

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	DATE: July 6, 1992
Department of Health and	)	
Human Services	)	Docket No. 91-504-5
- v. -	)	Decision No. CR212
Lake Norman Medical	)	
Center,	)	
Respondent.	)	

DECISION

The United States Department of Health and Human Services (the Department) charged Lake Norman Regional Medical Center (Respondent) with violating section 504 of the Rehabilitation Act of 1973, as amended (Act), 29 U.S.C. § 794(a), and its implementing regulations, 45 C.F.R. Parts 81 and 84. The Department seeks as a remedy termination of all federal financial assistance to Respondent.

Respondent requested a hearing. I held a hearing in Charlotte, North Carolina from January 22 - 24, 1992. The parties complied with the posthearing briefing schedule which I established.

I have carefully considered the applicable law, the evidence adduced at the hearing, and the posthearing briefs and proposed findings and conclusions submitted by the parties. I conclude that the Department has failed to prove that Respondent engaged in conduct which violated the Act. Therefore, I do not order the imposition of a remedy against Respondent.

ISSUE

The issue in this case is whether Respondent is engaging in unlawful conduct in violation of section 504 of the Act.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The complaining party, Charmaine Bonus (Bonus), is a licensed nuclear medicine and x-ray technologist. DHHS Ex. 9.<sup>1</sup>
2. Respondent is a 121-bed acute care community hospital, located in Mooresville, North Carolina. Notice at 3 - 4; Answer at 4; Tr. at 491.
3. Respondents' facilities and services include a medical-surgical suite, obstetrical and gynecological services, intensive care, coronary care, and out-patient surgery. Tr. at 491.
4. Respondent's departments include a Diagnostic Imaging Department. Tr. at 491.
5. Respondent's Diagnostic Imaging Department provides services which include diagnostic x-rays and nuclear medicine. Tr. at 491.
6. Respondent is a recipient of federal financial assistance from DHHS, including reimbursement for items or services provided under the Medicare program. Notice at 4; Answer at 4 - 5.
7. On April 13, 1988, Bonus interviewed for a job with Respondent's Diagnostic Imaging Department as a radiologic technologist. Tr. at 355 - 356.
8. The duties of a radiologic technologist at Respondent include using x-ray equipment to conduct x-ray examinations of patients. DHHS Ex. 15.
9. The duties of a radiologic technologist at Respondent require an employee who performs those duties to engage in standing and walking throughout the work day and to visit locations located on all four floors of Respondent's hospital building. Tr. at 494 - 495.

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<sup>1</sup> I refer to the Department's exhibits as "DHHS Ex. (number)." I refer to Respondent's exhibits as "R. Ex. (number)." I refer to the transcript as "Tr. at (page)." I also cite the Department's Notice and Opportunity for Hearing as "Notice at (page)" and the Answer and Defenses of Respondent Lake Norman Regional Medical Center and Request for Hearing as "Answer at (page)" for material facts which are not disputed.

10. Michael Scott Billings (Billings) was Respondent's Director of Diagnostic Imaging in May, 1988. Tr. at 489 - 490.
11. Based on Bonus' application and the interview, Billings recommended that she be hired for the position of radiologic technologist. Tr. at 500 - 501.
12. Bonus accepted Respondent's offer of employment. Tr. at 359 - 360.
13. Bonus was unemployed prior to commencing her employment with Respondent. Tr. at 338.
14. Prior to commencing her employment with Respondent, Bonus had applied for and was receiving unemployment compensation benefits from the State of North Carolina. Tr. at 338; DHHS Ex. 73.
15. Bonus was ineligible to receive unemployment compensation benefits from the State of North Carolina, after becoming employed by Respondent, and during the period of her employment by Respondent, based on the wages that Respondent had agreed to pay her. DHHS Ex. 73, 76, 77; Tr. at 360.
16. Bonus knew that, once she became employed by Respondent, and during the period of her employment by Respondent, she would be ineligible to receive unemployment compensation benefits from the State of North Carolina, based on the wages that Respondent had agreed to pay her. DHHS Ex. 73, 76, 77; Tr. at 345, 348, 360.
17. Under North Carolina law, an applicant for or recipient of unemployment compensation benefits may be prosecuted and penalized for making false statements concerning his or her eligibility for benefits. DHHS Ex. 75, Attachment B, Attachment C.
18. Bonus knew that she could be penalized under North Carolina law for providing false statements concerning her eligibility for unemployment compensation benefits. DHHS Ex. 75, Attachment B, Attachment C; Tr. at 351, 443.
19. On May 16, 1988, Bonus commenced her employment with Respondent as a radiologic technologist. DHHS Ex. 13; Tr. at 502 - 503.
20. At no time prior to her commencement of employment with Respondent did Bonus advise Billings or other representatives of Respondent that she suffered from a

medical condition which would affect her ability to perform the duties of radiologic technologist for Respondent. Tr. at 503 - 504.

21. On May 16, 1988, Billings directed that Bonus receive orientation in the duties of radiologic technologist. Tr. at 507, 510.

22. Bonus received orientation on May 16 and 17, 1988. Tr. at 510 - 511, 721 - 722.

23. During Bonus' orientation, Respondent's policies and work processes were explained to her and she was shown Respondent's facilities and the work sites where she would be expected to perform her duties as a radiologic technologist. Tr. at 722.

