

BEFORE THE
MISSOURI COMMISSION ON HUMAN RIGHTS
STATE OF MISSOURI

STATE OF MISSOURI ex rel.)
LLOYD BAY,)
)
Plaintiff,)
)
v.)
)
ASHCRAFT & ASSOCIATES,)
ELECTRICAL CONTRACTORS, INC.)
)
Respondent.)

MCHR Case Number: F-02/09-09270
AHC Case Number: 10-0005HRC

DECISION AND ORDER

After reviewing the record in the above-styled case the Commission Panel adopts the Hearing Examiner's Findings of Fact and Conclusions of Law and Issues the following Decision and Order.

IT IS HEREBY ORDERED:

1. Respondent violated 213.055 RSMo. By discriminating against Complainant Lloyd Bay, by terminating his employment because of his disability.
2. Respondent shall pay to Complainant the sum of \$17,534.50 in back pay, plus pre-judgment interest at the rate of 3.07 percent, \$20,000 in actual damages for humiliation and emotional distress and \$5,000 in actual damages for violation of his civil rights.
3. Respondent shall cease and desist from further discriminatory practices that involve using disability or other prohibited factors in its employment practices.

 _____ Roger L. Worthington Commissioner Agree <input checked="" type="checkbox"/> Disagree _____	 _____ Michael Direkes Commissioner Agree <input checked="" type="checkbox"/> Disagree _____
Date 8/23/12	Date 9/10/12



Jenifer M. Placzek
Presiding Commissioner
Agree
Disagree _____

Date 9/21/12

Before the
Commission on Human Rights
State of Missouri



STATE OF MISSOURI ex rel.
LLOYD BAY,

Petitioner,

vs.

ASHCRAFT & ASSOCIATES
ELECTRICAL CONTRACTORS, INC.

Respondent.

No. 10-0005 HRC

RECOMMENDED DECISION

The Administrative Hearing Commission (“the Hearing Examiner”) recommends that the Missouri Commission on Human Rights (“MCHR”) order Ashcraft & Associates Electrical Contractors, Inc. (“Ashcraft”)¹ to pay Lloyd Bay \$17,534.50 in back pay, pre-judgment interest at the rate of 3.07 percent, \$20,000 in actual damages for humiliation and emotional distress, and \$5,000 in actual damages for violation of his civil rights.

¹The original charge of discrimination filed by Bay was against Ashcraft & Associates, not Ashcraft & Associates Electrical Contractors. Both are corporations owned solely by Dennis Ashcraft. At the hearing, Ashcraft objected to MCHR’s naming of Ashcraft & Associates Electrical Contractors as the respondent, even though MCHR amended its complaint to name the latter as the respondent. In his proposed findings of fact, conclusions of law, and legal brief, Ashcraft withdrew his objection and stipulated that Ashcraft & Associates Electrical Contractors, Inc. is the proper respondent in this case. We use the name “Ashcraft” to refer to both the company and to Dennis Ashcraft.

Procedure

Bay filed a complaint with MCHR on February 2, 2009. MCHR appointed this Commission as the hearing examiner and transmitted the case to us on August 11, 2010. MCHR filed an amended complaint on December 29, 2010. The Hearing Examiner convened a hearing on the amended complaint on August 9, 2011. Vanessa Howard Ellis represented MCHR. Gregory D. Groves represented Ashcraft. The case became ready for our recommended decision on November 30, 2011, the date the last written argument was filed.

Findings of Fact

The Parties

1. Bay is a journeyman wireman/electrician and master electrician licensed with the City of Springfield, Missouri. He has been an electrician for 32 years.
2. Bay is a member of the International Brotherhood of Electrical Workers (“IBEW”), local 453, in Springfield, Missouri (“the Union”).
3. As an electrician, Bay has had periods of unemployment. He once quit a job with the Springfield public schools. He was terminated from another job. There are times when jobs are not available, and there are gaps between one union job and another one.
4. Bay has a condition called discoid lupus. It is not the same thing as systemic lupus erythematosus (“systemic lupus”).
5. Systemic lupus is defined as:

a chronic, remitting, relapsing, inflammatory, and often febrile multisystemic disorder of connective tissue, acute or insidious in onset, characterized principally by involvement of the skin, joints, kidneys, and serosal membranes. It is of unknown etiology, but it is thought to represent a failure of the regulatory mechanisms of the autoimmune system that sustain self-tolerance and prevent the body from attacking its own cells.... The disorder is marked by a wide variety of abnormalities, including arthritis and arthralgias,

nephritis, central nervous system manifestations, pleurisy, pericarditis, leucopenia[.²]

