



State of Connecticut  
**COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES**  
**OFFICE OF PUBLIC HEARINGS**

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*Promoting Equality and Justice for all People*

July 15, 2022

CHRO ex rel. Kenneth Lombardi v. Town of Westport Pension Board CHRO No. 1820325 Fed No. 16a201800819.

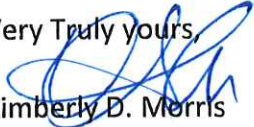
**FINAL DECISION**

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent via email to the commission, complainant and respondent.

Very Truly yours,

  
Kimberly D. Morris  
Secretary II

cc.

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Jon P. FitzGerald, Presiding Human Rights Referee

**STATE OF CONNECTICUT  
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITES  
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Commission on Human Rights and Opportunities ex rel. Kenneth Lombardi : Connecticut Commission on Human Rights and Opportunities  
: CHRO No. 1820325  
v. :  
Town of Westport Pension Board : July 15, 2022

**FINAL DECISION**

I  
**PRELIMINARY STATEMENT**

OFFICE OF  
PUBLIC HEARINGS - CHRO  
DATE 7/15/22  
TIME 9:05 AM  
RECEIVED BY [Signature]

Kenneth Lombardi, the complainant, filed his affidavit of illegal discriminatory practice (complaint) with the Commission on Human Rights and Opportunities (commission) on January 31, 2018. In his complaint he alleged that the respondent Town of Westport Pension Board (pension board), violated General Statutes § 46a-60 (b) (1) and Title II of the federal American with Disabilities Act of 1973, 42 U.S.C. § 12101 et seq. (Title II), as enforced through General Statutes § 46a-58 (a), when it denied him disability pension benefits.

The complaint was certified to the office of public hearings on October 18, 2019. The respondent filed its post-certification answer denying the allegations of discrimination on December 19, 2019. On August 7, 2020, the commission filed notice that pursuant to General Statutes § 46a-84 (d) it was deferring prosecution of the complaint to Mr. Lombardi's attorney.

The public hearing was held on March 23, 2022 at which time the parties appeared, called witnesses, and presented evidence. Post-hearing briefs were due on June 2, 2022.

Supplemental briefs were due on June 30, 2022, at which time the record closed. Mr. Lombardi and the pension board timely filed their briefs and supplemental briefs. The commission did not file a brief or supplemental brief.

For the reasons stated herein, it is found that the pension board did not engage in a discriminatory practice and the complaint is dismissed.

## II PARTIES

The parties to this action are the Commission on Human Rights and Opportunities, 450 Columbus Boulevard, Hartford, Connecticut; Kenneth Lombardi, c/o Attorney Thomas W. Bucci of Willinger, Willinger & Bucci, P.C., 1000 Bridgeport Ave, Shelton, Connecticut; and the Town of Westport Pension Board, c/o Attorney Andrew B. F. Carnabuci of Rose Kallor, LLP, 750 Main Street, Hartford, Connecticut.

## III FINDINGS OF FACT

Based upon a review of the pleadings, exhibits, and transcript, and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found (FF). References to the transcript are designated as "Tr." followed by the page number. References to exhibits are designated as C for Mr. Lombardi and R for the pension board, followed by the exhibit number. The commission proffered no exhibits.

1. The Town of Westport hired Mr. Lombardi as a firefighter in 1980. Tr. 7.
2. Mr. Lombardi worked for thirty-seven years before retiring. Tr. 7.

