

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

STANLEY DECK, Complainant,

VS.

HENKEL CORP., Respondent.

CP# 05-85-12982

THIS MATTER, a complaint filed by Stanley Deck (Complainant) with the Iowa Civil Rights Commission (Commission) charging Henkel Corporation (Respondent) with discrimination in employment on the basis of disability came on for hearing in Keokuk, Iowa on April 21, 1988, before Ione G. Shadduck serving as Hearing Officer. The case in support of the complaint was presented by Teresa Baustian, Assistant Attorney General (AAG). Respondent was represented by Larry L. Shepler, Attorney at Law. The record was held open for testimony of a subpoenaed witness who failed to appear, namely, Richard Holtsclaw. Option was given to depose witness Holtsclaw or to continue with his testimony in Des Moines with opportunity for Respondent to respond. Counsel agreed to take witness Holtsclaw's deposition on May 3, 1988, and that deposition will be considered as part of the Transcript.

After having reviewed the record, the Administrative Law Judge (ALJ) proposed findings of fact, conclusions of law, recommended decision and order on December 8, 1988. Exceptions were filed. At its regularly scheduled meeting held February 24, 1989, the Commissioners modified the ALJ's proposed decision by adopting all exceptions filed by Teresa Baustian (AAG). Following is the modified findings of fact, conclusions of law, decision and order.

FINDINGS OF FACT

1. The Complainant, Stanley Deck, timely filed verified complaint CP# 05-85-12982 with the Iowa Civil Rights Commission on May 14, 1985, alleging a violation of Iowa Code section 60 IA. 6, discrimination in employment on the basis of disability, specifically perceived mental disability, by Henkel Corporation, Respondent.
2. The complaint was investigated, probable cause found, conciliation attempted but failed. Notice of Hearing was issued December 23, 1987.
3. From approximately 1948, when Deck started to help his father on a milk route, until 1980, when he started to work for Henkel (then General Mills), Deck held 13 or more unskilled laborer jobs.
4. On March 11, 1980, Deck started to work for Henkel. His job was in the area of sanitation. Later he was transferred to general plant work and then to the vitamin department.
5. On April 13, 1983, Deck had a mental breakdown. He was diagnosed as having acute agitation and depression. He continues as of the hearing date to be on drug therapy. (T. 16).

6. In August 1983, Deck applied for social security disability. This was done at the suggestion of D.A McQueen, personnel manager for Henkel, because Deck's insurance was running out. (T. 17) His beginning date of entitlement was October 1, 1983, with benefits as follows:

10-83	through 11-83	= \$553.00 month
12-83		= 572.00
01-84	through 11-84	= 575.00
12-84	through 11-85	= 595.00
12-85	through 11-86	= 613.50
12-86	through 11-87	= 620.00
12-87	through time of hearing	= 646.80

Medicare coverage was provided beginning 10-1-85 (C. Ex. 3).

7. Deck was examined by S. Kantammeni, M.D., a psychiatrist, on October 4, 1983. The doctor's memorandum submitted to Disability Determination Services, 510 East 12th Street, Des Moines, Iowa (C. Ex. 1), noted that in the interview, Deck could not think straight, was cooperative but had difficulty relating with the doctor. He appeared anxious, withdrawn and depressed, unable to sit still. His thought processes revealed marked confusion and he was unable to have a meaningful conversation for any prolonged length of time. His memory was grossly impaired and he had a very low frustration tolerance level. The doctor didn't feel Deck was capable of driving a motor vehicle or operating any dangerous machinery. The doctor did not believe Deck capable, at that time, of day to day work activities. His diagnosis was major depression. (C. Ex. 1).

8. On February 3, 1994, in response to Deck's inquiry, McQueen wrote Deck a letter informing Deck that his health insurance benefits would expire on February 28, 1984. Deck had been on sick leave since April 13, 1983. Deck was given an opportunity to convert his health insurance to individual coverage. Deck was also notified in this letter that February 28, 1984 was the date he would be terminated due to his inability to work. (R. Ex. A).

9. On February 29, 1984, McQueen wrote to Edward Miller, President, American Federation of Grain Millers, Local No. 7, to inform him of his discussion with Deck on February 28, 1984. During that talk, McQueen agreed to defer any action on Deck's termination until after the scheduled review by Social Security Administration in November as to Deck's continued disability. McQueen also asked Deck to have his physician provide a current statement as to his disability and prognosis of recovery and to have his physician keep McQueen apprised as to his status and condition. McQueen also reported to Miller that he had asked the Corporate Benefits Department to determine the costs of insurance for Deck. (R. Ex. 1).