6. Discoid lupus is:

a chronic form of cutaneous lupus erythematosus in which the skin lesions mimic those of the systemic form but systemic signs are rare, although multisystem manifestations may develop after many years. It is characterized by discoid skin plaques showing varying degrees of edema, erythema, scaliness, follicular plugging, and skin atrophy surrounded by an elevated erythematous border typically involving the face and scalp, but widespread dissemination may occur.[³]

7. Bay's discoid lupus affects only his skin. If Bay is in the sun, he must use sunscreen with at least a 70 SPF or he will develop rashes and lesions on his skin. Bay treats the rashes and lesions with a topical steroid cream.

8. Bay's discoid lupus does not prevent him from working as a journeyman electrician.

9. Ashcraft is an electrical contracting business owned by Dennis Ashcraft located near Springfield, Missouri.

10. Ashcraft employed six or more employees in 2008. It also hires union electricians on a job basis to work on commercial, industrial, and residential jobs.

Obtaining Jobs through the Union

11. The Union maintains a referral system in order to assign electricians to jobs.

12. Union members who are available to work sign their names on the out-of-work registry ("the registry"), a book maintained at the Union hall.

²THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 330 (1992 supp.), cited in *Haschmann v. Time Warner Entertainment Co.* 151 F.3d 591, 594 (7th Cir.1998).

³DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1072 (30th ed. 2003).

13. When a contractor needs an electrician, the contractor calls the Union, and a dispatcher records the information about the job on the “job line.” The contractor indicates whether the job is a “short call” – a job that lasts two weeks or less.

14. Union members can call the job line for information about available jobs between 4:30 p.m. and 8:00 a.m. the next morning. If a union member wants a job on the job line, the member calls the dispatcher at the union hall after 8:00 a.m.

15. The dispatcher notes all of the members who want the job, then assigns it to the qualified person who has been out of work the longest, according to the registry.

16. Article IX, section 11 of the agreement between the Union and the Springfield Electrical Contractors Association (the “Inside Agreement”) provides that “An applicant who is hired and who receives, through no fault of his own, work of forty (40) hours or less shall, upon re-registration, be restored to his appropriate place within his Group.”⁴

17. Members of the Union are not allowed to accept non-union jobs.

Bay’s Employment with Ashcraft

18. On or about September 2, 2008,⁵ Ashcraft requested a journeyman electrician from the Union for work on a school job site. He did not indicate that the job was a short call.

19. Bay called the Union to request the Ashcraft job. He was next in line for a job assignment. Bay received the referral to the Ashcraft job.

20. As a journeyman electrician working through the Union for Ashcraft, Bay made \$36.45 per hour, including benefits.

⁴Exhibit 11 at Bates 118. Bay was in Group 1, consisting of locally resident journeyman wiremen with four or more years’ experience in the trade. This group had the highest priority for work referrals.

⁵All subsequent dates are in 2008 unless otherwise indicated.

21. Bay reported to the Cherokee school in Springfield on September 3. The job was an addition to the school. The work hours were 7:00 to 3:30 with a half hour lunch.

22. Bay was teamed with another electrician, Scott Wilson, as a "tool partner."

23. Springfield schools prohibit smoking on school grounds. Bay is a heavy smoker. He knew of the school non-smoking policy because he had been briefly employed by the Springfield school district. Bay smoked at the Cherokee job site in his car on his breaks and at lunchtime. Ashcraft saw him exhaling smoke one time at the Cherokee job site.

24. Bay worked at the Cherokee job site on September 3 and 4. He and Wilson were told to report to another school, Southwest, on September 5.

25. Bay and Wilson began working at the Southwest job site on September 5. This job was all new construction. The building did not yet have walls or a roof, so the work was outside. Because there were no walls, roof, or students, workers at the Southwest job site smoked as they worked.

26. September 5 was a sunny day. Bay realized he had forgotten his sunscreen and asked Wilson if he had any. Bay mentioned to Wilson that he had discoid lupus, so he had to wear sunscreen while working outdoors.