3. During his employment with the Town of Westport fire department, Mr. Lombardi was promoted to the positions of acting lieutenant, lieutenant, fire inspector, and assistant fire chief. Tr. 7.
4. On December 9, 2004, Mr. Lombardi, in the performance of his duties, was standing next to an alarm panel in a utility closet of a condominium complex when the horn went off. As a result of that incident, he suffered binaural hearing loss. Mr. Lombardi and the Town of Westport entered into a voluntary agreement by which Mr. Lombardi received workers' compensation payments for the injury. Tr. 14 – 17; C-1, C-2, C-3.
5. During his employment, Mr. Lombardi received annual physical examinations from the Town of Westport. Each year the examinations concluded that he was fit for duty with no restrictions. Tr. 92, 146.
6. The Occupational Health Services of Norwalk Hospital performed Mr. Lombardi's 2010 annual physical. The clinician informed Mr. Lombardi that he had a severe hearing loss but that there had been no significant change in his hearing from his baseline test in 2008. The clinician recommended to Mr. Lombardi that he have an ear, nose, and throat examination. Tr. 18 – 19; C-32, C-33.
7. Mr. Lombardi's annual physicals in 2011, 2012 and 2013 confirmed the severe hearing loss but showed no significant change in his hearing from his 2008 baseline test. Tr. 19 – 20; C-34, C-35, C-36.

8. Following all his physical evaluations, the only information the clinicians provided to the Town of Westport's personnel office was that Mr. Lombardi was released to return to work with no restrictions. Tr. 146.

9. On March 17, 2017, Mr. Lombardi had his annual physical with Norwalk Hospital Occupational Health Services. The clinician cleared Mr. Lombardi for duty with no restrictions. The clinician noted that Mr. Lombardi's hearing loss had not significantly changed since his 2008 evaluation. The clinician recommended to Mr. Lombardi that he follow up on his hearing loss with an ear, nose, and throat examination. C-32.

10. In response to this recommendation Mr. Lombardi contacted Lawrence Fliegelman, M.D., for an examination. Thereafter, on March 28, 2017, Dr. Fliegelman examined Mr. Lombardi. He diagnosed Mr. Lombardi with moderate to severe sensorineural hearing loss. Dr. Fliegelman found that Mr. Lombardi had lost 75% of his hearing. According to Dr. Fliegelman, he was unfit for duty. Tr. 21 – 22; C-4, C-39, C-40, C-41

11. Upon receiving Dr. Fliegelman's report, the Town of Westport placed Mr. Lombardi on light duty. Tr. 24 – 25; C-5, C-6.

12. Ralph Chetcuti, personnel director for the town, changed Mr. Lombardi's status from injury leave to sick leave because only a few weeks earlier Mr. Lombardi's annual physical had released him to full duty with no restrictions, and there was no report of a subsequent injury. At the direction of the fire chief,

deputy fire chief, and union president, Mr. Chetcuti changed the sick leave back to injury leave with light duty. Tr. 32 – 38, 97, 143 – 144; C-7, C-10, C-23.

**13.** Mr. Chetcuti and his office process applications for normal and disability pensions and present the material to the pension board for its decision. Tr. 134.

**14.** On March 31, 2017, Mr. Lombardi submitted to Mr. Chetcuti notice of his retirement effective April 30, 2017 and his request for a disability pension. Tr. 25 – 26, 134 – 135; C-9.

**15.** Mr. Chetcuti told Mr. Lombardi that he did not qualify for a disability pension because his hearing injury had occurred over fourteen years earlier and had not prevented him from performing his job duties. Tr. 27, 136; C-11; R-1; R-23.

**16.** Because Mr. Lombardi could work in the capacity of light duty for an additional eighteen to twenty-four months, he rescinded his notice of retirement. Tr. 31, 98; C-12.

**17.** Thereafter, Mr. Lombardi contacted Andrew Parker, M.D., for an examination. Dr. Parker performed an ontological and audiological evaluation of Mr. Lombardi on May 15, 2017. The examination revealed a bilateral moderate to severe high frequency sensorineural hearing loss that was almost certainly caused by prolonged noise exposure during a period of many years. According to Dr. Parker, Mr. Lombardi had a 41% permanent loss. Dr. Parker recommended that Mr. Lombardi be evaluated for and fitted with new binaural hearing aids. C-38; R-3; R-22.

**18.** Mr. Lombardi retired effective May 31, 2017 as an assistant fire chief. He was eligible for a normal retirement pension but requested a disability retirement pension. Tr. 39; C-15, C-18; R-25.

**19.** Notwithstanding the two medical reports that he was unfit for duty, Mr. Lombardi performed his job duties up until the time of his retirement. Tr. 78 – 81.

