I. Gen. Laws § 28-5-6(5).

The Complaint alleges that Complainant had a disability as defined by R.I. Gen. Laws 42-87-1(1)(iii), the "regarded as" prong of the definition. Complaint (Comp.) ¶ 5i. As stated by the United States Court of Appeals, Sixth Circuit:

> [T]o state the threshold condition of a "regarded as" ADA claim, an employee need only show that their employer believed they had a "physical or mental impairment," as that term is defined in federal regulations. The employer may then rebut this showing by pointing to objective evidence "that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. [29 C.F.R.] § 1630.15(f). *Accord Mancini v. City of Providence*, 909 F.3d 32, 45-46 (1st Cir. 2018); *Silk v. Bd. Of Trustees, Moraine Valley Cmty. Coll.*, 795 F.3d 698, 706 (7th Cir. 2015).

Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 319 (6th Cir. 2019). Federal regulations define "physical or mental impairment" broadly, to include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems". 29 C.F.R. § 1630.15(f).

It is clear Complainant had a physical impairment. Complainant suffered an injury to his thumb which impeded the use of his hand. Respondent was clearly aware of the impairment, as Complainant's unchallenged testimony established that the injury occurred at work and Complainant provided documentation of his medical treatment to Respondent's management. Thus, it must next be determined whether Respondent proved that Complainant's impairment was both "transitory" and "minor".

Respondent proved that Complainant's impairment was transitory. Complainant's injury occurred on November 1, 2016 and Complainant was cleared to work without restrictions on December 13, 2016, less than two months later. Though Complainant testified that he continued to have issues with his thumb continuing more than six months following his injury, Complainant did not prove that Respondent was aware of or perceived any such long-term effects at the time of his termination. Complainant submitted two doctor's notes to Respondent prior to his termination, neither of which suggested his injury would result in a long-term impairment.

Respondent also proved that Complainant's impairment was minor. Though "minor" is not defined by statute, a number of courts have found impairments similar to, or more severe than, Complainant's injury to be "minor". See, e.g., Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 259-60 (3rd Cir. 2014) (finding that a broken metacarpal resulting in the loss of use of three fingers for about two months was transitory and minor); Myatt v. Cathedral Vill., No. 19-130, 2019 WL 2288116, at *3-4 (E.D. Pa. May 29, 2019) (concluding that a hand injury impacting the plaintiff's ability to grasp and grip objects which lasted less than six months was transitory and minor, notwithstanding that it might require surgery in the future); Clark v. Boyd Tunica, Inc., No. 3:14-cv-00204-MPM-JMV, 2016 WL 853529, at *5-6 (N.D. Miss. Mar. 1, 2016) (finding a fractured ankle to be transitory and minor and citing a number of cases holding that broken bones are transitory and minor).

Having found that Respondent successfully proved Complainant's impairment was both transitory and minor, it is not necessary to go further in analyzing Complainant's disability discrimination claim. However, it is also worth noting that Complainant has failed to prove that Respondent's stated reason for his termination is pretext for discrimination or retaliation, as will be discussed below.

COMPLAINANT HAS FAILED TO PROVE THAT RESPONDENT RETALIATED AGAINST HIM

The FEPA and the CRPDA prohibit retaliating against employees who engage in certain types of protected conduct. R.I. Gen. Laws § 28-5-7(5) provides that it is unlawful for an employer "to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under this chapter". R.I. Gen. Laws § 42-87-3(5)(iii) prohibits disability discrimination in employment. R.I. Gen. Laws § 42-87-3(6) provides that "[t]he application, exemptions, definitions, requirements, standards, and deadlines for compliance with subdivision (5) shall be in accordance with the requirements of the Americans with Disabilities Act", which prohibits retaliation for opposing unlawful practices. 42 U.S.C. § 12203(a).