27. Bay did not find any sunscreen, but he continued to work the rest of the day without it.

28. Bay reported to the Southwest job site again on September 8 at 7:00 a.m.

29. At 1:30 p.m. on September 8, Ashcraft arrived at the Southwest job site and told Bay he was laying him off because he was cutting back. Ashcraft gave Bay a termination slip that said "reduction in force." Bay gathered his tools and left the Southwest job site.

Events after Bay's Termination

30. Bay went to the Union hall and told Randy Appleby, the business manager and financial secretary of the Union, that he had been terminated. He did not physically re-sign the registry.

31. On the same day, September 8, Ashcraft called the Union to request another journeyman electrician. He spoke to Jack Bauer, the dispatcher for the Union.

32. Bauer asked Ashcraft why he had laid off Bay if he needed another electrician. Ashcraft said, "One of these days I'll tell you something." Then he said, "I'll just tell you right now. Did you know he had lupus?"⁶ He told Bauer he could not take responsibility for Bay working on one of his job sites and falling off a ladder.

33. That evening, Bay called the job line to see if there were any jobs available. He heard there was another job available for a journeyman electrician with Ashcraft.

34. On September 9 Ashcraft hired Ricardo Cardenis, another Union electrician whose name was also on the registry, to replace Bay. Cardenis worked for Ashcraft until February 24, 2009, when he was terminated due to a reduction in force.

35. Bay called Appleby on September 9 and asked him to contact Ashcraft to find out why he had been laid off, since Ashcraft was hiring another electrician.

36. Appleby called Ashcraft. Ashcraft told him he terminated Bay because he smoked too much. Appleby asked whether Ashcraft had spoken to Bay about his smoking and whether that issue could be worked out.

37. Ashcraft then told Appleby that Bay had lupus and he didn't want Bay falling off a ladder with a heart attack. Ashcraft asked Appleby if he knew what lupus was, and Appleby said

⁶Tr. at 203.

he did not. Ashcraft said it was like multiple sclerosis, except that it affected the organs instead of the nervous system.

38. Appleby called Bay and told him he was sorry to hear he had lupus. Later, he and Bauer consulted the Union's lawyer, who told them that Ashcraft's termination of Bay was a violation of the Americans with Disabilities Act.

39. Bauer met Ashcraft for lunch the following week and again tried to discuss Bay's termination. Ashcraft again talked about Bay's smoking and his lupus.

40. Ashcraft did not rehire Bay.

41. Ashcraft has never terminated another worker for smoking.

Bay's Subsequent Employment and Events

42. Bay accepted another job through the Union at Witech in the Kansas City area on October 21.⁷ He was employed at that job from October 21 until January 21, 2009. At the Witech job, Bay made \$11/hour more than he made as a journeyman electrician on the Ashcroft jobs.

43. Bay put his name back on the registry on January 21, 2009. He was then unemployed until May 20, 2009, when he accepted another Union job.

44. Bay had to withdraw \$1,496.50 from his retirement account to pay for medical insurance for himself and his wife in 2009 when he was unemployed.

45. Bay's marriage began experiencing trouble, and he and his wife decided to divorce in 2009. They had been married since 2005.

⁷The evidence on this point was conflicting. Bay testified that he did not get the Witech job until late November. However, union records indicate that the correct date was October 21.

Conclusions of Law

I. Evidence

Bay offered 20 exhibits into evidence. The parties stipulated to most of them. After objection, Bay agreed to withdraw pages 10-12, 17-19, 30-32, and 48-49 from Exhibit 1, and Exhibits 6, 7, 18, 19, and 20 in their entirety.

II. Credibility

MCHR must judge the credibility of witnesses, and has the discretion to believe all, part, or none of the testimony of any witness.⁸ The “credibility of a witness’s testimony is for the fact finder to determine.”⁹ “Credibility means capacity for being believed or credited.”¹⁰ Anything that sheds light on the accuracy, truthfulness, and sincerity of a witness, which by necessity includes facts and circumstances, is proper for determining the credibility of a witness.¹¹

The parties to this case agree on most of the facts, but diverge on the crucial fact issue. Ashcraft testified that he did not know Bay had lupus at the time he terminated him from the job, and that he terminated him because Scott Wilson, Bay’s tool partner at both of the schools, complained to Ashcraft that Bay was not doing his share of work because he spent too much time smoking and “looking for shade.” Bauer and Appleby both testified that Ashcraft mentioned Bay’s smoking to them, but also said that Bay had lupus and he couldn’t have him “falling off a ladder with a heart attack” on the job. As Ashcraft’s knowledge is a pivotal issue, we must address the credibility of these witnesses. Each party points to inconsistencies in the testimony of the other’s witnesses, and there are inconsistencies on both sides. We determine,

⁸*Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

⁹*Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo. App., W.D. 1993).