24. Bonus' orientation was conducted by Cathy Brannon Steed (Brannon), who is an x-ray and ultrasound technician employed by Respondent. Tr. at 512, 717, 721 - 722.<sup>2</sup>

25. On May 16 and 17, 1988, Bonus observed Brannon perform x-ray studies on patients at Respondent's facilities. Tr. at 722 - 723.

26. Bonus did not perform x-ray studies on May 16 and 17, 1988. Tr. at 723.

27. Bonus told Brannon that it had been 15 to 20 years since she had performed x-ray studies, and she needed time to familiarize herself with the equipment used and the processes performed by Respondent. Tr. at 723.

28. Bonus did not complain to Brannon on May 16, 1988, that she was experiencing any problems from a medical condition that would interfere with her ability to perform her duties as a radiologic technologist. Tr. at 724.

29. On the afternoon of May 17, 1988, Bonus told Brannon that she needed to leave work early in order to see a physician. Tr. at 725.

30. Bonus told Brannon that the reason she was going to see a physician was that her knee was bothering her. Tr. at 725.

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<sup>2</sup> In May, 1988, Brannon was known as "Cathy Brannon." She married a coworker in 1989. Tr. at 716, 744.

31. Brannon did not see or speak to Bonus after the afternoon of May 17, 1988. Tr. at 718, 741.
32. On the afternoon of May 17, 1988, Bonus told Billings that she had suffered an injury to her knee and that she needed to leave work early in order to see a physician. Tr. at 513 - 514.
33. On May 17, 1988, Bonus was scheduled to work from 8:00 a.m. to 4:30 p.m.; Billings gave her permission to leave work an hour early so that Bonus could see a physician. Tr. at 374, 514.
34. At no time prior to the afternoon of May 17, 1988, did Bonus tell Billings that she had suffered a knee injury, or that she was experiencing difficulties performing her duties. Tr. at 513.
35. Bonus left Respondent's facilities at about 3:30 p.m. on May 17, 1988. Tr. at 458.
36. Bonus had an appointment to see William A Kutner, Jr., M.D. (Dr. Kutner), at 5:00 p.m. on May 17, 1988. Tr. at 127, 458.
37. Dr. Kutner is an orthopedic surgeon. Tr. at 120.
38. After she left work at 3:30 p.m. on May 17, 1988, but prior to seeing Dr. Kutner at 5:00 p.m. on that date, Bonus went home to attend to personal business related to the sale of her house. Tr. at 458 - 459.
39. Bonus did not tell Billings or Brannon that she would be seeing a real estate agent or attending to personal business between the time she left work early on May 17, 1988, and the time on that date when she saw Dr. Kutner. Tr. at 514, 726.
40. As of May 17, 1988, Dr. Kutner's office was located about 150 feet from Respondent's facilities. Tr. at 514.
41. Dr. Kutner first saw Bonus on May 12, 1988. DHHS Ex. 7; Tr. at 121.
42. On May 12, 1988, Bonus related to Dr. Kutner that she had injured her right knee five weeks previously and that she continued to experience pain on the inner aspect of her right knee. DHHS Ex. 7.
43. On May 12, 1988, Dr. Kutner concluded, on the basis of his examination of Bonus, that she probably had a torn medial meniscus (cartilage) in her right knee.

Dr. Kutner concluded that Bonus also had some chronic arthritic changes in her knee and a subluxing patella. DHHS Ex. 7; Tr. at 122 - 123, 138.

44. Dr. Kutner's May 12, 1988 diagnosis that Bonus probably had a torn medial meniscus was a clinical diagnosis based on the history related by Bonus and on his examination of her. Tr. at 123.

45. On May 17, 1988, Bonus told Dr. Kutner that she had attempted to work and that she was experiencing a lot of pain in her knee. DHHS Ex. 7.

46. Dr. Kutner prescribed medication to Bonus and suggested that she stop working, in order to rest her knee. DHHS Ex. 7; Tr. at 128 - 129.

47. If she continued to experience pain in her knee, Dr. Kutner would consider performing an arthrogram and perhaps arthroscopy of the knee. DHHS Ex. 7; Tr. at 129.

48. An arthrogram is a diagnostic test involving the injection of dye into the knee, followed by x-rays. Tr. at 129.

49. Arthroscopy is a test involving surgical examination of the inside of the knee, using a fiberoptic scope. Tr. at 162.

50. On May 17, 1988, Dr. Kutner provided Bonus with a note which stated that she was classified as totally disabled until her next appointment, on May 24, 1988. DHHS Ex. 19; Tr. at 149.

51. On May 17, 1988, after her visit with Dr. Kutner, Bonus presented Billings with Dr. Kutner's note stating that she was disabled. She advised Billings that she would be unable to work until after her May 24, 1988 visit with Dr. Kutner. DHHS Ex. 19, 28; Tr. at 516; See Tr. at 389 - 394.

52. Based on Dr. Kutner's note, Billings approved Bonus' absence from work. Tr. at 516.

53. Bonus was not eligible to receive sick pay from Respondent during her absence from work, due to the brevity of her term of employment with Respondent. DHHS Ex. 16.

54. Bonus understood that she would not be paid by Respondent for the period that she would be absent from

work due to the injury to her knee. See DHHS Ex. 2, Tr. at 394 - 395.

55. On May 19, 1988, Bonus telephoned Billings at his home. Tr. at 519.

56. Bonus told Billings that, by receiving wages from Respondent for two days of work, she would be denied unemployment compensation for the entire month. Tr. at 523.