**20.** Thereafter, Mr. Lombardi contacted Ashutosh Kacker, M.D. On October 2, 2017, Dr. Kacker examined Mr. Lombardi. He concluded that Mr. Lombardi had a hearing loss of 41% and was not fit for duty as such a hearing loss compromised his ability to work as a firefighter. C-42.

**21.** The fire department pension plan is set forth in an agreement between the Town of Westport and the Westport Firefighter's Local 1081, International Association of Firefighters, AFL-CIO. C-47.

**22.** Section 6 of the plan provides in part that: "6.1 Upon certification by a [sic] least three (3) physicians appointed by the Pension Board that a Participant is disabled so as to be permanently disqualified from service of all duties as a regular full time firefighter, such disability having occurred during actual performance of duty, or resulting from the effects of any injury received, disease contracted, or exposure endured while in the actual discharge of his duties, such Participant shall be retired and shall receive: (a) Subject to Sections 6.1(b), (c) and (d), the monthly pension benefit granted will be as

follows . . . .” C-47, p. 27. The section then provides for the calculation of the disability pension benefit.

**23.** The pension plan is administered by the pension board. The pension board consists of the chairman of the board of finance, the first selectman or first selectwoman, the finance director, the town clerk, the fire chief, and two members of the fire department designated by the union. Tr. 72 – 73; C-27, p. 34

**24.** The pension board often accepts the attending physician’s assessment of a disability and then it obtains two independent medical examinations. Tr. 149.

**25.** Because Mr. Lombardi worked up until the day of his retirement, the pension board could not find three physicians willing to examine him. Tr. 140 – 142. The pension board referred Mr. Lombardi to Craig Hecht, M.D, for an independent examination. The pension board accepted the evaluations from two of the three physicians (Dr. Parker and Dr. Fliegelman) selected by Mr. Lombardi. Tr. 47, 148.

**26.** Dr. Hecht examined Mr. Lombardi on October 24, 2017. C-44; R-19.

**27.** Dr. Hecht agreed that Mr. Lombardi had sustained loss of hearing. Dr. Hecht, though, found that Mr. Lombardi could perform 90% of his job responsibilities. C-44; R-19.

**28.** On December 18, 2017, the pension board denied the disability portion of Mr. Lombardi’s retirement pension. R-29.

**29.** Mr. Lombardi continues to receive a normal retirement pension. Tr. 59.



IV  
GENERAL STATUTE § 46a-60

In the preprinted portion of his complaint, Mr. Lombardi marked the box alleging that the pension board violated General Statute § 46a-60 (b) (1). This statute prohibits an employer from engaging in discriminatory employment practices against an employee. Mr. Lombardi, though, does not reference this statute or discuss this allegation in either his brief or his supplemental brief. Therefore, the alleged violation of § 46a-60 (b) (1) is deemed waived.

That Mr. Lombardi is not pursuing an employment discrimination claim is confirmed by his General Statute § 46a-58 allegation. In that allegation, Mr. Lombard is not asserting an employment discrimination claim under Title I of the ADA which prohibits an employer from discriminating against an employee. Rather, he is asserting a claim that the pension board violated Title II of the ADA which prohibits a public entity from discriminating against a disabled person in the denial of benefits or services.

V  
GENERAL STATUTE § 46a-58

In his complaint, Mr. Lombardi also alleged that the pension board committed a discriminatory practice against him in violation of General Statute § 46a-58. This section provides in relevant part that:

(a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran.

The protected federal right, privilege, or immunity that Mr. Lombardi alleges the pension board violated is Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12103 and §§ 12131 to 12134. Specifically, § 12132 provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

To prove that the pension board violated § 46a-58 (a), then, Mr. Lombardi must prove that it violated Title II. This he has not done.