¹⁰*Marvin E. Neiberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. App., E.D. 1993).

¹¹*Roberts v. Emerson Elec. Mfg. Co.*, 362 S.W.2d 579, 584 (Mo. 1962).

however, that Ashcraft's testimony was more inconsistent on central issues – and therefore less credible – than that of the other witnesses in this case.

The primary issue on which Ashcraft attempted to impeach the credibility of Bay, Appleby, and Bauer was whether Bay was required to re-sign the out-of-work registry after he was terminated by Ashcraft. At his deposition, Bay said that when he came back to the Union hall after Ashcraft terminated him, he re-signed the registry. Appleby, at his deposition, agreed that if an electrician was terminated and wanted to be consider for jobs again, he or she had to re-sign the registry.

Bay's name appears on the registry at the beginning of August 2008. It does not appear again until January 21, 2009. At the hearing, Bay, Appleby, and Bauer all explained this by reference to Article IX, section 11 of the Inside Agreement, and said that a member who had taken a job but received less than 40 hours through no fault of his own not only maintained his priority on the registry, but did not have to physically re-sign the book. Rather, Appleby testified, he could simply inform the Union by e-mail, note, or regular mail that he wished to maintain his place on the registry.

The evidence on this point was confusing, but we do not find it to be materially inconsistent. Not only did all the witnesses later point to the "40 hour rule" as the reason Bay did not re-sign the registry on September 8, he received another job through the Union's normal process on October 21. He also called the job line the evening of September 8 to find out about job opportunities, despite not having re-signed the book. Obviously, he maintained a position on the registry, and he believed that he did, whether or not he physically re-signed it after he was terminated by Ashcraft. We reject the suggestion that the confusion on this point undermines the credibility of Bay and his witnesses, or Bay's effort to mitigate his damages.

By contrast, Ashcraft's inconsistencies were more numerous and more material, and he proffered explanations for some, but not all of them. The most obvious is the explanation he wrote on Bay's termination slip: "reduction in force." This was clearly not true, as he called the Union the same day to request another journeyman electrician. The explanation Ashcraft gave for this was that he had been told previously by Bauer that if he terminated someone for cause, the Union would "have a problem"¹² with that.

A: And so, I just automatically every time that I lay anybody off I lay them off a reduction in force.

Q: Even if there are specific reasons to terminate him?

A: Even if there are specific reasons.^[13]

Perhaps this is true, but this is only one of several inconsistencies. Ashcraft testified at one point that he never talked to Appleby, and that he had caller I.D. on his cell phone and did not accept Appleby's calls. He later testified that "He [Appleby] did contact me one time and talked to me about Mr. Bay, and I referred him to Mr. Groves and hung the phone up."¹⁴ Evidently he accepted Appleby's call at least once.

Ashcraft testified that he terminated Bay because he was a heavy smoker, but he admitted during his deposition that he has never terminated any other employee for smoking on the job. He also testified that he moved Bay to the Southwest job site so that his smoking would not be a problem. He successfully impeached himself at one point in the hearing:

Q: Did you say anything to [Bay] at that time about smoking?

A: No, ma'am, I didn't.

Q: Okay. Just so we're clear, again, now, you've said it was a problem at the first school, correct? Now, when Mr. Bay went to

¹²Tr. at 240.

¹³*Id.*

¹⁴*Id.* at 259.

the second school, the smoking problem at the second school –

A: When I sent Mr. Bay to the second school, it was not a problem.

Q: [Smoking] was not a problem?

A: At that point.

Q: So, why was he fired from the second school then?

A: I decided to lay Lloyd off and gave him a reduction in force.

Q: Okay; but smoking wasn't a problem at the second school?