57. Bonus asked Billings on May 19, 1988 if Respondent could alter its personnel records so as not to evidence the fact of her employment by Respondent. DHHS Ex. 32; Tr. at 523; See DHHS Ex. 28, Tr. at 414, 446.

58. Bonus' purpose in asking Billings if Respondent could alter her personnel records was to facilitate an attempt by her to obtain unemployment compensation benefits which she was not entitled to receive. Tr. at 446, Findings 55 - 57; See Findings 16 - 18.

59. On May 20, 1988, Billings reported his May 19, 1988 conversation with Bonus to Respondent's administrator, Richard Blackburn (Blackburn). DHHS Ex. 32; Tr. at 524; See DHHS Ex. 28.

60. Blackburn directed Billings to discharge Bonus. DHHS Ex. 28; Tr. at 524; See DHHS Ex. 32.

61. On May 20, 1988, Respondent discharged Bonus. DHHS Ex. 20.

62. Respondent discharged Bonus because she had requested Respondent to engage in dishonest conduct concerning her personnel records. DHHS Ex. 20, 32; Tr. at 524.

63. Respondent did not discharge Bonus because it had concluded that her knee injury would affect her ability to perform her duties as a radiologic technologist. Findings 57 - 62.

64. Billings did not contact Bonus to inform her of Respondent's decision to discharge her. Tr. at 530.

65. Dr. Kutner saw Bonus on May 24, 1988. DHHS Ex. 7; Tr. at 149.

66. On May 24, 1988, Bonus told Dr. Kutner that her condition had improved. DHHS Ex. 7.

67. Dr. Kutner concluded that Bonus' condition had improved sufficiently to enable her to return to work, without restrictions, on May 25, 1988. DHHS Ex. 7, 19; Tr. at 150.
68. Dr. Kutner provided Bonus with a note certifying she would be able to return to work on May 25, 1988. DHHS Ex. 19.
69. As of May 25, 1988, Bonus was ready to resume the duties of radiologic technologist for Respondent, without any limitations or restrictions as a consequence of her knee injury. Tr. at 465.
70. On May 24, 1988, Bonus met Billings at Respondent's facilities and showed him Dr. Kutner's note certifying that she would be able to return to work. DHHS Ex. 19; Tr. at 532 - 533.
71. Bonus did not represent to Billings that she continued to suffer from any injury or that her duties as radiologic technician needed to be limited or restricted in order to accommodate her injury. Tr. at 534 - 535.
72. Billings told Bonus at his May 24, 1988 meeting with her that she no longer had a job with Respondent. Tr. at 533.
73. Billings had no additional conversations or meetings with Bonus after his meeting with her on May 24, 1988. Tr. at 550.
74. On June 3, 1988, Bonus filed a complaint with the Department's Office for Civil Rights (OCR), alleging that Respondent had discriminated against her on the basis of a handicap. DHHS Ex. 2.
75. On November 2, 1989, OCR notified Respondent that OCR had concluded that Respondent had unlawfully discriminated against Bonus on the basis of a handicap. DHHS Ex. 43.
76. OCR advised Respondent that, as a condition for resolving its findings that Respondent had unlawfully discriminated against Bonus, Respondent must offer Bonus reinstatement and compensate her for lost wages. DHHS Ex. 43.
77. On November 15, 1989, Respondent notified OCR that it denied OCR's allegations that Respondent had engaged in unlawful discrimination. DHHS Ex. 44.

78. On July 26, 1991, OCR commenced this action by filing an administrative complaint against Respondent.
79. On August 19, 1991, Respondent timely requested a hearing.
80. This case is governed by section 504 of the Act, 29 U.S.C. § 794(a), and by regulations contained in 45 C.F.R. Parts 81 and 84.
81. It is unlawful under section 504 of the Act for a program or activity receiving federal financial assistance to discriminate against an otherwise qualified individual with a handicap, solely on the basis of his or her handicap. 29 U.S.C. § 794(a).
82. Respondent is a recipient of federal funds within the meaning of the Act. Finding 6; 29 U.S.C. § 794(a).
83. Bonus did not, prior to May 25, 1988, manifest an impairment which substantially limited her performance of major life activities. Findings 41 - 47, 65 - 71; 29 U.S.C. § 706(8)(B)(i); 45 C.F.R. § 84.3(j)(1)(i), (j)(2)(i), (ii).
84. Bonus does not have a record of an impairment which substantially limited her performance of major life activities. 29 U.S.C. § 706(8)(B)(ii); 45 C.F.R. § 84.3(j)(1)(ii), (j)(2)(iii).
85. Respondent did not regard Bonus as having an impairment which substantially limited her performance of major life activities. Findings 62, 63; 29 U.S.C. § 706(8)(B)(iii); 45 C.F.R. § 84.3(j)(1)(iii), (j)(2)(iv).
86. Bonus is not an "individual with handicaps" within the meaning of section 504 of the Act. Findings 83 - 85; 29 U.S.C. § 706(8)(B); 45 C.F.R. § 84.3(j).
87. In discharging Bonus on May 20, 1988, Respondent did not discriminate against her solely on the basis of a handicap. Findings 62 - 63, 83 - 86; 29 U.S.C. § 794(a).
88. Respondent did not engage in unlawful discrimination against Bonus under section 504 of the Act, or under implementing regulations. 29 U.S.C. § 794(a); 45 C.F.R. Parts 81 and 84.