10. On April 10, 1984, McQueen wrote to Deck informing him that one of the conditions under which he agreed to defer the termination was that Deck have his physician provide information as to his condition and progress and that he had received no reports. He asked that Deck contact his doctor and have the information submitted. (R. Ex. B).

11. On May 3, 1984, Dr. Pineda, Deck's doctor, wrote to Dr. Cohan, Medical Director for Henkel, in response to a request from Dr. Cohan. Dr. Pineda saw Deck on May 3, 1984, and stated that he felt Deck would be capable of returning to work but that he would need to continue on medication. A copy of the letter was sent to Deck and McQueen. (R. Ex. C).

12. McQueen talked with Deck about his options to return to work and Deck decided he wanted to return to his former job which was that of Supply in the Starch-Gluten Department. McQueen stated, that during this meeting with Deck, which included Deck, his department superintendent, chief steward of the union, a department union steward, and McQueen, Deck was very nervous and indecisive. (R. Ex. K). Apparently, between May 3 and May 14, 1984, McQueen talked with both Doctors Cohan and Pineda. In McQueen's letter to Dr. Cohan dated May 14, 1984, he stated that Dr. Pineda had withdrawn his release for Deck to return to work. The withdrawal was based primarily on his concern for Deck's personal safety. McQueen also expressed his concern for Deck's ability to perform. (R. Ex. K)

13. On June 25, 1994, McQueen, wrote to Deck informing him that his termination would be effective June 25, 1984, because of his protracted period during which he was unable to report to work. (R. Ex. L)

14. Deck filed a termination grievance with the union. At the fourth step meeting held on July 26, 1984, the following agreement was made:

1. The company will assume the cost of having Mr. Deck examined by a psychiatrist mutually selected by the company's medical director and Mr. Deck's physician.

2. The parties will accept this psychiatrist's opinion as to whether or not Mr. Deck can be reemployed safely and with an anticipation of his ability to work regularly as could be expected of any other employee and with no more supervision than any other employee.

3. The examining psychiatrist will review Mr. Deck's medical history and current treatment. If he finds that Mr. Deck can be reemployed he will also determine an appropriate trial period during which Mr. Deck must report as scheduled. If during the trial period he is absent due to a relapse or recurrence of illness he will be terminated and the examining psychiatrist must also determine, if Mr. Deck is remaining on medication, what is an appropriate reporting schedule for Mr. Deck's physician to confirm to the company that his patient is taking the medication and what possible side effects such medication may have in the work environment.

4. If Mr. Deck is reemployed his benefits will be reinstated at the completion of his trial period, but not later than 60 days from the date of reemployment.

5. If Mr. Deck is reinstated he will be eligible for back pay from July 26 to date of reemployment offset by any other income he has received during that period, for example, unemployment compensation, social security, etc.

(R.Exh.D)

15. Pursuant to Item 1 of the agreement, Deck reported to Dr. Campbell on August 2, 1984. On August 16, 1984, Dr. Campbell wrote to Dr. Cohan with the recommendation that Deck be returned to his usual employment as soon as possible, adding that continued psychiatric care with clear and immediate objectives were indicated. (R. Ex. E)

16. Pursuant to Item 2 of the agreement, Dr. Campbell's recommendation was accepted and Deck returned to work at Henkel in August 1984. His options were to return to his original job or work in the vitamin department. He was discouraged from going into the vitamin department because of its difficulty and problems with the two prior employees being terminated. There was also a conflict between management and the Union as to seniority for that position. (Holtsclaw Depo. p. 34, T. 89) Deck was assigned clean-up and supply in the Starch- Gluten Department, an entry level job and the same job he held originally.

18. Sandra Deck, wife of Complainant, testified that when he returned to work in the fall of 1984, Deck was in recovery. (T. 98)

19. In September 1984, Deck fell off a ladder and broke a foot. He was off work for six or seven weeks. He was released to return to work in November 1984. (T. 20)

20. On December 3, 1984, when Deck had been on the job one week, Henkel scheduled him to begin training on the assistant operator's job. Under the union contract, training two steps up is required of all employees in order that employees are capable of filling-in as substitutes when needed. The requirement is two steps. The assistant operator job for which Deck was in training was only the first step. (T. 58 and Holtsclaw Depo. 8, 16) The union contract contains no provision on when employees must take the training in order to become qualified. (T. p. 152). The only requirement is that an employee take training every six months to requalify for a position unless that employee has worked in the position during that period. (Holtsclaw Depo. p. 36)

