

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Jayne B.
Khalifa, Acting Commissioner,
Department of Human Rights,

ORDER

Complainant,

V.

Hennepin County,

Respondent.

The above-entitled matter was initiated by the Complainant, Minnesota Department of Human Rights, by the issuance of a Complaint and a Notice of and Order for Hearing on or about April 8, 1987. This matter was assigned to Administrative Law Judge Peter C. Erickson. Helen G. Rubenstein, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, has appeared on behalf of the Complainant. Janeen E. Rosas, Assistant County Attorney, 2000 Government Center, Minneapolis, Minnesota 55487, has appeared on behalf of the Respondent, Hennepin County.

A Prehearing Conference was held on May 14, 1987, at which time discovery and briefing schedules were set for the purpose of bringing dispositive motions prior to any hearing on this matter. Motions have been filed by both parties, however, only the motions for summary judgment filed by the Respondent will be considered in this Order. The motions filed by the Complainant will be reserved for a later determination. Consequently, this Order is not dispositive of all the issues which must be determined in this case. The issues which have been briefed and will be decided in this Order are: (1) whether the "Langevin" allegations should be dismissed with or without prejudice; and (2) whether summary judgment should be ordered in Respondent's favor because the Charging Party does not qualify as a "disabled person".

Based upon all of the records, files and arguments of counsel, the Administrative Law Judge makes the following:

ORDER

1. Respondent's motion to dismiss the "Langevin" allegations with

prejudice is GRANTED, unless Complainant chooses to respond to the motion for summary judgment on the merits; and

2. Respondent's motion to dismiss the "Tervo" disability discrimination allegations is GRANTED.

Dated this day of September, 1987.

PETER C.ERICKSON
Administrative Law Judge

MEMORANDUM

PROCEDURAL HISTORY

As stated above, this case was initiated by the issuance of a Complaint which was dated April 8, 1987. This Complaint was brought on behalf of two Charging Parties, William Langevin and Allan Tervo. The "Langevin" count alleged that Hennepin County discriminated against Mr. Langevin on the basis of disability when Respondent disqualified Langevin from employment in June of 1977. A Charge had been filed by William Langevin on June 24, 1977 and probable cause found by the Department of Human Rights in late December, 1980.

Count 11 of the Complaint concerns an allegation of disability discrimination against Respondent for disqualifying Allan Tervo from employment because of the results of a pre-employment physical examination. This disqualification occurred in June of 1984. Mr. Tervo filed a Charge of discrimination in July of 1984 and the Department found probable cause in May of 1986.

On June 22, 1987, a First Amended Complaint was issued by the Department of Human Rights. This Complaint contained an additional allegation in Count I (Langevin) that Hennepin County discriminated because it required Langevin to furnish information pertaining to disability. Additionally, Count II (Tervo) was amended by adding an allegation that Hennepin County discriminated against Mr. Tervo when it required him to furnish information pertaining to disability. Before the First Amended Complaint was issued, an Answer to the initial Complaint had been filed by the Respondent on May 4, 1987. An "informal" Amended Answer to the Amended Complaint was filed by Hennepin County on July 16, 1987.

After Respondent filed its Motion for Summary Judgment, a Second Amended Complaint was issued-by the Complainant which eliminated all of the allegations concerning William Langevin (Count I). Complainant has stated that it "agrees to dismissal without prejudice of those allegations relating to the Charge of Mr. Langevin." Letter from Ms. Rubenstein dated August 6, 1987. Mr.-Langevin's deposition had been taken on June 11, 1987 by the Respondent to support its Motion for Summary Judgment concerning the allegations contained in Count 1. Complainant's briefs did not address the Motion to Dismiss the Langevin allegations.

On August 13, 1987, a Third Amended Complaint was issued by the Department of Human Rights to correct the case title (insertion of the new Commissioner's

name) and to correct certain clerical errors. A Supplemental Answer to the Third Amended Complaint was filed on September 4, 1987.

-2-

this factual statement is for the purpose of deciding this motion only and shall not be considered "undisputed" facts for the purpose of any other motion in this proceeding.

-3-

Allan E. Tervo applied for employment as a detention deputy with the Hennepin County Sheriff's Office on or about February 21, 1984. Tervo completed each stage of the selection process for the position of detention deputy including a written test, oral interview, strength and agility test, and psychological testing. He provided information requested by the County for purposes of a background investigation. A county official informed Tervo and other applicants that the County screened out individuals it considered unqualified for the position of detention deputy at each stage of the selection process, and that only qualified candidates proceeded to the next stage of the process. Following completion of a strength and agility test, the County informed Tervo that he was among 30 finalists out of 900 original applicants for the detention deputy position.

