Commonwealth of Massachusetts
Commission Against Discrimination

Case No. 03BEM02426

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Jose Santiago, *
Complainant *
*
vs. *
*
City of Methuen, *
Respondent *
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Respondent City of Methuen's Memorandum of Fact and Law

The respondent in accordance with the pre-determination discovery order hereby submits its memorandum of fact and law in the above-entitled case. The respondent in this memorandum will refer to the documents and memorandum in record including; 1) the charge of discrimination, 2) the position statement of respondent with the 18 exhibits attached thereto, 3) complainant's response to the position statement, 4) respondents verified motion to dismiss, 5) complainants opposition to the motion and 6) the reply of the respondent to the opposition to dismiss. (This memorandum has attached to it exhibits 19 thru 27.)

The record establishes the following facts exist;

1) Jose Santiago was appointed a permanent police officer on October 18, 1982. (exh. 1 to the position statement.). Santiago was thereafter appointed temporary sergeant on Jan. 21, 1990 and a permanent sergeant on July 3, 1990. (exh. 1 to position statement)
2) On September 27, 1996 Santiago was involved in an incident while on duty for which he claimed an injury. As a result Chief MacDougall placed Santiago on injured line of duty status under G.L. Chapter 41 section 111F. (this being a type of workers compensation benefit specifically designed for police and fire personnel- para. 5 of exh. 2 to position statement).

3) In 1997 Santiago sought to retire on accidental disability benefits under Chapter 32 section 7 of the General Laws. In accordance with this statute a state appointed Regional Medical Panel examined him on September 23, 1997. (see certificate of record of Administrative Magistrate Maria A. Imparato of the Division of Administrative law Appeals- attached hereto as exh. 19)[1]

4) The state appointed Regional Medical Panel concluded that Santiago was not physically incapacitated and substantially incapable of performing his particular job. In support of this conclusion the panel unanimously signed a medical narrative concluding on the last page thereof "It is the opinion of this orthopedic panel that Mr. Santiago's lumbar strain was resolved." "We can find no orthopedic abnormality to support his application for accidental retirement disability." "In the absence of objective findings, the panel finds him capable of resuming the work of a police officer without restriction." (exh. 19 attached hereto).

5) On the basis of the Regional Medical Panel report the Methuen Retirement Board denied his application for retirement benefits. Santiago then appealed this decision to the Commonwealth of Massachusetts Contributory Retirement Appeals Board pursuant to G.L. Ch. 32 section 16(4). In accordance with this statute Administrative Magistrate Maria A. Imparato thereafter held a hearing on September 14, 1999. (exh 19 attached hereto)

6) On November 8, 1999 Administrative Magistrate Imparato issued her decision. The magistrate's conclusion and order on page 7 found "The decision of the Methuen Retirement Board to deny accidental disability retirements benefits to Jose Santiago is affirmed." "The Board's decision is affirmed because the regional medical panel did not employ an erroneous standard when it answered in the negative with respect to the existence of a disability---". "Disability is the inability to perform the essential functions of one's job." (exh. 19 attached hereto on page 7 of the decision)

7) No appeal was taken of this decision by Santiago (see exh. 19 attached hereto -certificate of record last sentence of page 1)

[1] The respondent was provided with the memorandum a copy of the certificate of record. It was in its possession the original and will provide it to the attorney investigator if so requested.

8) After receiving the regional medical panel report and on the basis of the report Chief of Police MacDougall ordered Santiago back to work on October 11, 1997. (position statement exh. 2 para. 6 and exh. 4) . Santiago returned to work for a short period and thereafter absented himself on November 12, 1997 and has not worked as a police sergeant since then. (exh. 2 para. 8)

9) In 1998 Santiago was elected as a state representative and then re-elected a state representative in 2000. As a result of being elected he applied for and received unpaid leaves of absence from the police department from Jan. 1, 1999 to December 31, 2002. (position statement exh. 7 and 8)

10) In the November 2002 he was defeated in his bid for re-election to the state representatives seat. (position statement exh. 2 para. 9)

11) As a result of his defeat as a state representative he sought re-instatement as a police sergeant in a light duty capacity only by letter of his attorney dated January 15, 2003. The letter in paragraph 1 indicates he was withdrawing as of that date the leave of absence request (position statement exh. 9).