In order to establish a prima facie case of retaliation, Complainant must produce evidence establishing that (1) he engaged in protected activity, (2) he experienced an adverse employment action and (3) there was a causal link between the protected activity and the adverse action. See Shoucair v. Brown Univ., 917 A.2d 418, 427 (R.I. 2007) (quoting Calero-Cizero v. U.S. Dep't of Justice, 355 F.3d 6, 25 (1st Cir. 2004). If a prima facie case is established, the burden shifts to Respondent to offer a legitimate, non-discriminatory reason for the adverse action. See Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). If Respondent meets this burden, Complainant must then prove by a preponderance of the evidence that Respondent's stated reason is pretext for retaliation. See Id. (citing McDonnell Douglas, 411 U.S. at 802; Reeves v. Sanderson Plumbing Prod.s, Inc., 530 U.S. 133, 142 (2000)).

Complainant succeeded in establishing a prima facie case of retaliation. Complainant experienced an adverse employment action when he was terminated. Complainant established that he engaged in protected activity, namely, requesting a reasonable accommodation in the form of time off from work due to his injury. See, e.g. Wright v. CompUSA, Inc., 352 F.3d 452, 477 (1st Cir. 2003) ("[w]e now hold that requesting an accommodation is protected activity . . . ."). Complainant's retaliation claim is not precluded by his failure to establish a disability. See Id. His request for accommodation qualifies as protected activity, notwithstanding the fact that he may not have been entitled to the accommodation, so long as he had "a good faith belief that the requested accommodation was appropriate . . . ." Heisler v. Metro. Council, 339 F.3d 622, 632 (8th Cir. 2003); Accord Bryson v. Regis Corp., 498 F.3d 561, 566-67 (6th Cir. 2007); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 759 n.2 (3rd Cir. 2004); Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1264 (10th Cir. 2001). The Commission finds that Complainant made such a showing. Complainant established that his injury impeded his ability to work and that he was taken out of work by his medical providers. Importantly, Complainant testified that when he delivered the note from his doctor to Mr. Cambio on November 11, 2016, requesting time off from work, he believed he was unable to work.

Finally, Complainant produced sufficient evidence to demonstrate, for the relatively light burden of establishing a prima facie case, see Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996) ("[t]he plaintiff's prima facie burden is not onerous . . . ."), a causal connection between his request for accommodation and his termination. "Proof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2nd Cir. 1998) (quoting Manoharan v. Columbia Univ. Coll. of Physicians and Surgeons, 842 F.2d 590, 593 (2nd Cir. 1988). Respondent terminated Complainant approximately one month following his November 11, 2016 request for leave, and Complainant had not yet returned to work at that time. Additionally, Complainant testified that when he delivered his doctor's note to Mr. Cambio, Mr. Cambio laughed. Thus, the Commission finds that Complainant established a prima facie case of retaliation.

However, Respondent met its burden of articulating a legitimate reason for Complainant's termination. Ms. Faria testified that Complainant was terminated due to Respondent's decision to outsource its mechanic work.

Thus, the burden now falls to Complainant to prove by the preponderance of the evidence that Respondent's stated reason for his termination was pretext for retaliation. Complainant has failed to do so. The Commission found both Complainant and Ms. Faria to be credible witnesses. Ms. Faria testified that she made the decision to outsource Respondent's mechanic work and terminated Complainant for this reason. Complainant testified that when he was notified of his termination, he was given the same reason for his termination – that Respondent had decided to outsource its mechanic work. Additionally, Ms. Faria's unchallenged testimony established that Michael Zabatta, the only mechanic aside from Complainant who was employed by Respondent during the period in question, was terminated in early December of 2016. Thus, Mr. Zabatta was terminated around the same time as, if not prior to, Complainant. Finally, Ms. Faria testified that Respondent did, in fact, outsource its mechanic work to outside companies for six to eight weeks before deciding to resume the use of in-house mechanics because it was determined that Respondent was not saving money and had less control over repairs due to outsourcing. Thus, the weight of the evidence supports Respondent's proffered reason for Complainant's termination.

ORDER

Having reviewed the evidence presented on September 25, 2018, the Commission, with the authority granted it under R.I. Gen. Laws § 28-5-25, finds that Complainant failed to prove the allegations of the Complaint and hereby dismisses the Complaint.

Entered this 13th day of May, 2020.

Angelyne E. Cooper, Esq.
Hearing Officer

I have read the record and concur in the judgment.

Dr. John B. Susa
Commissioner

Rochelle Bates Lee
Commissioner