A

In *Mary Jo C. v. New York State and Local Retirement System*, the plaintiff brought a Title II claim against two defendants one of whom, the Central Islip Public Library, was her employer. The other defendant was the New York State and Local Retirement System which administered the pension plan of which the plaintiff was a member. The Court of Appeals concluded that the ADA "unambiguously limits employment discrimination claims to Title I. A public employee may not bring a Title II claim against his or her employer, at least when the defendant employer employs fifteen or more employees." *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 171 (2d Cir. 2013). Here, Mr. Lombardi was employed by the Town of Westport. FF 1,2. Unlike the pension plan administrator in *Mary Jo C.*, though, the pension board here is simply a board within the Town of Westport composed of town employees. FF 23. Therefore, Mr. Lombardi cannot bring a Title II complaint against the Town of Westport acting through its pension board.

B

Even if the pension board is deemed not to be Mr. Lombardi's employer, the Title II claim is nonetheless dismissed.

"Title II of the ADA[, 'Public Services,'] provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" *United States v. Georgia*, 546 U.S. at 153, 126 S.Ct. 877 (quoting 42 U.S.C. § 12132). The statute "require[s] that covered entities make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003) (internal quotation marks omitted).

To prove a violation of Title II, a party must therefore establish: (1) that he is a "qualified individual" with a disability; (2) that he was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability. *Hargrave v. Vermont*, 340 F.3d 27, 34-35 (2d Cir. 2003).

A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *United States v. Georgia*, 546 U.S. at 153-54, 126 S.Ct. 877 (quoting 42 U.S.C. § 12131(2)).

"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). "[A] defendant need not make an accommodation at all if the requested accommodation 'would fundamentally alter the nature of the service, program, or activity.'" *Powell v. National Bd. Of Medical Examiners*, 364 F.3d 79, 88 (2d Cir. 2004) (quoting 28 C.F.R. § 35.130(b)(7)).

Typically, "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers,

among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.” *Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) (applying same standard in Title III case as under Title II, see *infra* note 6). It is a factual issue “whether [a] plaintiff[s] proposed modifications ... amount to ‘reasonable modifications’ which should be implemented, or ‘fundamental alterations,’ which the state may reject.” *Crowder*, 81 F.3d at 1485.

(Footnote omitted.) *Mary Jo C.*, *supra*, 707 F.3d 152-53.

Here, the relevant text defines a qualified individual as

an individual with a disability who, with or without reasonable modifications to *rules, policies, or practices*, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the *essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2) (emphases added).

The text thus distinguishes between two categories of requirements: (1) rules, policies, or practices, which are subject to the requirement of reasonable modification, and (2) essential eligibility requirements, which are not.

The fact that Congress provided that “rules, policies, or practices” would be subject to reasonable modification, and contrasted this flexibility with the requirement that a qualified individual meet the “essential eligibility requirements” of a program within the same sentence suggests that Congress meant these categories to have different meanings. “Generally, identical words used in different parts of the same statute are presumed to have the same meaning. But where, as here, Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Cruz–Miguel v. Holder*, 650 F.3d 189, 196 (2d Cir. 2011) (citations and internal quotation marks omitted).

Courts have therefore reasoned that essential eligibility requirements, unlike “rules, policies, [and] practices,” 42 U.S.C. § 12131 (2), are not subject to reasonable modification or waiver.

*Id.*, 155-56.

Cases interpreting the 'essential eligibility requirement' language indicate that whether an eligibility requirement is essential is determined by consulting the importance of the requirement to the program in question.

Id., 157

The regulations indicate that "essential eligibility requirements" are those requirements without which the 'nature' of the program would be 'fundamentally alter[ed].' [28 C.F.R. § 35130 (b) (7)]. These terms seem to us clearly to contemplate that some relatively minor eligibility requirements, even if set by statute, will not be deemed essential because they will not be necessary to prevent the fundamental alteration of the program's nature.

Id., 158.

Similarly here, we read the ADA to require us to analyze the importance of an eligibility requirement for a public program or benefit, rather than to defer automatically to whatever 'formal legal eligibility requirements' may exist, no matter how unimportant for the program in question they may be.

Id., 159.