21. The plant was a fairly sophisticated operation, requiring only six people per shift to run the entire plant. (T. p. 139) The assistant operator's job involved monitoring equipment, taking different readings, checking different bottom-ways and samples, and some clean-up. (T. p. 191) The purpose of the training was so that there would be immediate relief in case of illness or vacation. (T. p. 139)

22. On December 5, 1984, Deck talked with Glenn Deatherage, his supervisor, expressing a desire to be transferred out of the Starch-Gluten Department. Deatherage wrote up the request, Deck signed it and Deatherage witnessed his signature. Even with this written request it is necessary to follow the posting/sign-up procedure when an opening occurs. (T. 121) (R. Ex. F) Deatherage drew up a memo recording this conversation. Deck stated to Deatherage that he did

not feel he could handle the assistant operator position, that he was worried about it and lacked the self-confidence to do the job. Deck said he was having difficulty remembering because of the illness and medication. Deatherage assured Deck that both he and Deck's trainer were there to assist him, that he had only been in training three days and that he still had four days of training to go. (T. 84, R. Ex. M) On his last day of the training, Deck was left alone on the job as was customary procedure. After working in the assistant operator position approximately two hours, Deck went to Glenn Deatherage to report that he was ill and asked to be relieved for the day. In a memo which he subsequently prepared, Deatherage wrote that Deck reported that he didn't feel well, that he hadn't been able to sleep or eat for past 3-4 days due to worrying and being nervous about the job. Deatherage recorded that he asked if a few more days of training would help and Deck said he didn't think it would make any difference due to his illness affecting his ability to remember. Deatherage wrote that he informed Deck that both he and Logsdon thought he was making acceptable progress. Deck said he knew best and that he could not do this work. In this memo from Deatherage to Roger Dallner, Deatherage stated that he felt that Deck was not capable, at that time, of operating any station in the Starch-Gluten department other than supply. Given enough time -- maybe..." (R. Ex. N)

Deatherage testified that Deck was complaining of stomach cramps, that he appeared outwardly nervous (T. p. 182), and his voice was shaky (T. p. 190). Deatherage believed that Deck was, indeed, sick (T. p. 182), and Deck's departure that day was authorized.

23. Cletus Logsdon, a Henkel employee who had been training people for 36-37 years, was the trainer for Deck while he was learning the assistant operator's job. On the day that Deck went home, approximately December 9, 1984, the day Deck alleges he had a touch of the flu, Deck approached Logsdon about not feeling well. Logsdon suggested he stay at work and go into the breakroom and that he would run Ins station for him. Logsdon believed Deck's job was in jeopardy if he left because Deck did go home. The next day he returned to work and was put on his old job. (T. 69)

24. Richard Holtsclaw, chief union steward during the time at issue, characterized Deatherage as one of the better line foremen who would extend additional training to Deck if it was needed. He also recalled that Deck had expressed that he had trouble with the job and that the job had made him nervous. (Holtsclaw Depo. pp. 15, 18, 22)

Holtsclaw testified that when he arrived at the plant on December 10th, he was immediately concerned because he felt the company would take action in regard to Stanley leaving work under the circumstances which he did (Holtsclaw Depo. p- 9) Holtsclaw testified that this absence was considered by the company to be different from Deck's earlier absence due to a foot injury. "In the event Stanley was injured at work, if he caught a cold, if he simply, for example, broke his arm at work or while working around the house, anything of this nature, it had no bearing on the agreement. They stressed a relapse or recurrence of his mental problems would be the only reason for violating the agreement." (Holtsclaw Depo. p. 12)

25. Several hours after Deck started to work on December 10, 1984, he was called into the office and met with McQueen, Richard Holtsclaw, union representative, Roger Dallner, production manager, and Deatherage, shift supervisor. He was informed that because of his own statements

of his inability to do the job and management concerns that his attitude created a situation which could be hazardous to himself and other employees, he was being immediately suspended pending review of all circumstances related to his situation. Deck stated he could do the "supply job." Management explained that the supply position required that he also be able to do the next two higher jobs. (R. Ex. 0) No one else had ever been discharged for not becoming qualified in a position within the prescribed time period. (Holtsclaw Depo. p. 13)

26. A Management/union meeting was held, with Deck present, on December 12, 1984. The Committee was advised of Management's decision to suspend Deck and it was noted that a complete medical summary from Deck's physician had been part of the earlier agreement and that nothing had been received since his return to work. (R. Ex. I)

27. The report of the Step III appeal dated 12/13/84, outlined the requests which Daniel McQueen was desirous of making of Deck's doctor including a narrative report, as to his condition and frequency of treatment, medication and possible side effects, effects or problems if medication is not taken, safety around moving equipment, safety working with chemicals, safety around hot pipe and electrical equipment, safety on stairs, ladders, steps and working in high places. (R. Ex. P)