A: As I said, when I laid Lloyd off, I told him the smoking was a big issue.^{15]}

Finally, it is worthy of note that the parties agree that Ashcraft found out that Bay had lupus from Wilson; they disagree only on the timing of that communication. Bay contends that Wilson must have told Ashcraft before he was terminated; Ashcraft contends that Wilson told him about Bay's condition about a week after he was terminated. Ashcraft described Wilson as being very talkative, "and a lot of the things that Scott says you kind of take and you kind of mingle it around and you take 90 percent of it and throw it out because it doesn't really mean too much[.]"¹⁶ Given this characterization, it is less credible that Ashcraft terminated Bay because of a complaint from Wilson that Bay smoked too much and was not pulling his weight at the job site, than that he terminated Bay because Wilson told him that Bay had lupus.

We conclude that Bay, Appleby, and Bauer are more credible than Ashcraft and that Ashcraft terminated Bay because he believed he had lupus.

¹⁵Tr. at 251-52.

¹⁶*Id.* at 254.

III. Discrimination

Section 213.055.1,¹⁷ which is part of the Missouri Human Rights Act (“MHRA”), provides:

It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability[.]

Ashcraft was an employer as defined by statute because it had more than six employees.¹⁸ He discharged Bay because he believed he had lupus. The MHRA does not require Bay to prove that discrimination was a substantial or determining factor in an employment decision; “if consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient.”¹⁹ But while we have determined that Ashcraft discharged Bay because he believed he had lupus, we must still determine whether Bay was terminated because of his “disability.” In making such a determination, we may resort to guidance from both Missouri cases construing the MHRA and federal employment discrimination case law that is consistent with Missouri law.²⁰

Section 213.010(4) of the MHRA defines “disability” as:

a physical or mental impairment which substantially limits one or more of a person's major life activities, **being regarded as having such an impairment**, or a record of having such an impairment, which with or without reasonable accommodation does not

¹⁷Statutory references are to RSMo 2000, unless otherwise noted.

¹⁸Section 213.010(7).

¹⁹*Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007).

²⁰*Id.* at 818.

interfere with performing the job, utilizing the place of public accommodation, or occupying the dwelling in question.

(Emphasis added). Pursuant to 8 CSR 60-3.060(1)(C), employment is a “major life activity” included in MHRA’s disability discrimination protections.

Bay argues that he was terminated because Ashcraft regarded him as disabled. Regulation 8 CSR 60-3.060(1)(E) defines “is regarded as having such an impairment” as:

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or by others as constituting such a limitation; or
2. Has none of the impairments defined in paragraph (1)(A)1. or 2. of this rule, but is treated by an employer or by others as having an impairment which substantially limits a major life activity[.]

Bay has a physical impairment according to 8 CSR 60-3.060(1)(A) because he has a “physiological disorder . . . affecting . . . [the] skin[.]” Bay’s discoid lupus does not substantially limit his major life activities. But we must still determine whether, when Ashcraft terminated Bay, he *treated* Bay as having a physical impairment that substantially limited a major life activity.

Ashcraft evidently believed that Bay had systemic lupus, a more serious disease than discoid lupus. Cases discussing whether systemic lupus is a disability for purposes of the Americans with Disabilities Act vary. Some find it to be such a disability;²¹ some do not;²² and the analysis may be highly fact-intensive. We have not found a Missouri or an 8th circuit case

²¹See, e.g., *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir.1998); *Willett v. Kansas*, 942 F. Supp. 1387 (D.Kan.1996).

²²See, e.g., *McNeill v. Wayne County*, 300 Fed.Appx. 358, 2008 WL 4830701, 38 NDLR P 71, C.A.6 (Mich.), November 06, 2008 (NO. 07-2325); *Kizzee v. City of Houston*, 252 F.3d 1356, 2001 WL 422715, C.A.5 (Tex.), April 2, 2001 (NO. 00-20351).

that discusses the issue.²³ But that is something of a red herring in this case. What matters is that Ashcraft believed, erroneously, that Bay's lupus was a disease that affected his organs and put him at risk for having a heart attack on the job.

Ashcraft argues that even if he knew Bay had lupus, he did not discriminate against him on the basis of disability:

Even taking Appleby's statements as true that Ashcraft was concerned that Bay would fall off a ladder, such a statement only points to Ashcraft's concern about Ashcraft's liability. The statement, if true which Ashcraft denies, does not establish Respondent regarded Bay as having a substantial limitation of one or more major life activities.