## ANALYSIS

The Department charges Respondent with discriminating against Bonus solely on the basis of a handicapping condition, by discharging her from employment on May 20, 1988, four days after she had commenced work for Respondent and three days after she had been excused from work due to an injured knee.<sup>3</sup> I conclude that Respondent did not discriminate against Bonus. I premise this conclusion on my findings that the Department failed to prove that Bonus had a handicapping impairment or was regarded as having such an impairment by Respondent. Bonus' medical condition -- an injury to her knee which affected her ability to work for one week -- did not substantially limit her in the performance of major life activities. Respondent did not regard Bonus as being substantially limited. Furthermore, it is apparent from the evidence in this case that Respondent's discharge of Bonus had nothing to do with its perception of her medical condition at the time of her discharge. Rather, Respondent decided to discharge Bonus after she requested Respondent to abet her in making a dishonest representation to the North Carolina Employment Security Commission.

1. Bonus did not have an impairment which substantially limited one or more of her major life activities at the time of her discharge by Respondent.

The Act establishes as a threshold test in any case where discrimination is alleged under section 504 that the party alleging discrimination must prove that the alleged victim is an "individual with handicaps." The impairment which the Department alleges to be handicapping in this case consists of an injury which Bonus sustained to her right knee, prior to her commencing work for Respondent on May 16, 1988. The impairment prevented her from working for Respondent from May 18 - 24, 1988. After

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<sup>3</sup> In its Notice of Opportunity for Hearing, the Department charged Respondent with having discriminated against Bonus solely on the basis of a handicap. It also alleged that Respondent unlawfully used pre-employment health screening procedures to discriminate against applicants for employment. On January 16, 1992, the parties stipulated that Respondent's current employment policies are in compliance with the Act. In light of this stipulation, I make no findings in this decision as to whether Respondent is currently engaging in pre-employment health screening procedures which violate the Act.

that date, Bonus was able to perform all of the duties of her position as a radiologic technologist. I find that Bonus' knee injury, because of its brief duration, was not a "substantially" limiting impairment within the meaning of the Act and, therefore, not a handicap. Congress did not intend that impairments of such brief duration as that experienced by Bonus qualify as handicaps.

Section 504 of the Act provides that:

No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).<sup>4</sup>

The Act generally defines an "individual with handicaps" to be a person who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B). This definition has been incorporated in the Department's implementing regulations. 45 C.F.R. § 84.3(j)(1). The three definitions of an "individual with handicaps" are alternative definitions. An individual need only satisfy one of the three to meet the statutory test.<sup>5</sup>

The Department's regulations define a "physical impairment" to mean any physiological disorder or condition, affecting one or more of a person's body

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<sup>4</sup> There is no dispute in this case that Respondent operates programs or activities which receive federal financial assistance within the meaning of section 504 of the Act.

<sup>5</sup> The Department did not charge that Bonus has a record of a handicapping condition and that Respondent discriminated against Bonus based on her record of having a handicapping condition. See 29 U.S.C. § 706(8)(B)(ii); 45 C.F.R. § 84.3(j)(1)(ii), (j)(2)(iii).

systems, including the musculoskeletal system. 45 C.F.R. § 84.3(j)(2)(i). They define "major life activities" to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 C.F.R. § 84.3(j)(2)(ii).

There is no question that, for the week beginning May 17, 1988, and ending May 24, 1988, Bonus had a "physical impairment" (her knee injury) which affected her musculoskeletal system. Although the etiology of her impairment is unclear (it may have resulted from a torn cartilage, arthritis, displaced kneecap, or some other cause), there is no dispute that she suffered from a medical condition which affected her knee. Nor is there any dispute that Bonus' impairment affected her "major life activities" during this one week period. Bonus' knee injury was painful and it interfered with her ability to perform the duties of radiologic technologist for Respondent, beginning May 18, 1988. These duties included considerable standing and walking.

Evidence offered by the Department establishes that Dr. Kutner, the physician who treated Bonus through May 24, 1988, concluded that Bonus probably had suffered a torn cartilage in her knee. He also observed some mild arthritic changes in her knee and a subluxing patella. However, Dr. Kutner did not perform tests which would have definitively established that Bonus had sustained a torn cartilage. It is, therefore, not clear precisely what was causing Bonus to experience pain during the dates in issue. However, whatever the cause of Bonus' problems, it is not disputed that she was totally incapacitated from performing her duties between May 18 and May 24, 1988 as the result of a musculoskeletal impairment. By the same token, she was totally fit to resume her duties beginning May 25, 1988.

The Department argues that the clinical evidence of Bonus' knee injury, consisting of the medical findings of Drs. Kutner and McBride, documents arthritic changes of sufficient severity to qualify the injury as a substantial impairment and a handicap.<sup>6</sup> I do not find

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<sup>6</sup> The Department offered, and I received, evidence concerning diagnosis and treatment of Bonus' knee by Robert B. McBride, Jr., M.D. (Dr. McBride), in August, 1988. DHHS Ex. 8. Dr. McBride concluded that Bonus was suffering from degenerative arthritis of the patellofemoral joint. Id. Although I admitted this  
(continued...)

the precise etiology of Bonus' condition to be determinative of the question of whether she had a substantially limiting impairment. The issue before me is not whether Bonus sustained a medically documented injury to her knee. The parties agree that she sustained a musculoskeletal injury which proximately caused the limitations she experienced between May 17 and May 24, 1988. The issue is to what extent Bonus was limited by her injury and whether those limitations rose to a level which would satisfy the Act's requirement that an impairment be substantial in order to qualify as a handicap. If, in fact, the limitations caused by an impairment qualify it as a handicap, the impairment's precise etiology is irrelevant, so long as some medically-recognized cause can be determined. If, on the other hand, the limitations caused by an impairment do not qualify it as a handicap, the impairment's precise etiology is equally irrelevant.