### C

There are, then, three elements Mr. Lombardi must establish to prove a violation of Title II by a preponderance of the evidence. First, he must prove that he has a disability and that he is a qualified individual. Second, he must prove that the Town of Westport excluded him from its disability pension plan. Third, he must prove that his exclusion from a disability pension was due to his disability.

### 1

The first element of a Title II case has two components: whether Mr. Lombardi has a disability and whether he is a qualified individual. As to the first component, Mr. Lombardi is disabled as he has a significant hearing impairment. FF 10, 17, 20, 27.

As to the second component, Mr. Lombardi did not prove that he is a qualified individual. Whether he is a qualified individual depends on whether the relevant provisions of the pension plan are (1) rules, policies, or practices that are subject to reasonable modification; (2) nonessential eligibility requirements that may also be subject to reasonable modification or (3) essential eligibility requirements that are not subject to modification.

According to section 6 of the pension, to qualify for a disability-based pension there must be certification by at least three physicians appointed by the pension board that (1) the applicant is disabled so as to be permanently disqualified from service of all duties as a regular full time firefighter and (2) that disability occurred during actual performance of duty, or resulted from the effects of any injury received, disease contracted, or exposure incurred while in the actual discharge of the applicant's duties. FF 22. This is clearly an eligibility requirement and not simply a rule, policy, or practice.

The pension board has apparently decided that the requirement of three independent medical examinations is a nonessential modifiable eligibility requirement while the requirement of at least one independent medical examination selected by the pension board is an essential eligibility requirement. FF 24, 25.

The eligibility requirement that there be independent medical confirmation that an applicant is disabled, that the disability permanently disqualifies the applicant from service of all duties as a regular firefighter, and that the disability occurred during or arose from an injury received during the performance of the applicant's job duties is an essential, and reasonable, eligibility requirement for a determination of whether one is eligible for a

disability-based pension. Requiring the Town of Westport to waive all independent medical examinations and rely solely on medical reports submitted by an applicant from physicians chosen by the applicant would constitute a fundamental alternation of the nature of the disability pension program.

Mr. Lombardi is not a qualified individual because he did not fulfill an essential eligibility requirement. The pension board did not receive a certification from at least one independent medical examiner selected by the pension board that Mr. Lombardi is so disabled as to be permanently disqualified from service of all duties as a regular full time firefighter.

2

As to the second element, Mr. Lombardi established that the Town of Westport excluded him from its disability pension plan. FF 28.

3

As to the third element needed to establish a Title II violation, Mr. Lombardi did not prove that his exclusion from the pension plan was due to his hearing loss.

To qualify for a disability pension, the pension plan requires that three physicians appointed by the pension board must certify that as a result of a job related disability an applicant cannot perform all the duties of a regular firefighter. FF 22. As the pension board was unable to find three physicians, it chose one physician (Dr. Hecht) and accepted medical reports from two physicians (Dr. Fliegelman and Dr. Kacker) chosen by Mr. Lombardi. FF 25. While the reports from Dr. Fliegelman and Dr. Kacker state that Mr. Lombardi was not fit for duty, the independent medical examination performed by Dr.

Hecht concluded that Mr. Lombardi was able to perform 90% of his duties. FF 10, 20, 27. The pension board denied Mr. Lombardi a disability pension not because of his hearing loss but because the independent medical examination concluded that he could perform his job duties.

## VI

### CONCLUSIONS OF LAW

1. Mr. Lombardi waived his claim that the pension board committed a discriminatory employment practice in violation of General Statute § 46a-60 (a).
2. Mr. Lombardi cannot bring a Title II claim against the pension board.
3. Even if the pension board is deemed not to be Mr. Lombardi's employer, it is an essential eligibility requirement that at least one of the reports certifying that an applicant "is disabled so as to be permanently disqualified from service of all duties as a regular full time firefighter, such disability having occurred during actual performance of duty, or resulting from the effects of any injury received, disease contracted, or exposure endured while in the actual discharge of his duties" be from a physician chosen by the pension board.

## VII ORDER

For these reasons, the complaint is dismissed.

*/s/ Jon P. FitzGerald*  
Hon. Jon P. FitzGerald  
Presiding Human Rights Referee