As the final stage of the selection process, the County required Tervo to submit to a pre-employment physical examination by Dr. Richard Cohan on or about May 30, 1984. At this time, no conditional offer of employment had been made to Tervo. As part of the examination process, Tervo was required to complete a questionnaire form concerning his own and his family's medical history.

During the pre-employment physical examination, Dr. Cohan determined that Tervo's distant vision in each eye was 20/200 and that he suffered from a high tone hearing loss in his right ear. Mr. Tervo's eyesight was corrected, by use of glasses or contacts, to 20/20. However, the report from Dr. Cohan stated that "physical and laboratory results show that the applicant does not meet the requirement of the Hennepin County Sheriff's Department because of distant vision not 20/100 uncorrected and high tone hearing loss R ear. " Following this pre-employment physical examination, the County sent Tervo a letter notifying him that he was disqualified for employment as a detention deputy because he had failed to meet the County's uncorrected vision standard.

The vision standard of 20/100 uncorrected in each eye for employees of the Hennepin County Sheriff's Department was established by Dr. Richard Cohan for the following reasons:

. . . The reason why law enforcement agencies of all types do set up a limit on uncorrected vision is the possibility that the Peace Officer may have to function without his glasses or contact lenses for various reasons. The glasses could be knocked off in a struggle with another individual, sometimes Peace Officers will remove their glasses when they enter a cell with a prisoner because of the possibility that in a struggle the glasses might break and cause damage to the eye, or perhaps the glasses could be taken from the Peace Officer and used as some type of a weapon, because broken glass is a sharp instrument. We set the standard that a Peace Officer would need 20/100 uncorrected in each eye because we felt that was the bare minimum that they could function and carry on their job. 20/100 is poor vision, and even at that level an individual

would most likely have trouble reading normal signs,
identifying someone and just difficulty carrying on
activities because again 201100 is quite poor vision.
Medically when you measure vision after 201100, the next

medical measurement is 201200, which is legally blind. Thus, if the individual does not meet our standard of 201100 in an eye, that means that his vision in that eye would be 201200 or worse, or in other words he would be legally blind in that eye. I just think that from a medical point of view, it would be a mistake to let an individual function as a Peace Officer of any type who is legally blind in an eye if for one reason or another his glasses or contact lenses were not available to him.

Exhibit 9 attached to Complainant's responsive brief.

Mr. Tervo graduated from college with a degree in mass communications and, at that time, hoped to obtain a job in social services, preferably working with juveniles in the capacity of a counselor. Mr. Tervo worked at several jobs for short periods of time and then, in January of 1984, began working toward a certificate in law enforcement at Minneapolis Community College. He applied for the Hennepin County Sheriff's Department position as a detention deputy shortly after he began the program at Community College. Mr. Tervo is scheduled to graduate with a degree in law enforcement from the Minneapolis Community College this year. Other than being a bar to employment by the Hennepin County Sheriff's Office, Mr. Tervo's poor uncorrected vision has not hindered his daily life activities in any way. Mr. Tervo currently wears contacts which correct his vision to 20/15. He currently plays basketball, softball, football, raquetball, tennis, jogs and lifts weights.

Mr. Tervo desires to work in the area of law enforcement or corrections and is willing to accept a job in either of these areas in any part of the state or metropolitan region. Although most law enforcement agencies do have uncorrected vision standards, there is nothing in the record to indicate whether Mr. Tervo would meet or fail the standards of other law enforcement agencies. Additionally, there is nothing to show whether employment in the corrections field would require a mandated "level" of uncorrected vision.

At the time Mr. Tervo applied for the job with Hennepin County, he also applied for other jobs in "management". Additionally, he applied for a job as a juvenile correction counselor at Glen Lake with Hennepin County but was not hired for that position. Mr. Tervo also applied for a position as a health care assistant at the Detox Center in Minneapolis.

Mr. Tervo currently is employed as a Human Services Technician at the

Metro Regional Treatment Center in Anoka. Mr. Tervo is aware of jobs in the law enforcement and correction fields that do not have vision acuity standards but has not applied for any of these jobs because he has not been aware of any openings (e.g., probation or parole officers). Tervo has filed applications for corrections officer positions with the correctional facilities at Lino Lakes and at Shakopee. He was given an oral examination for the Shakopee job and is currently on their potential employee list.