12) Chief Joseph Solomon upon receiving Santiago's request for return to duty in January 2003 and being aware of state regulations for interruption in service contacted the Massachusetts Criminal Justice Training Council. (Position statement exh. 5 para. 10). Chief Solomon was aware of the state retraining requirement as a result of an advisory notice sent to the police superiors union by then Chief MacDougall back on Sept. 11, 2000. (this advisory notice is attached to the position statement as exh. 11)

13) As of the request in January 2003 to return to duty Santiago had not worked for the police department from November 1997. He thus had not been in uniform for over five years. In fact excepting for working five days in Oct./Nov. 1997 he had not performed any police functions since September 27, 1996. Thus by January 2003 he had not performed the job regularly for well over six years.

14) The Criminal Justice Training Council advised Chief Solomon in a letter dated January 17, 2003 that an officer with an interruption in service of five or more years would be required to complete a Commonwealth Criminal Justice Training Council approved basic recruit academy. (position statement exh. 5 para. 11 and exh. 10)

15) Based upon this information Chief Solomon sent Santiago a letter dated January 22, 2003 advising him of this requirement and telling him in accordance with state regulations the department would sponsor him at the academy. (position statement exh. 5 para. 12 and exh. 12)

16) Santiago failed to contact the chief to arrange for this sponsorship even though the chief's letter advised him to contact the department. He did not even go to the station for a work related purpose until December 1, 2003. (position statement exh. 5 para. 13)

17) On December 1, 2003 Santiago appeared at the station and demanded that the chief reinstate him. Santiago ignoring the state control of this training demanded that the chief design the retraining program and not the Criminal Justice Training Council. The chief advised him orally as he had in writing of the state requirement for retraining. The chief told Santiago he would for his benefit obtain from the training council the forms. The chief thereafter contacted the CJTC (Criminal Justice training Council) to obtain the forms. They were sent to him by email. He then sent Santiago and his attorney the forms to him to fill out for the retraining. Santiago has not filled out and filed the forms for retraining as of this date. (Solomon aff. exh. 21 para. 8J)

18) Santiago had by counsel appealed the decision requiring the retraining per state regulation to the Civil Service commission by a letter dated March 11, 2003 (position statement exh. 15).[2]

19) Santiago references a letter issued March 1, 2002 claiming a legitimate request to return to duty. The respondent has taken the position that this was nothing more than a thinly veiled attempt to seek position himself in the superior court litigation regarding his removal from injured line of duty status. In response to the respondent's request for production of documents supporting

[2] The appeal was initially defectively filed and at the Civil Service hearing Santiago dismissed his appeal. A proper appeal was later filed with the State Personnel Administrator (both attached as exh. 25 to this memorandum.)

complainant's request to return to duty Santiago's attorneys produced this letter with the settlement proposal.This document attached hereto as exh. 20 proves that this was a litigation maneuver and not an attempt to return to duty. This fact is well established given that the heading lists the superior court case docket number and in handwriting Santiago's counsel as to the superior court case wrote "Will settle for 37,500". Complainant has proven respondents position correct on this issue.

20) Santiago did not at any time before his defeat as a state representative and his vacating that office seek or act to rescind his requested and granted leave of absence. Nor did he appeal not being reinstated in 2002 to the civil service commission or the personnel administrator under Chapter 31 section 37 G.L. (Solomon aff. attached hereto as exh. 21. para. 7)

21) No other superior officer has sought to return to active and continued duty after having been out of service for over five years. (Solomon aff. exh. 21 para. 11)

Unsupported and contradicted fact claim made by Santiago

Santiago claims that he never received a response to his "request" to return to work regarding his attorney's letter dated March 1,2002. (this letter is attached to the position statement as exh. 16 and a follow-up letter attached as exh. 17). Contrary to this claim his attorney in the letter known as exh. 17 made a claim of right to pick his own shift and when questioned by this writer by letter of March 13, 2002 never responded to this claim. (exh. 18 attached to the position statement)

Complainant recently in an interrogatory answer # 4 (attached hereto as exh. 26) claims to have gone to the station to seek work on March 1, 2002.