The Eighth Circuit and other courts are clear that the inability to work on a ladder does not constitute a major life activity . . .

As noted by Petitioner in his brief, Missouri courts look to state precedent as well as federal employment case law when handling discrimination cases. . . . There is no evidence that Ashcraft believed that Bay had an impairment that affected a major life activity. Even assuming the hearing examiner believes the disputed evidence, the most that Petitioner has proven is that Ashcraft was only concerned about liability issues.[²⁴]

"The 'regarded as' portion of the ADA, which was intended to combat the effects of archaic attitudes about persons with or regarded as having disabilities, is satisfied when an employer mistakenly believes an actual, non-limiting impairment substantially limits one or more of the individual's major life activities."²⁵ However:

An employer's awareness of an employee's physical impairments, however, does not establish that the employer regarded the employee as disabled. Rather, "[i]n order to be regarded as

²³In *Doughty v. Regional Aids Interfaith Network*, 2005 WL 1185546 (W. D. Mo., 2005), a terminated employee brought a claim against the Regional AIDS Interfaith Network claiming that her termination was, in part, due to her disability of lupus. In denying RAIN's motion to dismiss and motion for summary judgment, the court did not address whether the employee's claimed lupus was a disability.

²⁴Resp. Memorandum in Support of its Proposed Findings of Fact, Conclusions of Law and Recommended Decision and Order at 2-3.

²⁵*Burrow v. Boeing Co.*, 2011 WL 1594937, *14 (E.D. Mo., April 27, 2011), quoting *Kirkeberg v. Canadian Pacific Ry.*, 619 F.3d 898, 906 (8th Cir. 2010).

disabled with respect to the major life activity of working, the employer must mistakenly believe that the actual impairment substantially limits the employee's ability to work . . . ' . . .
"Regarding an employee as having a limitation that is not itself a disability cannot constitute a perception of disability." [26]

We do not interpret Ashcraft's shorthand expression of the reason he terminated Bay – that he did not want Bay to have a heart attack and fall off a ladder – in a literal fashion. In other words, we believe that Ashcraft was not solely concerned with Bay's ability to work on a ladder, but was more generally concerned that Bay would injure himself or die on one of his jobs, and had a particular concern he might have a heart attack. It seems evident that Ashcraft, after learning that Bay had "lupus," concluded that: (1) Bay had systemic lupus; (2) systemic lupus put Bay at risk for a serious medical incident such as a heart attack; and (3) Ashcraft wanted to avoid the risk that such an adverse medical incident would occur when Bay was on one of his jobs. Ashcraft had his own understanding of what it meant to have lupus: he thought it "was like multiple sclerosis, except that it affected the organs instead of the nervous system." He based his discharge of Bay not just on a concern about his company's liability, but on this fundamental misunderstanding of how the disease might affect Bay's ability to work.

Ashcraft, citing *Epps v. City of Pine Lawn*,²⁷ argues vigorously that this is not disability discrimination because under the case law:

There is a distinction between being regarded as an individual unqualified for a particular job because of a limiting physical impairment and being regarded as 'disabled' within the meaning of the ADA. Accordingly, an employer is free to decide that . . . some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job. [28]

²⁶2011 WL 1594937, *14 (internal citations omitted).

²⁷353 F.3d 588 (8th Cir. 2003).

²⁸*Id.* at 592.

Ashcraft cites *Epps, Conant v. City of Hibbing*,²⁹ and *Schuler v. SuperValu, Inc.*³⁰ – all decisions of the Eighth Circuit Court of Appeals – in support of his position. In *Conant*, the court affirmed a summary judgment against an employee whose preemployment physical indicated that he could not lift more than 30 pounds or repeatedly squat or bend. In *Schuler*, the court affirmed summary judgment against an employee whose preemployment physical indicated that he should not drive a forklift or work around dangerous equipment. In *Epps*, the court affirmed summary judgment against an employee whose treating physician concluded that he should seek different employment because the physical demands placed upon a Pine Lawn patrolman – specifically, bending, squatting, and running – aggravated his neck and back pain. In *Conant*, the court noted that the record showed nothing more than that the city regarded Conant as “anything more than unable to perform this particular job.”³¹ *Schuler* and *Epps* drew similar conclusions.

