STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

CHRO, ex. rel., Brian Kelly,		
Complainant	:	CHRO No. 0210359
	:	EEOC No. 16aa200802
v.		
City of New Britain,		
Respondent	:	October 14, 2004

<u>Ruling re: Respondent's Motion to Dismiss</u>

I. Summary

By a motion to dismiss filed on May 26, 2004 ("the motion"), the City of New Britain ("respondent" or "the City") moves to dismiss the complaint filed on March 4, 2002 ("complaint") by Brian Kelly ("complainant") with the Commission on Human Rights and Opportunities ("commission" or "CHRO"). The commission filed its objection to the motion ("commission's objection") on August 16, 2004. The complainant filed his objection to the motion ("complainant's objection") on August 9, 2004.

For reasons set forth herein, the respondent's motion is DENIED and the complaint is not dismissed as requested by the respondent.

II. Procedural History

The complainant filed his complaint with the commission on March 4, 2002. He claims that the City violated General Statutes §46a-60(a)(1), the American with Disabilities ("ADA") and Section 504 of the Rehabilitation Act of

1973, as amended, ("Section 504") by failing to hire him as a New Britain police officer on September 12, 2001 and thereafter because of his disability, a 10% left ankle disability. The complainant also alleges that the City refused to provide him with a formal written rejection to his application for the New Britain police officer position. The complainant further alleges that the City refused to assess his actual physical capabilities, in violation of the law. Finally, the complainant alleges that he can perform the essential functions of the New Britain police officer position with or without reasonable accommodations.

III. Parties' Position

The City raises four arguments relating to the ADA and Section 504 in the motion. First, it argues that the complainant has failed to produce sufficient facts to establish that he is a qualified individual with a disability, under the ADA or Section 504, or that he is "physically disabled" under § 46a-60(a)(1). In addition, the City argues that the complainant failed to state a claim that his "impairment" substantially limits one or more of his major life activities. The City also argues that the position of New Britain police officer demands unique qualifications and that the complainant has failed to meet those qualifications. Finally, the City argues that just because the complainant is declared unsuitable for the particular position of a New Britain police officer does not mean he cannot perform other jobs. Therefore, he does not have a substantial limitation of a major life activity as required by the ADA. (motion 1, 2, 3)

The City also argues that the complaint should be dismissed because it was untimely (not filed within 180 days of the discriminatory act, as is required by §46a-82(e)). The City did not provide a date for the discriminatory act in its motion. (motion 4)

The commission argues, in its objection, that the City never notified the complainant that he was disqualified from the Police Academy training course that started in March 2001. Therefore, the City's failure to act on the complainant's ankle status continued until the complainant's eligibility list ended in December of 2001. The complainant filed his complaint with the commission on August 16, 2002, within the 180 days of the end of the eligibility list. (commission's objection 9, 12, 13,14)

As to the ADA argument and Section 504, the commission argues that the complainant had the ability to perform the job of New Britain police officer, with or without, reasonable accommodations. (commission's objection 1,2,3,4) The commission also argued that complainant has stated a viable claim under Connecticut state law. The commission notes that the requirements of Connecticut disability law are different than those under federal law. (commission's objection 5,6,7,8,9,10,11,12).

In his objection, the complainant argues that the City denied him an appointment as a police officer and the City refused to respond to his inquiries regarding the status of his appointment. The complainant also argues that the City engaged in disability profiling by assuming, without relevant evidence, that complainant would not be able to perform the essential functions of the police

officer position. The complainant strongly argues that he was able to perform the job duties of a New Britain police officer with or without reasonable accommodations. He currently works for the Department of Corrections, the State of Connecticut. The complainant alleges that he offered to perform physical tests to resolve the issue of whether he could perform the essential functions of the police officer position. The complainant also argues that there was an agreement between him and the City to keep the City's conditional offer of employment open pending further medical documentation from the complainant. (complainant's objection 8,9,10,11,12)

On the timeliness issue, the complainant stated that he filed his complaint with the commission within 180 days of the City's initial indication, on September 12, 2001, of its intent to reject his application. The complainant notes that the City did not provide the date of the discriminatory act in its motion. (complainant's objection 1,2,3,4,5,6,7,8,9,10,11)

IV. Analysis

A. Standards

A motion to dismiss tests, among other things, whether on the face of the record the tribunal lacks jurisdiction. *Upson v. State,* 190 Conn 662, 624 (1993). The City's arguments concerning the ADA do not constitute a claim of lack of jurisdiction. Rather these first two arguments essentially are that the complainant cannot prove even a prima facie case, that there are no genuine issues of material fact and therefore, that it is entitled to judgment as a matter of law. This

is more properly a motion for summary judgment. The City's argument that the complainant did not file his complaint within 180 days is a proper subject of a motion to dismiss. Therefore, not withstanding its designation, the City's motion to dismiss will be treated, where appropriate, as a motion for summary judgment and also a motion to dismiss. See *Commission on Human Rights and Opportunities, ex. rel., Thomas Nobili v. David E. Purdy & Company, LLC,* CHRO No. 0120389, pg. 2 (ruling on motion to dismiss, dated January 17, 2003) and *Commission on Human Rights and Opportunities, ex. rel., Lorraine Stevens v. The Urban League of Hartford,* CHRO No. 0010328 pg. 1-2 (ruling on motion to dismiss, December 5, 2002).