On this date he claims "The date was March 1, 2002 . The time was in the a.m.." The key statements in the interrogatory answer are "When I went into the Police Station that morning; I signed the logbook that contains time and date. I told the chief that I was there to work. The chief told me that I could not work and could not stay. Supporting witnesses are Sgt. Larry Phillips and Lt. Michael Winck." (note the correct spelling of the name is Wnek). As to this claim reference is had to the

affidavit of Lt. Michael Wnek and Sgt. Phillips (see exh. 22 attached hereto). In reality the visit by Santiago to the station did not occur until January 16, 2003. This is well beyond the five years away from service issue. A key piece of proof that his visit date is January 16, 2003 and not March 1, 2002 is the fact that though Santiago claims to have signed the logbook no such book existed at the station until September 2002 when a new security system was installed. (see exh. 21 para. 11 and exh. 22 para. 4). No meeting occurred with the Santiago and the Chief in March 2002 see attached exh. 23 of Chief MacDougall. In fact his own letter to Wnek contradicts Santiago's date estimation on this matter. (see attached exh. 24) In the letter he clearly notes the meeting with Wnek and Phillips on union business occurred on January 16, 2003 and not March 1, 2002 as he now claims.

Applicable Law

For the reasons stated below the respondent respectfully states that there is insufficient evidence to support a finding of Probable Cause to credit the allegations of the complaint.

The two claims at hand relate to diverse reasons for discrimination that being disability and then national origin and/or race. The claims as made appear based on disparate treatment. The focus therefore is on "how a particular individual was treated and why". The complainant bears the burden of proving discriminatory motive. Santiago's case does not rest on direct evidence of discriminatory motive. Thus the three prong test enunciated in Wheelock College vs MCAD 371 Mass. 130 (1976) (adopting McDonnell-Douglas Corp.) applies. Under this framework the plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a non-discriminatory reason for the employment decision, supported by credible evidence. The burden then shifts back to the plaintiff to establish that the reason articulated by the employer is not the real reason, but in fact a pretext, and that but for the plaintiff's protected status, the employment decision would have been different. The burden is on the complainant to show that an unlawful consideration was the "determinative factor" for the adverse employment action.

The framework ultimately calls upon the complainant to show that there are facts which left unexplained would support an inference of discrimination. The case of Lipchitz vs Raytheon Company 434 Mass. 493. (2001) requires the showing of a four element test that being; membership in a protected class, harm, discriminatory animus and causation.

Using this we then proceed to analyze the issues presented;

A. Handicapped Discrimination

Complainant's case is woefully inadequate on several grounds. As to the first prong there is in this case no legally recognizable qualified handicap. As to the second prong there is a legitimate reason for the employment action that being state regulation. As to the third prong there is no demonstrated pretext on the but-for his protected status the action would not have happened, as there is no demonstration of disparate treatment

Prong One- The claim of disability has been resolved in prior litigation and may not now be re-litigated.

Santiago's claimed disability relates back to the incident of September 27, 1996. The very same disability claims as litigated in the retirement decision listed below. The facts demonstrate that Santiago has fully litigated his claimed disability in the (CRAB) Contributory Retirement Appeals Board Case (see certificate of record of Magistrate Imparato Santiago exh. 19). He appealed the denial of his retirement based upon the fact that a state appointed regional medical panel concluded he was not disabled from performing his duties as a police sergeant. The Division of Administrative Law Appeals upheld this decision after a hearing conducted under Chapter 32 section 16. This decision was not appealed and therefore became final and binding on Santiago under Chapter 32 section 16 (4) which reads "After the conclusion of such hearing, the Division of Administrative Law Appeals shall submit to the parties a written decision which shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties, unless within fifteen days after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board."
There being no appeal in this case the decision became final and binding. This preclusion to relitigate the disability issue exists under established law "issue preclusion" formerly known as collateral estoppel. See American Law Institute, Restatement Of The Law Second, Judgments 2d (1982).