28. On January 3, 1985, Deck visited Dr. Pineda, psychiatry and neurology. In his report to McQueen, Dr. Pineda reported Deck was "feeling well according to him and he looks that way to me." He said Deck is well enough to be able to perform his job, but Deck feels it would be to his advantage to have another job with less exposure to high places and away from dangerous chemicals. Pineda reported further that medication was required and that the physical examination did not reveal side effects from the medication. (R. Ex. H)

29. It was the Union's position at this time that Deck did have bumping rights and the possibility of bumping was explored but no bumps were available. (Holtsclaw Depo. p. 33)

30. On January 15, 1985, a fourth step meeting was held. Based on the facts and circumstances surrounding Deck's grievance over his suspension, Henkel's position was that Deck had not met the terms of his probation and that he was unable to perform his job. The grievance was denied. Therefore, the suspension was converted to discharge effective January 21, 1985. (C. Ex. 2)

31. The union concluded that the stipulation, R. Ex. D, did govern Stanley Deck's employment, and that possibly Deck had not met those terms. Therefore, on January 23, 1985, the Union notified Deck that his grievance did not merit pursuing through further grievance procedure. On February 1, 1985, the Union notified Deck that Union Executive Board denied his appeal because they felt that his case did not warrant arbitration. Deck appealed this decision in his letter dated 2-5-85 to Robert W. Willis, General President of American Federation of Grain Millers. Willis forwarded Deck's letter, and so informed Deck, to Lloyd Freilinger, Vice President, on February 8, 1985. On March 7, 1985, Willis wrote Deck that he had reviewed Deck's grievance and found no basis which would justify requiring the Local Union to process the grievance further. (R. Ex. G)

32. Sandy Deck testified to the emotional response of her husband to the news of his termination. Deck has dwelt on the subject of his termination since that time and the loss of his employment has deprived him of his sense of self-worth. (T. pp. 98-99)

33. On May 14, 1985, Deck filed his complaint with the Iowa Civil Rights Commission alleging that his termination was based on perceived mental disability.

CONCLUSIONS OF LAW

1. The complaint, CP# 05-85-12982, was timely filed, processed, and the issues in the complaint are properly before the Administrative Law Judge and ultimately before the Commission.

2. In Iowa Code section 601A. 2(11), "disability" is defined as "the physical or mental condition of a person which constitutes a substantial handicap." IAC 161-8.26(1) provides that the term *substantially handicapped" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Section 161-8.26(5) further explains "is regarded as having an impairment" as:

- a. Has a physical or mental impairment that does not substantially limit major life activities but that is perceived as constituting such a limitation;
- b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- c. Has none of the impairments defined to be 'physical or mental impairments, " but is perceived as having such an impairment.

Complainant claims discrimination as the basis of *perceived mental disability. a

3. Deck was in and out of various hospitals after April 1983, when he had a mental breakdown. Over a year later, May 1984, Deck was still not capable of returning to work because of his mental impairment. Through a union/management agreement, Deck returned to work in August 1984, with continued psychiatric care indicated.

Beginning in October 1983, Deck became eligible for social security disability benefits and medicare based on his mental impairment. That entitlement continued as of the date of this Hearing. It is, therefore, concluded that Stanley Deck was, in fact, mentally impaired.

4. The administrative rules promulgated to implement the statutory prohibition of discrimination on the basis of disability provide that the duty of accommodation is owed to the otherwise qualified handicapped employee or applicant. 161 Iowa Admin. Code 8.27(6). Although that phrase is not further defined in the Iowa Administrative rules, "qualified handicapped person" is defined in the rules implementing the federal Rehabilitation Act, on which the Iowa rules are patterned. There, a "qualified handicapped employee" is defined as one who with or without

reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or other. 29 C.F.R. §1613.702(f)

The Commission rule, specifically 161-8.27(6), requires reasonable accommodation. That section provides as follows:

An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program. [Emphasis added]

Not only is the rule quite clear and unambiguous in requiring reasonable accommodation to an *otherwise qualified" person, but the statute also emphasizes the same provision. Section 601A.6(l) (a) provides in part:

If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this subsection.