"[S] ummary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Although the party seeking summary judgment has the burden of showing the non-existence of any material fact, a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact, together with the evidence disclosing the existence of such an issue. In deciding a motion for summary judgment the trial court must view the evidence in the light most favorable to the non-moving party. Summary judgment is designed to eliminate the delay and expense of litigating an issue where there is not a real issue to be tried." (internal quotations omitted; internal citations omitted) *Sizer v. Connecticut Post,* 2004 Conn. Super. LEXIS 1272, *3-4; *Witt v.*

St. Vincent's Medical Center, 252 Conn. 363, 368, (2000); *Jackson v. R.G. Whipple, Inc.,* 225 Conn. 705,712 (1993).

B. The "Physical Disability"
analysis under §46a-60(a)(1)

The City's motion is questioning whether the complainant has a disability. The City's motion addresses the complainant's claims under the federal law and the state law in the same analysis. However, the analysis under state law is different and needs to be applied separately than the analysis under the ADA. Therefore, even if the complainant does not succeed in his efforts to prove discrimination under the ADA or Section 504 he may still prove that he has been discriminated against under state law. In *Commission on Human Rights and Opportunities, ex. rel., Mary L. Johnson v. State of Connecticut, Department of Correction*, CHRO No. 9740163, March 9, 2000, the Human Rights Referee stated that "the complainant's failure to establish a prima facie case under federal law is not fatal to her claims under state law." Section § 46a-60(a)(1) provides as follows:

> "it shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability or ***physical disability***".

> "To satisfy his prima facie case, the complainant must demonstrate (1) that he was disabled under the applicable statutes; (2) that the respondents were

> subject to the applicable statutes; (3) that he was qualified to perform the essential functions of the position with or without reasonable accommodation, and (4) that he suffered an adverse employment action because of his disability. *Giordano v. City of New York,* 274 F.3d 740, 747 (2nd Cir. 2001); *Shaw v. Greenwich Anesthesiology Assocs.,* P.C., 137 F.Supp.2d, 48, 54 (D.Conn. 2001); *Feathers v. Vivisection Investigation League, Inc.*, 2000 Conn. Super. LEXIS 2319." (*emphasis added.*)

Nobili, Id. at p.20.

An individual has a disability under § 46a-60(a)(1) when he is physically disabled under § 46a-51(15). Section § 46a-51(15) defines physical disability as follows:

> "Physically disabled" refers to any individual who has any ***chronic*** physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device; (emphasis added.)

(1)The complainant was an individual with a disability.

An individual is disabled if he has a chronic physical condition. Chronic has been interpreted as meaning:

> "Neither state statute defines the term "chronic," nor is the term used in the federal statutes. When left undefined, the words of a statute must be given their commonly approved meaning unless a contrary intent is clearly expressed. *Carothers v. Capozziello*, 215 Conn. 82, 129 (1990). Webster's Ninth New Collegiate Dictionary defines the term as "marked by long duration or frequent recurrence; not acute." Black's Law Dictionary (6th ed. 1990) similarly defines the term, when referring to diseases, to mean "of long

> duration, or characterized by slowly progressive symptoms; deep-seated and obstinate, or threatening a long continuance; distinguished from acute." See *Gilman Brothers Co. v. Commission*, *supra*, 1997 Conn. Super. 1311 *8-9. The condition need not be permanent in order to be deemed chronic. *Caruso v. Siemens Business Systems, Inc.*, 2003 U.S. App. LEXIS 1211 (2nd Cir. 2003)."

Nobili, supra, p.22.

The complainant informed the City that his left ankle was injured years before while he was serving in the U. S. Marines. The complainant also informed the respondent that his ankle had healed and that he still had some residual limitation. The complainant's ankle condition was "of long duration" and it should be classified as "chronic." Therefore, the complainant was an individual with a disability under the state law.

(2) The City is subject to §§ 46a-51, et seq., which includes §46a-60(a)(1).