The Act and implementing regulations do not specifically state a durational test which would either qualify or disqualify an impairment as being "substantially limiting." However, that issue has been addressed both directly and indirectly by the courts in a number of cases. The rule which emerges from the courts' decisions is that there is no specific durational requirement in the Act. On the other hand, the courts have identified the Act's purpose as being to protect individuals from discrimination which is based on impairments which significantly affect those individuals' ability to compete in the work place. Impairments which do not have a significant impact on individuals' ability to compete, either because they limit individuals only in some minor capacity, or because they are of a very limited duration, are not considered to be substantially limiting impairments.

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<sup>6</sup>(...continued)

evidence, I consider it to be irrelevant for purposes of deciding whether Bonus was an "individual with handicaps" in May, 1988. The Department concedes that Bonus suffered from no limitations in her ability to perform the duties of radiologic technologist after May 24, 1988. The fact that Bonus may have had some medical condition affecting her knee after May 24, 1988, is of no consequence, because it did not limit her. And whatever the etiology of Bonus' condition prior to May 24, 1988, Bonus was completely restricted from performing the duties of her job between May 17 and May 24 of that year.

Congress did not intend to confer broad statutory protections on every impairment, including minor or common conditions, or on impairments which only briefly limit -- albeit severely -- affected individuals. The purpose of the Act is to protect those individuals who, by virtue of their impairments, are significantly disadvantaged in their efforts to compete in the workplace. To extend the Act's protections to trivial or common impairments, or even to severe impairments of very brief duration, would debase the statutory purpose. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasany v. U.S. Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (Jasany).<sup>7</sup> The concept of "substantiality" embodied in the Act embraces both severity and duration. Both of these factors (and others as well) must be evaluated in the context of an individual case to decide whether an impairment is substantial. However, where an impairment is of very brief duration, as is the case here, that limited duration may decide the issue of whether the impairment is substantial within the meaning of the Act.

The courts have found to be substantially limiting impairments which are potentially curable and which, therefore, are not of unlimited duration. For example, the United States Supreme Court held in School Bd. of Nassau County v. Arline, 480 U.S. 273, reh'g denied, 481 U.S. 1024 (1987) (Arline), that a contagious illness (tuberculosis) could qualify as a handicap. Some contagious illnesses, including tuberculosis, are potentially curable. Thus, Arline supports the principle that an impairment need not necessarily be permanent to qualify as substantially limiting. However, in Arline, the duration of the impairment was more than brief. The complainant had suffered several recurrences of tuberculosis before the alleged discrimination occurred.

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<sup>7</sup> The burden of proving that an aggrieved individual meets the Act's definition of an individual who is protected by the Act lies with the party charging discrimination. Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981). Once that burden is carried, the burden shifts to the party who is charged with discrimination to prove that its actions were for a legitimate, nondiscriminatory purpose. Id. If minor or transitory impairments were found to fall within the ambit of those impairments which are "substantially" limiting under the Act, then the threshold burden of proof would be very low. In most cases, that would, in effect, shift most of the burden of proof to the party who is charged with discrimination.

Furthermore, the record did not document or suggest that the complainant was likely to be cured of the disease in the immediate future. Thus, the complainant's disease had caused long-term limitations, with a prognosis for possible future limitations, even if the potential for eventual cure existed.

Courts have held that even potentially permanent impairments do not substantially limit individuals where they only affect the impaired individuals' ability to do highly specialized work. For example, in Jasany, the court found an employee's impairment (mildly crossed eyes) to be a minor limitation not rising to the level of a handicap under the Act, despite the fact that the impairment prevented the employee from performing his assigned duties (operating a mail sorting machine). The court reasoned that the impairment only affected the employee's ability to perform a narrow and specialized range of duties. The impairment did not affect the employee's ability to compete for and perform jobs in general. Therefore, the impairment was not a substantially limiting impairment. Courts have reached similar conclusions in other cases involving impairments which interfered only with employees' ability to perform a narrow range of duties. de la Torres v. Bolger, 610 F. Supp. 593, (N.D. Tex. 1985), aff'd, 781 F.2d 1134 (5th Cir. 1986) (employee precluded from working as a mail carrier due to left-handedness); Miller v. AT & T Network Systems, 722 F. Supp. 633 (D. Or. 1989), aff'd, 915 F.2d 1404 (9th Cir. 1990) (employee precluded from performing duties as a telephone installer in Arizona due to intolerance to high temperatures).