"The essential functions of a job are those set forth in the position description. Thus, an individual is "qualified" if he can perform all of the functions of his job as outlined in the standard position description, even though because of a disability, he cannot perform additional duties that are performed by other persons holding the same job. Guinn v. Bolger, 598 F. Supp. 196 (D.C.D.C. 1984)

Furthermore, an individual need not be able to perform an of the duties of the position in question without modification. "It is sufficient if an individual can perform the essential limitations." Trimble v. Carlin, 633 F. Supp. 367 (D.C. Pa. 1986); Strathie v. Dept. of Transp., 716 F.2d 227 (3rd Cir. 1983).

Because no consideration was given to allow Deck more time to acclimate himself to the plant environment upon returning from his breakdown before subjecting him to additional demands, nor was consideration given to allowing Deck a more gradual training schedule which could have alleviated his anxiety, one cannot conclude that Deck would have been unable to perform the assistant operator function if he had been accommodated. Offering additional training at the end of the training period, after Deck's anxiety had been building to the point that he had become physically ill and unable to do any job was not an accommodation. Because the company made no accommodation to permit an assessment of whether Deck could perform the assistant operator functions, it is not necessary to determine whether that function is even essential to the supply position. The testimony was that the cross-training was required only so that trained substitutes would be available if the regular employee was ill or on vacation.

Having concluded that Dock was a qualified handicapped employee, Henkel owed Deck a duty to accommodate his handicap. Henkel made no effort to accommodate Deck's mental illness, but instead acted in accordance with its previously determined stipulation that upon an absence "due

to a relapse of recurrence of illness he [would] be terminated..." Therefore, the termination on January 21, 1985, was illegal discrimination on the basis of disability.

6. The Complainant, Stanley Deck, has mitigated his lost earnings in that he has properly endeavored to secure other employment, although his endeavors have been unsuccessful.

REMEDIES

The purpose of Chapter 601A is remedial in nature and the Commission is granted a broad range of remedies. Section 601A. 15(8) includes the following provisions:

(1) ... reinstatement or upgrading of employees with or without pay ... Interim earned income and unemployment compensation shall operate to reduce the pay otherwise allowable

(7) Posting notices in conspicuous places in the Respondent's place of business in form prescribed by the Commission and inclusion of notices in advertising material.

(8) Payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees.

The purpose of awarding damages to Complainants injured by unlawfully discriminatory acts is to restore persons to the position they would have been in had the discriminatory act not occurred. Foods, Inc. v. Iowa Civil Rights Commission, 318 NW 2d 162, 171 (Iowa 1982).

The definition of *actual damages" is "the amount awarded to a complainant in compensation for his [sic] actual and real loss or injury% according to Black's Law Dictionary 352 (5th ed. 1979). In Amos v. Prom, Inc., 115 F. Supp. 127, 132 (N.D. Iowa 1953), a federal court interpreting Iowa law recognized emotional distress damages as compensatory. In Chauffeurs. Loc. U. 238 v. Civil Rights Comm'n., 394 NW 2d 375, 382-383 (Iowa 1986), the Iowa Supreme Court agreed with those jurisdictions allowing the award of emotional distress damages by the Civil Rights Commission or its equivalent. The court stated that such a result "seems only natural because emotional distress is generally a compensable injury, and the language of the statute allows actual damages which are synonymous with compensatory damages". The Court also stated that allowing the 'award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy under section 601A. 15(8)." Foods, Inc., 318 NW 2d at 171.

It is easier to determine an amount of damages for emotional distress when there is evidence of psychological harm by an expert witness, however, there are situations where it is reasonable to conclude that emotional distress has occurred just by the circumstances and testimony of the complainant. Because of Dock's already vulnerable emotional state, (of which Henkel was well aware), the unexpected nature of Deck's discharge after his struggle to return to productive employment, and the testimony of Mrs. Deck describing her husband's reaction to his discharge,

it can reasonably be concluded that Deck suffered emotional distress. Deck should be awarded \$5,000.00 in emotional distress damages.

RECOMMENDED DECISION AND ORDER

1. Henkel Corp. violated Iowa Code section 601A.6 (1987) by suspending and then terminating Stanley Deck's employment because of this disability.
2. Because Henkel Corp. sold its interest in the plant located in Keokuk, Iowa to Ogilvie Mills before this complaint was filed, reinstatement is not made part of this remedial scheme.
3. Backpay is awarded for the period from December 10, 1984 through the date when the final decision of the Iowa Civil Rights Commission is entered, less any interim earned income and unemployment benefits. Interest shall accrue at 10 % annum. from May 4, 1985 until paid in full.
4. IT IS FURTHER ORDERED that Deck shall be awarded \$5,000.00 in damages for emotional distress.

Signed this 13th day of April, 1989.

RUBE ABEBE, Commissioner

Iowa Civil Rights Commission