Conant, Epps, and Schuler are distinguishable from this case. In all of them, the employer discharged an employee after receiving medical evidence that the employee could not perform specific functions of a particular job. Cases have noted that “[i]f a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability.”³² It is one thing to determine that an employee cannot lift 30 pounds, bend or squat, or climb a ladder, and conclude that the employee cannot perform the essential functions of a particular job. But Ashcraft’s perception of Bay’s physical impairment was not based on medical evidence, and we do not believe it was narrowly focused on the specific demands of his job. Rather, the evidence indicates that he

²⁹271 F.3d 782 (8th Cir. 2001).

³⁰336 F.3d 702 (8th Cir. 2003).

³¹271 F.3d at 785.

³²*Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780, 784 (8th Cir. 2006).

regarded Bay's lupus as a disease that affected his organs and generally put him at high risk of a heart attack or other adverse medical incident.

We find a more analogous case to be *Galambos v. Fairbanks Scales*.³³ In that case, Galambos had received a successful performance review shortly before he had a heart attack. One month after the heart attack, he was placed on a probation plan with demanding requirements. He asked for no accommodations, and he met the conditions of his probation. He was fired anyway. The court found that Galambos made a prima facie showing that his employer regarded him as substantially limited in his ability to work.

We look also to *Daugherty v. City of Maryland Heights* for the Missouri Supreme Court's guidance on this issue. In that case, the court distinguished Daugherty's situation from the one in *Epps*. Maryland Heights argued that Daugherty was not disabled under the MHRA simply because he was unable to perform the particular job of police captain. But the Supreme Court, viewing Daugherty's evidence in its most favorable light, said that it showed that the City believed he was incapable of performing an entire class of jobs – uniformed officer positions of any rank. Accordingly, it reversed the lower court's grant of summary judgment in favor of the City. We find this case to be closer to *Daugherty* than to *Epps* in that Ashcraft regarded Bay as unable to work any type of job on one of his job sites because of his risk of a heart attack.

IV. Damages

Section 213.075.11 provides in part:

The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order

³³144 F.Supp.2d 1112, 1127-28 (E.D. Mo., 2000).

requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of back pay; hiring; reinstatement or upgrading; . . . [and] payment of actual damages[.]

Cease and Desist Order

Although the parties disagree as to how long Bay would have been employed by Ashcraft but for the discriminatory termination, they agree that his employment would have ended by May 2009 at the latest. Therefore, reinstatement would not be an appropriate remedy, and a cease and desist order would have no practical effect as to Bay. However, the Hearing Examiner recommends that MCHR issue a cease and desist order so that future employees hired by Ashcraft do not suffer from the same discriminatory practices.

Back Pay

In general, a victim of employment discrimination and discharge is entitled to back pay from the date of discharge until the date of the final judgment.³⁴ However, the claimant also has a duty to make reasonable efforts to mitigate damages by seeking other employment.³⁵

Bay's efforts to mitigate damages were reasonable: he remained available to accept jobs through the Union throughout the period in question. Bay's successor in the job, Cardenas, was terminated due to a genuine reduction in force on February 24, 2009. We find that Bay would not have been employed with Ashcraft past that date. In addition, Bay was employed by Witech for three months, and while there, he made \$11/hour more than he did at Ashcraft. Therefore,

³⁴*Pollock v. Wetterau Food Distr. Group*, 11 S.W.3d 754, 770 (Mo. App., E.D. 1999).

³⁵*Id.*

we recommend that MCHR award back pay for the period from September 9, 2008 to October 21, 2008 (30 working days) and from January 21, 2009 through February 24, 2009 (25 working days).³⁶ We calculate the sum as follows:

Wages Bay would have earned at Ashcraft:

- Bay's hourly wage at Ashcraft, with benefits: \$36.45
- One day of pay = 8 x \$36.45 = \$291.60
- 30 working days + 25 working days = 55 working days
- 55 x \$291.60 = \$16,038.00

We add to that the amount Bay was forced to withdraw from his retirement account, \$1,496.50, as compensation he would otherwise have received:

- \$16,038 + \$1,496.50 = **\$17,534.50**

Prejudgment Interest

An award of prejudgment interest is also appropriate in cases under the MHRA.³⁷ The purpose of anti-discrimination laws is to provide "make whole relief," and prejudgment interest is included in this concept.³⁸ Section 408.040.3³⁹ awards prejudgment interest equal to the applicable federal funds rate, plus three percent. The federal funds rate as of December 31, 2011 is 0.07 percent.⁴⁰ We recommend interest on Bay's back pay award at the rate of 3.07%.⁴¹