"The function of *res judicata*, or claim preclusion, and collateral estoppel, or issue preclusion, has been to enforce repose in the judicial process and to establish the proposition that no one ought to have to

relitigate matters which have been fully tried and litigated on the merits in a prior judicial trial. "At some point there should be an end to litigation." 38 Mass. Prac. 431.

"The Supreme Judicial Court and the Appeals Court have applied the doctrines of *res judicata*, or claim preclusion, and collateral estoppel, or issue preclusion, in the context of state administrative agency adjudicatory proceedings." 38 Mass. Prac. 431.

In cases such as Smola vs. Higgins 42 Mass. App. Ct. 724 (1997) the Appeals Court reaffirmed that "issue preclusion" formerly known as Collateral Estoppel applies to administrative proceedings. In Stowe vs. Bologna 415 Mass. 20,22 (1993) the court stated "a final order of an administrative agency in an adjudicatory proceeding, not appealed from and as to which the appeal period has expired, precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." See also Green vs. Town of Brookline 53 Mass. App. Ct. 120,123 (2001) (in relying on the Restatement (second) of Judgments the court applied issue preclusion thus barring relitigation of an issue decided by an administrative agency.) See also Salem vs. M.C.A.D. 44 Mass. App. Ct. 627,637 (1998) and Corrigan vs. General Elec. Co. 406 Mass. 478 (1990). (Determination of Industrial Accident Board may be given Collateral Estoppel effect in subsequent judicial proceeding); Lopes vs. Board of Appeals of Fairhaven 27 Mass. App. Ct. 754 (1989) (principles of claim preclusion and issue preclusion apply both to administrative boards and to courts.)

"The doctrine of issue preclusion prevents relitigation of an issue determined in an earlier action when the same issue arises in a later action, based on a different claim, between the same parties or their privies, and the determination was essential to the decision in the earlier action. Salem vs M.C.A.D. 44 Mass.App.Ct. 627, 639 see also Restatement (Second) of Judgments § 27 (1982).

"The judicial doctrine of issue preclusion also known as collateral estoppel provides that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' " *Martin v. Ring,* 401 Mass. 59, 60-61 (1987), quoting *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.,* 395 Mass. 366, 372 (1985), which quoted Restatement (Second) of Judgments § 27 (1982).

In this context it is important to note the critical link between the standards of disability determinations by which the MCAD works and that of the retirement law. Under Chapter 151B section 1 the term "qualified handicapped person" means a handicapped person who is capable of performing the essential functions of a particular job with reasonable accommodation. Chapter 32 section 7 called upon the medical panel to determine if as a result of an injury Santiago was "unable to perform the essential functions of a particular

job." In both instances the examination is one of determining the ability to perform **essential functions of the job**. The medical panel determined and the Administrative Magistrate after hearing ruled he was not disabled from performing the essential functions. That issue has been litigated to closure. (See by comparison the application of issue preclusion to Injured on Duty Benefits after a medical panels ruling on the disability issue.) "The determinations to be made in considering the police officers application for sick-leave benefits under Chapter 41 section 111f, and for an accidental disability retirement under Chapter 32 section 7(1) are substantially the same if not identical." (Hayes vs. Revere 24 Mass App. Ct. 671,675-676.(1987**)). (**Lundergan v. Caira 1994 WL 879669 Mass. Superior Court , Feb 7, 1994. McHugh Judge.).

The exception section to "issue preclusion" under the Restatement (second) of Judgments does not apply because; 1) administrative review of the Division of Administrative Law Appeals decision by the Contributory Retirement Appeals Board (CRAB) was available, as well as a further judicial review of the CRAB decision, 2) the determination made by the medical panel as to the disability is one of fact equally applicable in the case before MCAD, 3) the burden of proving disability rested in both cases with Santiago and 4) Santiago exercised his opportunity to obtain a full and fair adjudication before the administrative magistrate but not the court. The administrative magistrate concluded that the regional medical panel correctly performed its medical function and when Santiago failed to appeal the law provided that it became final and binding on him. The law of collateral estoppel or issue preclusion renders final the fact that Santiago is not disabled and thus he is not a member of a protected class.