Pursuant to §§ 46a-51(10) "Employer" is defined as follows:

> "Employer includes the state and all political subdivisions thereof and means any person or employer with three or more persons in such person's or employer's employ. "

New Britain is a political subdivision of the State of Connecticut with more than three employees, therefore it is covered by §§ 46a-51 et seq.

(3)The complainant was qualified.

The complainant was qualified to be a police officer candidate. He successfully passed the written test and was ranked 10th in his group. He was selected by the City to be a candidate to enter into the police academy. His offer was conditional upon the successful completion of the post offer tests and examinations. He was deemed qualified until the very last day of his screening period, when he was examined by the respondent's physician, in order to further evaluate the status of his left ankle condition. It was after this examination that the respondent informed the complainant that he would not be entering the police academy. The City later informed the complainant that his physical condition was the reason why he was not allowed to enter the academy with his class. The City also told the complainant that it was still considering his eligibility as a police officer and that it would contact him later. It informed him that further examination may be necessary. The complainant thereupon attempted to engage the respondent in meaningful communications to identify the information and examinations, which the City needed to assess his condition and eligibility as a police officer. The City did not notify the complainant, in writing, to inform him that he was disqualified. The complainant has asserted, throughout the entire process, that he was qualified, with or without reasonable accommodations, for the police officer position.

Additional information is needed to more fully assess the complainant's qualifications for the New Britain police officer position the complainant's doctor said he could perform the job. The City must explore the content and the justification for its physical standards and job qualifications. Even with his

disability the complainant might be able to perform the job of New Britain police officer. A public hearing will explore whether the standards and requirements utilized by the respondent are job related, have a manifest relationship to the employment in question and were reasonably related to the work of a police officer.

Finally, in considering whether a person with a known disability is qualified for a position, an employer has a duty to consider whether the person requires reasonable accommodations to assist him in performing the duties and responsibilities of the position. While the Connecticut statute, unlike the ADA, does not have language setting forth a duty on the part of the employer to provide reasonable accommodations, Connecticut courts have implicitly recognized that such a duty exists. A superior court case, *Ezikovich v. Commission on Human Rights and Opportunities*, 1998 WL 258182, (Conn.Super.) involved a complainant's appeal of the commission's finding that a respondent employer had provided the complainant with a reasonable accommodations to her disability of chronic fatigue syndrome:

> "The CHRO did not misapply or misunderstand the law of reasonable accommodation . . . the CHRO found that a fixed start work schedule was a reasonable accommodation and rejected the plaintiff's claim that reasonable accommodation was an at will, "work when you can" schedule . . . the conclusions of the CHRO as to reasonable accommodations follow the applicable law."

The strongest indication of the existence of a duty to make reasonable accommodations for an employee's disabilities under state law can be found in

the superior court case, *Silhouette Optical, Ltd. v. Commission on Human Rights and Opportunities*, (Conn. Super.), 10 Conn. L. Rptr. 599, January 27, 1994 (Maloney, J.). The complaint alleged a violation of General Statutes § 46a-60(a)(1) and the commission's hearing officer held that "the [respondent] had a duty to investigate reasonable accommodations for [complainant], but did not do so." The respondent employer appealed to the superior court. Judge Maloney refers first to the duty to make reasonable accommodations under the federal law and concludes by affirming the hearing officer's decision that the respondent had a duty to make reasonable accommodations under the state law.

The record does not provide enough clarification of efforts that the City made to determine whether a reasonable accommodation would qualify the complainant for the position or what, if any, reasonable accommodations were suggested by the City. Both the complainant and the commission strongly argue that he could perform duties of New Britain police officer, with or without reasonable accommodations.

Both the complainant and the commission have contested the City's claim that he was not qualified for the position of New Britain police officer. The report of the complainant's doctor also supports his claim. A determination of whether the complainant is "physical disabled" requires more evidence. This is especially true when I am required to view the evidence in the light most favorable to the non-moving parties, the complainant and the commission. Therefore, there are genuine issues of material fact present in this case which require a public hearing to resolve.

(4) The complainant suffered an adverse employment action.

The City has admitted that it did not allow the complainant to enter into the police academy training course because of the complainant's ankle condition. Therefore, the complainant has suffered an adverse employment action.

C. The analysis under the ADA and Section 504

The City argues that the burden of proof to establish a prima facie case is the same for both the federal and the state law. This is not correct. The burden of proof for a complainant to make a claim pursuant to the ADA and Section 504 is different than the burden the complainant has pursuant to state law. To establish a prima facie case, under the ADA or Section 504, the complainant must prove the following:

> "Under the ADA or Section 504, a plaintiff may establish a prima facie case by showing that: (1) he has a "disability" within the meaning of the statute; (2) his employer is covered by the statute and had notice of the individual's disability; (3) he could perform the essential functions of the job he applied for, with or without reasonable accommodations, and (4) he was subject to an adverse employment action because of his disability or his employer refused to make reasonable accommodations." (citations omitted)

Worthington v. City of New Haven, 1999 WL 9588627 *5 (D. Connl.).