Courts have also concluded that impairments of only brief and finite duration are not substantially limiting. Evans v. City of Dallas, 861 F.2d 846 (5th Cir. 1988) (Evans); McWilliams v. AT & T Information Systems, Inc., 728 F. Supp. 1186 (W.D. Pa. 1990) (McWilliams); Diaz v. U.S. Postal Service, 658 F. Supp. 484 (E.D. Cal. 1987) (Diaz); Stevens v. Stubbs, 576 F. Supp. 1409 (N.D. Ga. 1983). In Evans, a knee injury which required surgery was held not to be a handicapping impairment under the Act because of its transitory nature. 861 F. 2d at 852 - 853. In Diaz, a back impairment of transitory duration was held not to constitute a handicap. 658 F. Supp. at 491 - 492. In McWilliams, a three-month episode of mental depression was held to be transitory and not a handicap under a Pennsylvania statute which is similar to the Act. 728 F. Supp. at 1190 - 1191. The courts' rationale in these cases is the same which the courts have used to find that minor impairments or impairments affecting only specialized functions are not

substantially limiting impairments. Impairments which do not affect an employee's ability to compete for work in the workplace, but which impose only minor, specialized, or transitory limitations, are not substantially limiting impairments.

Bonus' impairment did not affect her ability to compete in the workplace. By her own admission, it limited her from performing work for only one week. At the end of that week, she was fit to resume her duties as a radiologic technologist. I conclude that, whatever the cause of Bonus' knee injury, that injury was not a substantial impairment, within the meaning of the Act.

The Department argues that a finding in this case that Bonus' injury was of insufficient duration to qualify as a substantially limiting impairment and a handicap would contravene established Executive Branch policy concerning the correct interpretation of the Act. The Department cites as authority for this contention a policy statement issued by the "Interagency Coordinating Council." Department's Post Hearing Memorandum of Law at 28 - 29. The Department avers that the Interagency Coordinating Council was established pursuant to the Act to assure consistent enforcement of the Act by the federal government. Id. The agency statement relied on by the Department is that:

[T]he duration of the impairment is not the controlling factor, as other factors such as the degree of the limitation must also be considered. Moreover, it must be emphasized that each case involving a determination of substantial limitation must be evaluated on its own merits.

52 Fed. Reg. 16459 (May 5, 1987).

It is not clear from the Department's brief the extent to which the Interagency Coordinating Council has authority to issue interpretations of the Act which are binding on Executive Branch agencies. However, for purposes of this decision, I am willing to assume that its interpretations are authoritative. I find nothing in the policy declaration cited by the Department which is inconsistent with judicial analysis of the Act or with my application of the Act in this case. The policy statement merely confirms that no blanket rule exists for deciding the substantiality of impairments based on their duration. However, it does not preclude a finding in the appropriate case that an impairment is of such brief duration as to be insubstantial.

2. Respondent did not regard Bonus as being substantially limited by her impairment.

The Department argues that, even if Bonus did not have a substantially limiting impairment, Respondent regarded her as being substantially limited. Therefore, according to the Department, Bonus meets the definition of an "individual with handicaps." 29 U.S.C. § 706(8)(B); 45 C.F.R. § 84.3(j)(1). I do not agree with this contention. The evidence does not establish that Respondent regarded Bonus as being substantially limited by her knee injury. To the contrary, it shows that Respondent assumed that Bonus' injury would only temporarily prevent her from performing her duties. At bottom, Respondent based its decision to terminate Bonus' employment on its assessment of her character, and not in reaction to any physical limitations it perceived Bonus as having sustained.

The evidence which the Department asserts establishes that Respondent regarded Bonus as being substantially limited by her impairment consists of proof that Bonus told her supervisor, Billings, that she needed to be released from work for at least one week due to her knee injury, coupled with Respondent's decision, three days later, to discharge Bonus. Bonus presented Billings with a note from Dr. Kutner to support her request to be relieved from working. The Department argues that Respondent could have inferred from Bonus' request and from Dr. Kutner's note that Bonus would be seriously incapacitated for a long time. Shortly after Bonus presented her request to Respondent (and also after Billings had approved her absence from work), Respondent discharged her. From this, the Department urges that I infer that Respondent premised its decision to discharge Bonus on the conclusion that her knee injury would render her unsuitable to perform her duties.

The undisputed facts are that Bonus visited Dr. Kutner on May 17, 1988, and received a note from him which asserted that she would be totally disabled from working until at least May 24, 1988. DHHS Ex. 19. Bonus presented this note to Billings, and, based on this note, he agreed to excuse her from work. Dr. Kutner did not tell Bonus that her injury would necessitate a lengthy absence from work, nor did his May 17 note indicate a lengthy absence. His testimony was that he told Bonus that he would reevaluate her injury on May 24, 1988, and that any further steps (including a possible arthrogram or arthroscopic procedure) would depend on the outcome of that evaluation. Thus, while Dr. Kutner's assessment and statements to Bonus suggest the possibility that her

incapacity might exceed one week, they do not necessarily lead to that conclusion. There is nothing in Dr. Kutner's note which states or suggests that Bonus' absence from work would necessarily be prolonged.

It is possible to infer from these bare-bones undisputed facts that Respondent's decision to discharge Bonus emanated from its perception of the extent of her injury, and a conclusion that she would be unable to perform the duties for which she was hired, for a prolonged period of time. I cannot dismiss out-of-hand the possibility that Respondent did regard Bonus as substantially limited by her knee injury, based on what Bonus presented to Billings. It is also possible to infer that Respondent did not discharge Bonus based on its perception of her impairment. After all, Respondent approved Bonus' absence from work based on the note she obtained from Dr. Kutner.

However, these undisputed facts only tell a part of the story. When the undisputed facts are read in context with other, credible evidence, it is apparent that Respondent's decision to discharge Bonus had nothing to do with its perception of her impairment. Rather, Respondent's decision to terminate Bonus was a consequence of its assessment of her character.