Analysis

Obviously, a critical element in proving a case of disability discrimination is proof that the Charging Party is afflicted with a "disability". Minn. Stat. 363.01, subd. 25 (1984) defines that term as follows:

"Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

The above-facts (Mr. Tervo's own admissions) show that Mr. Tervo has not experienced any limitations on his normal life activities except for his rejection for employment at the Hennepin County Sheriff's Office. Mr. Tervo has not applied for employment for any other jobs where rejection was based on his poor uncorrected vision. The record does show that Hennepin County regarded Mr. Tervo as having an impairment that precluded him from being considered for employment as a detention deputy with the Sheriff's Office.

As yet, there are no Minnesota cases which address the interpretation and implementation of Minn. Stat. 363.01, subd. 25 (1984) as it would apply to a factual situation like the one presented herein. The federal anti-discrimination statute contains language similar to the Minnesota statute and has been interpreted in the form of regulations which: (1) list working as a major life activity; and (2) define "regarded as having such an impairment" to include a physical impairment that does not substantially limit a major life activity but is treated by an employer as constituting such a limitation. 29 C.F.R. &) 5 84.3 (1986). The Judge will adopt these "interpretations" of what constitutes a disability as a starting point for this analysis.

If "working" is a "major life activity" within the meaning of the statute, then Mr. Tervo's ability, or inability, to work must be examined. Complainant relies on Wisconsin case law which holds that if an employer perceives that a job applicant cannot perform a particular job due to a physical anomaly, the applicant is entitled to the protections afforded by the Fair Employment Act. *City of LaCrosse v. LIRC*, 407 N.W.2d 510 (Wis. 1987); *Brown County v. LIRC*, 369 N.W.2d 735 (Wis. 1985). However, the Wisconsin statute defines "handicapped individual" as a person who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such an impairment; or
- (c) Is perceived as having such an impairment.

Section 111.32(8), Wis. Stats. (1983-84.) This definition is significantly different than the Minnesota statutory definition of "disabled person" set forth above. Consequently, the Judge will not follow the holdings in City of LaCrosse and Brown County.

The Minnesota statute requires that there be a substantial limitation on a person's ability to work (major life activity) . The Judge concludes that disqualification from one job with specific qualifications does not, in itself, meet the standard set forth in Minn. Stat. 363.01, subd. 25(1).

See, Salt Lake City Corp. v. Confer, 674 P.2d 632 (Utah 1983). Respondent contends that Complainant has offered no evidence to raise a factual issue concerning Allan Tervols ability to work. Tervo has admitted that he wishes to work in either law enforcement or corrections; he will accept a job in any part of Minnesota; there are jobs which Tervo would accept which have no vision requirements; and he is qualified to apply for jobs in law enforcement related areas. See, E. E. Black v. Marshall, 497 F. Supp. 1088, 1100-01 (D. Ha. 1980).

After a motion for summary judgment has been made with supporting affidavits, the burden shifts to the party opposing the motion to provide sufficient specific facts to raise a jury issue. Lundgren, 370 N.W.2d at 881; Brookshaw v. South St. Paul Feed, inc., 381 N.W.2d 33, 36 (Minn. App. 1986). Complainant has provided no affidavits or documentary evidence to show that Mr. Tervo's job opportunities are substantially limited due to his eyesight. Complainant asserts, however, that it should be permitted to litigate the issue of whether Respondent regarded Mr. Tervo as having an impairment which substantially limits one or more of his major life activities. It cites Dr. Cohan's statement that a person with Mr. Tervo's uncorrected eyesight would be "legally blind" as support for its assertion.

The Judge reads Dr. Cohan's statement in the context of the specific job requirements for a position with the Hennepin County Sheriff's Office. As Dr. Cohan states, a deputy sheriff must be able to function without his or her contacts or glasses in an emergency-type situation. The Judge does not read Dr. Cohan's "legally blind" statement as a perception by the employer that Mr. Tervo has a physical impairment which substantially limits one or more of his major life activities. The Judge concludes that no "material issue of fact" has been raised by Dr. Cohan's statement. Rather, Complainant has argued a legal conclusion which the Judge has rejected. The Judge additionally points out that in Padilla v. City of Topeka, 708 P.2d 543 (Kan. 1985), the court held that an applicant who was disqualified from employment with the city police department because she failed the uncorrected vision standard was not a "handicapped person" as defined by the Federal Rehabilitation Act of 1973 which defines the term "handicapped individual" identically to the definition of "disabled person" in chapter 363. See also, Burgess v. Joseph Schlitz Brewing Co., 259 S.E.2d 248 (N.C. 1979).

P.C.E.