³⁶In doing so, we follow the periodic mitigation method of calculating back pay. "Calculating lost wages by the periodic mitigation method is well supported in case law. *See, e.g., Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 656-57 (11th Cir.1984) (applying periodic basis under Title VII); *Eichenwald v. Krigel's, Inc.*, 908 F.Supp. 1531, 1567 (D.Kan.1995) (same); *Hartman v. Duffey*, 8 F.Supp.2d 1, 6 (D.D.C.1998) (noting "periodic mitigation is the preferred method for determining back pay liability in discrimination cases")." *Godinet v. Management and Training Corp.*, 56 Fed.Appx. 865, 872, 2003 WL 42505, 6 (10th Cir. 2003).

³⁷11 S.W.3d at 770.

³⁸*Id.*

³⁹RSMo Supp. 2011.

⁴⁰<http://research.stlouisfed.org/fred2/data/FEDFUNDS.txt>.

⁴¹Section 408.040, RSMo Supp. 2011.

Actual Damages for Humiliation and Emotional Distress

Actual damages in a Missouri civil rights case may also include amounts for humiliation and emotional distress.⁴² MCHR may award damages for emotional distress even without a medical diagnosis.⁴³ The sole evidence of humiliation and emotional distress presented by Bay was his testimony that he was “shocked, a little embarrassed”⁴⁴ after his conversation with Appleby in which Appleby told him he was sorry to hear he had lupus. He described himself as “a very private person” who did not “discuss any ailments or sicknesses or anything else I have.”⁴⁵ Bay also testified that his wife and he separated in May of 2009, and that they had not had significant marital problems prior to his termination from Ashcraft. He described the period after he was terminated as a “very stressful time”⁴⁶ and requests \$20,000 in actual damages for humiliation and emotional distress. Ashcraft offered no evidence to counter this. We recommend that MCHR award Bay \$20,000 in damages for humiliation and emotional distress.

Actual Damages for Violation of Civil Rights

In *Conway v. Missouri Comm'n on Human Rights*,⁴⁷ the court awarded actual damages for violation of civil rights in the amount of one third of the amount of the damages for humiliation and emotional distress. Bay asks for \$10,000, arguing that Ashcraft’s conduct was “pervasive and extreme and a total disregard for Bay’s civil rights.” “Pervasive” means “existing in or spreading through every part of something.”⁴⁸ We have no evidence that Ashcraft’s conduct was pervasive -- the evidence suggests his treatment of Bay was more in the

⁴²*Conway v. Missouri Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App., E.D. 1999).

⁴³*Id.*

⁴⁴Tr. at 86.

⁴⁵*Id.*

⁴⁶*Id.* at 90.

⁴⁷7 S.W.3d 571 (Mo. App., E.D. 1999).

⁴⁸<http://www.merriam-webster.com/dictionary/pervasive>.

nature of a hastily made, ill-advised judgment in the context of ignorance of the law, medicine, and any actual evidence.

However, Ashcraft did discriminate against Bay, and persisted in his course of conduct after Bauer and Appleby tried to tell Ashcraft that they believed his firing of Bay was illegal and asked him to take Bay back. Under those circumstances, we agree that an award is justified. The Hearing Examiner recommends that MCHR award Bay \$5,000 in actual damages for violation of his civil rights.

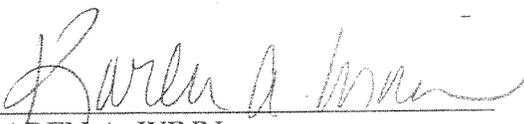
Summary

The Hearing Examiner recommends that MCHR order Ashcraft to:

1. pay Bay \$17,534.50 in back pay, plus interest at the rate of two percent,
2. pay Bay \$20,000.00 in actual damages for humiliation and emotional distress,
3. pay Bay \$5,000.00 in actual damages for violation of civil rights, and
4. cease and desist from further discriminatory practices.

Pursuant to MCHR's Regulation 8 CSR 60-2.200(1), the parties may file exceptions within 10 days of the date of this recommended decision.

SO RECOMMENDED on February 22, 2012.


KAREN A. WINN
Hearing Examiner