Qualified Handicapped person/essential duties Issue-

Assuming arguendo that MCAD decides further review the prong one "qualified handicapped person" issue

Santiago has further failed to demonstrate that he is capable of performing the essential functions of the job. Santiago only claims that he may perform light duty work of an administrative nature only. Santiago relies upon Dr. Ousler's reports filed with his opposition to respondent's motion to dismiss at the investigatory stage. (respondent notes the medical narrative of Ousler of April 23, 1997 was reviewed and rejected by the regional medical panel in its ruling of no demonstrated disability.) Santiago has failed to

present an argument in the investigatory review that he is "a qualified handicapped person" under Chapter 151B section 1. He fails to meet his burden to demonstrate that with reasonable accomodation he can perform the essential duties of a police sergeant. By way of example Ousler in the narrative attached dated March 26, 2002 attached to the opposition again states he is incapable of anything but administrative work. "Due to his continuing symptoms-----for him to return to full duty as a police officer is not recommended." A note attached to this states on 1/20/03 "---he is prohibited from returning to full working capacity as an on line police officer with the potential of him being involved in physical altercations which would bring him to a high risk factor of re-injury or further damage—."

Prong 2. Assuming arguendo that the Commission finds that Santiago met the first prong and that he is a "qualified handicapped person" then the respondent has nevertheless met its obligation to demonstrate a legitimate reason for its employment action. The respondent has demonstrated that is was complying with the retraining requirement of the Commonwealth Criminal Justice Training Council.

Santiago's first real attempt to return to duty occurred after his defeat as a state representative. At this time well past five years through counsel he submitted a letter terminating his leave of absence and seeking reinstatement. (exh. 12) Chief Solomon conferred with the Criminal Justice Training Council and then advised Santiago and his counsel of the state re-training requirements. The Criminal Justice Training Council has submitted a letter to this writer from Dennis Pinkham Executive Director dated March 31,2004, attached to this memorandum as exh. 27. In interpreting the regulation as to the definition of "interruption" of service the executive director in the last paragraph states "In reviewing these cases, the Committee has always defined the "interruption" as any break in service where the officer does not report for police duties."

The reason for applying the retraining requirement was well laid out in the case of Sullivan vs Town of Brookline 435 Mass. 353 (2001). In this case the court analyzed the status of someone seeking reinstatement after having been retired for more than five years. The court in upholding the retraining requirement noted at 361 "The retraining requirement set forth in G.L. c. 31 section 39, recognizes that, after five or more years away from the job, the former employee will not be familiar with the procedures, policies, practices, or even equipment involved in performing the job, as many of those aspects of the work will have undoubtedly changed since the retiree last held the position." "Allowing retirees to return to the job prior to retraining would return to the payroll of a police department, with full pay and benefits, officers who could not perform the complete range of duties." The Police Chief in exhibit 21 para. 14 has certified to this fact. Any reasonable analysis clearly would apply the same logic of the Sullivan decision as to retraining an officer returning from a leave of absence with that of a retiree returning to duty. The need to re-familiarize oneself with modern law, rules, equipment and safety needs is obvious on its face.

Prong 3- Pretext On this prong the complainant has not to date offered any evidence to demonstrate that the reason offered by the respondent is a pretext. He has failed to show that any action or inaction on the part of the respondent could reasonably be related to a discriminatory motivation. In fact his claimed seeking of reinstatement in March 1, 2002 is contradicted by; his continuation on his requested leave of absence, he easily refuted statement that he appeared at the police station on March 1, 2002 as contradicted by his claim that he signed a logbook, named supporting witnesses who under oath contradict his claim and his own letter attached as exhibit 27 which show the date of January 16,2003.

B. **National/Race Discrimination**

Prong 2 -The respondent restates it's reasoning as stated above. That it has a legitimate reason for its employment action in that prior to reinstatement he has a state regulatory requirement for retraining.

Prong 3- The respondent restates that the complainant has failed to offer any evidence to demonstrate that the reason offered by the respondent is a pretext.

Conclusion

For the reasons contained herein the respondent respectfully request that the commission make a determination of lack of probable cause.

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