The event which precipitated Respondent's decision to discharge Bonus was her May 19, 1988 request to Billings that Respondent alter its personnel records to conceal Bonus' commencement of employment with Respondent on May 16, 1988 and her work for Respondent on May 17, 1988. Bonus made her request to Billings two days after Billings had agreed to excuse Bonus from work, based on Dr. Kutner's note. Bonus' purpose for making this request was to enable her to falsely represent to the North Carolina Employment Security Commission that she had been unemployed on May 16 and 17, and to preclude an interruption in her receipt of unemployment compensation benefits. On this key point, I find Billings' testimony to be credible. Moreover, it is corroborated by the affidavit of Respondent's administrator in May, 1988, Richard Blackburn. DHHS Ex. 32. It is also corroborated by Respondent's decision to discharge Bonus on May 20, 1988, the day after Bonus made her request to Billings that Respondent alter its personnel records. DHHS Ex. 20. The fact that Respondent terminated Bonus only three days after Billings had agreed to excuse Bonus from work for a week suggests that there was an intervening event unrelated to Bonus' knee condition which precipitated the decision to terminate Bonus. Respondent needed Bonus' services. If Billings was concerned about the impact

Bonus' knee condition would have on her ability to perform her job, it would make sense for him to wait a few more days to see if she would be available to perform her duties before taking any action to terminate her. Respondent's decisive action to terminate Bonus on May 20, 1988 supports Billings' testimony that May 19, 1988 was the date on which Bonus made the request to alter her personnel records.

The Department asserts that Billings' version of the facts is not credible. It points to inconsistencies between his testimony at the hearing and statements which he made to the Department's investigator in February, 1989. It is true that Billings' recitation of the events leading to Bonus' discharge misstated the facts in one respect. DHHS Ex. 28. Billings' recitation to the Department's investigator assumed that Bonus had presented him with two notes requesting excused absences from work, rather than one note, as was, in fact, the case. He initially recalled that he had approved both absences and that it was during the second period of excused absence that Bonus had asked him to alter Respondent's personnel records. Id. I find that this discrepancy in Billings' testimony represents only a lapse in memory. The core of his testimony -- that Bonus asked him to alter personnel records during a period of excused absence from work -- is consistent. Furthermore, in February 1989, the Department's investigator did not show Billings documents which might have refreshed his recollection as to the exact sequence of events. Tr. at 541 - 542. Billings' February, 1989 statement is also consistent with a written statement made by him on June 8, 1988, only a few weeks after Respondent was terminated from her employment. While this statement also shows that Billings was confused about the number of notes Bonus presented to him, Billings is very clear that Bonus asked him to alter personnel records during a period of excused absence of work and that this dishonesty was the reason that she was discharged. DHHS Exs. 21, 22.<sup>8</sup> Thus, the core of Billings' testimony is corroborated by

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<sup>8</sup> Billings testified that he personally drafted DHHS Ex. 22 on June 8, 1992 and that Respondent's lawyer drafted DHHS Ex. 21. Tr. at 536 - 537. While DHHS Ex. 22 differs from DHHS Ex. 21 in that it does not mention Bonus' failure to apprise Respondent of her knee injury before she was employed, the documents are consistent in describing the sequence of events and the fact that Respondent terminated Bonus because of her dishonesty. Thus while there may be differences in the two documents, they are not materially inconsistent.

his February, 1989 interview with the Department's investigator as well as his virtually contemporaneous written statement.

By contrast, Bonus' testimony that she did not request Respondent to alter her personnel records until May 25, 1988, after the date of her discharge by Respondent, is not credible. Her lack of credibility is evident in her attempts to conceal, and then to justify, facts which prove that she behaved less than honestly. I find that Bonus' omission of critical facts from her account of events surrounding her employment and discharge by Respondent was an attempt by her to avoid exposure of evidence that would, at least, be embarrassing to her, and which would cast doubt on her overall credibility. I find further that Bonus did not credibly explain her omissions when she was confronted with them.

In her initial statement to the Department dated May 31, 1988, Bonus omitted mentioning her efforts to have Respondent alter her personnel records. DHHS Ex. 2. This is significant because the May 31, 1988 complaint contained a lengthy and detailed recitation of the chronological events which formed the basis for Bonus' complaint. It was purportedly a complete and accurate statement of the facts. The fact that it omits any reference to Bonus' request to have Respondent alter her personnel records undermines the credibility of the entire document as well as other statements made by Bonus.

Bonus later admitted that she had asked Billings whether her personnel records could be altered. However, she claimed that she made this request after Respondent discharged her. She made this admission only after it became apparent that Respondent was contending that it had premised its decision to discharge her on her request that her personnel records be altered. DHHS Ex. 21, 22, 26. Bonus' claim that she did not make the request to alter the personnel records until after she was discharged by Respondent is unconvincing because it is not corroborated by statements made in her initial complaint. Instead, this version of the "facts" appears to be self-serving testimony belatedly concocted to rebut Respondent's claim that it discharged her because of her dishonesty.