The City argues that the complainant has failed to demonstrate sufficient facts to establish that he has a disability within the meaning of the ADA. The City further argues that his impairment substantially limits only one of his major life activities. Both the complainant and the commission have contested the

respondent's allegations that the complainant was not disabled under the ADA or Section 504. Therefore, there are genuine issues of material facts as to the disability issue.

The second element of a prima facie case is whether the City is covered by the statute and had notice of his disability. Municipalities, such as the City are covered under the ADA as long as they have three (3) employees or more. The City has more than three employees. It is clear from all material in the file that the City had notice of the complainant's disability. Finally, the City is not arguing that it is not subject of the ADA or that it did not receive notice of his disability from the complainant.

As to the third element, of a prima facie case, both the complainant and the commission argue that he could perform the essential functions of the police officer position with or without reasonable accommodations. The City argues that the complainant cannot perform the essentials functions of the job. Therefore, there are genuine issues of material fact as to this issue as well.

The final element is whether he was subject to an adverse employment action because of his disability or whether his employer refused to make reasonable accommodations. The commission argues that because he did not enter the police officer training course, the complainant did suffer an adverse employment action. On the issue of reasonable accommodation, both the complainant and the commission argue that the City did not attempt to reasonably accommodate the complainant's disability or, indeed, to engage the

complainant in a discussion concerning what reasonable accommodations the complainant was seeking.

In its motion, the City does not address whether the complainant was subject to an adverse employment action, the issue of reasonable accommodations for the complainant's disability or whether it engaged in an "interactive discussion" with the complainant on the issue of reasonable accommodations. This leaves the assertions of the complainant and the commission on these issues uncontested by the City. Therefore, both the complainant and the commission have proffered enough evidence to establish a prima facie case on these issues. This is especially true given the fact that I am required to draw inferences against the City as the moving party. In a motion for summary judgment I must view the evidence in the light most favorable to the non-moving parties, i.e., the complainant and the commission.

Finally, there are a plethora of federal cases that hold that the disability determination in ADA cases "demands an individualized fact specific analysis." *Worthington,* supra,*7. In a recent United States Supreme Court decision styled *Toyota Motor Mfg., Inc. v. Williams,* 534 U.S. 184 (2002) the court held that whether an individual has a disability must be determined on a case-by-case basis and that an individualized assessment is especially necessary with impairments such as carpal tunnel syndrome where the symptoms vary widely. Therefore, there are genuine issues of material fact, under the ADA and Section 504 that need to be resolved at the public hearing.

D. The statute of limitations

The final issue I must deal with is the City's argument that the complaint must be dismissed because it has not been filed within 180 days of the discriminatory act. In relevant part, §46a-82(e) states "…Any complaint filed pursuant to this section must be filed within 180-days after the alleged act of discrimination…" The City argues because the complainant failed to file his complaint within the mandatory 180 days, the CHRO does not have jurisdiction to entertain the complaint and the complaint should be dismissed. Section 46a-54-88a(d) of the Regulations of Connecticut State Agencies provides that a "presiding officer may, on his or her own, or upon motion by a party, dismiss a complaint or portion thereof if the complainant or the commission: (1) fails to establish jurisdiction; (2) fails to state a claim for which relief can be granted; (3) fails to appear for a lawfully noticed conference or hearing without good cause, or (4) fails to sustain his or her burden after presentation of the evidence. Thus, the City's claim of lack of timeliness falls within the purview of §46a-54-88a(d)(1). This jurisdiction issue is the proper subject matter of a motion to dismiss.

The complainant, in his opposition to the City's motion, argues that he filed his complaint within 180-days of the initial indication by the City, on September 12, 2001, of its intent to reject his application for the police officer position. The commission argues that the City never notified the complainant in writing that he was disqualified from training for the position. The commission also argues that the City's failure to act on the complainant's ankle status continued until the

complainant's eligibility list ended in December of 2001. The complainant filed his complaint on March 4, 2002, within 180-days of when the eligibility list ended.

In its motion, the City has failed to provide the date of the discriminatory act, or adverse employment action, from which it claims the 180-days should run. Since the city is claiming that the complaint is untimely, the City is obligated to inform me of the date it believes the adverse employment act occurred so I can calculate when the 180-days began to run. Both the complainant and the commission have given different dates for the discriminatory act. Therefore, I am denying the City's request to dismiss the compliant because the City failed to provide me with the date of the discriminatory act, which is an essential element of its argument.

V. Conclusion

For reasons set forth herein, the City's motion to dismiss is DENIED.