It is also apparent that Bonus made dishonest representations to Respondent concerning her need to see Dr. Kutner on May 17, 1988. She obtained permission from Billings to leave work an hour early on that date, at 3:30 p.m., to see Dr. Kutner. In fact, her appointment

with Dr. Kutner was at 5:00 p.m. on May 17, 30 minutes after the end of her scheduled work with Respondent on that date. Dr. Kutner's office was only a short walk from Respondent's facilities, and Bonus could easily have walked to Dr. Kutner's office between 4:30 and 5:00 p.m.. Unbeknownst to Billings, Bonus actually left work an hour early on May 17 in order to conduct personal business related to the sale of her home. Findings 38 - 40. I infer a general lack of credibility from Bonus' willingness to be dishonest with her supervisor on the second day of her employment by Respondent. I find additional evidence of her lack of credibility from her failure to admit that she had left work early on May 17, 1988, for reasons other than those which she gave to Billings, until confronted with these facts during cross-examination by Respondent's counsel.

Bonus' lack of credibility is also evident in the discrepancies, both major and minor, between her recitation of the facts of the case, and the testimony of her former coworker, Brannon. Brannon contradicted Bonus on both major and minor issues. I find that Brannon is a witness who had no motivation to be untruthful, and I accept as true her version of the facts. As an example of one significant discrepancy between Bonus' and Brannon's testimony, Bonus stated that, on May 24, 1988, she presented Brannon with a note from Dr. Kutner which certified that Bonus could return to work. Bonus asserted that at that meeting with Brannon, Brannon told her that Billings had given Bonus' job to another individual. DHHS Ex. 2. By contrast, Brannon testified that she last saw Bonus on May 17, 1988, and had not spoken with her subsequently. Finding 31. Bonus' testimony on this point is significant in that she used it to bolster her contention that Respondent had assigned her job to another individual whom Respondent had preferred to hire in the first place. The fact that the conversation recounted by Bonus never took place not only impeaches her credibility, but suggests that she was distorting facts in her testimony in order to place events in a light which she thought would be most favorable to her and which would make Respondent look as if it had treated her unfairly.

An example of another discrepancy is that Bonus testified that Brannon knew that she was going home to conduct personal business related to the sale of her house on the afternoon of May 17, 1988, while Brannon credibly testified that she did not know this. Tr. at 458 - 459; Finding 39. Again, I find Bonus' testimony on this point to be another example of her willingness to misstate facts in an effort to minimize her wrongdoing.

As another example, Bonus testified that she had performed x-rays during her orientation by Brannon on May 16 and 17, 1988, whereas Brannon testified credibly that Bonus had performed no x-rays on those dates. Tr. at 456; Finding 26. I believe that Brannon's version of events is correct here because it is consistent with Billings' testimony that, normally, new radiologic technologists would not be instructed to perform x-rays during their orientation periods. Thus, I find Bonus' assertion that she performed x-rays on May 16 and 17 to be untruthful. Whether or not Bonus performed x-rays on these dates is irrelevant to the central issues in this case. On the other hand, her untruthful testimony on this point casts doubt on her overall credibility as a witness.

Thus, I find that the Department failed to prove that Respondent regarded Bonus as substantially limited by her knee impairment. I find, furthermore, that Respondent discharged Bonus because Bonus asked Respondent to abet her efforts to misrepresent facts to the North Carolina Commission on Employment Security. The Department has not proven that Bonus is an "individual with handicaps" within the meaning of the Act, because it has not proven that Bonus either had a substantially limiting impairment or that she was regarded by Respondent as having a substantially limiting impairment. Therefore, the Department has failed to meet its threshold burden of proof under section 504 of the Act.

3. Even if Bonus was an "individual with handicaps", Respondent did not discharge Bonus solely due to her knee impairment.

The Department's failure to prove that Bonus was either handicapped or was regarded by Respondent as being handicapped resolves the question of Respondent's liability in this case. The Department bears the burden of proof on the threshold issue of handicapped status, and its failure to meet its burden means that I need engage in no further evaluation of the evidence to find that Respondent is without liability.

However, it is evident in this case that, whether or not Bonus had a condition that would meet the Act's definition of a handicap, her condition and the limitations it caused were not the reason Respondent discharged her. As I hold above, Respondent discharged Bonus because she asked Respondent to abet her in an act of dishonesty. I would conclude that Respondent did not

discriminate against Bonus even if I had found that Bonus was handicapped within the meaning of the Act.<sup>9</sup>

#### CONCLUSION

I conclude that the Department failed to prove that Respondent discriminated against Bonus solely on the basis of a handicapping condition. Therefore, the Department has not proven that Respondent engaged in discrimination under section 504 of the Act. There exists no basis to impose a remedy against Respondent.

/s/

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Steven T. Kessel  
Administrative Law Judge

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<sup>9</sup> At the hearing, the Department sought to introduce DHHS Ex. 37, which it contended was evidence concerning Respondent's treatment of another employee on its payroll, in order to prove that Respondent's alleged discrimination against Bonus was part of a pattern of discrimination against handicapped individuals. I excluded that evidence because I concluded that the Department's Notice of Opportunity for Hearing failed to give Respondent adequate notice that the Department would be arguing that Respondent had engaged in a pattern of discrimination against handicapped persons. Tr. at 104 - 118, 196 - 207. Even had I admitted that evidence, however, it would not have affected my decision. The Department did not specifically allege that Respondent engaged in a pattern of discrimination against handicapped persons, of which discrimination against Bonus was but an example. Rather, it specifically alleged that Respondent discriminated against Bonus. The "pattern" evidence which the Department offered, but which I excluded, was offered as evidence to buttress the Department's principal allegations of discrimination against Bonus. I would not have been persuaded by this supporting evidence, because the direct evidence which the Department offered on the issue of discrimination against Bonus is unpersuasive.