



**In the Matter of:**

**OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS,  
UNITED STATES DEPARTMENT  
OF LABOR,**

**ARB CASE NO. 97-039**

**ALJ CASE NO. 94-OFC-11**

**DATE: August 30, 1999**

**PLAINTIFF**

**v.**

**GOODYEAR TIRE & RUBBER CO.,**

**DEFENDANT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

James D. Henry, Esq., Heidi Dalzell-Finger, Esq., Debra A. Millenson, Esq.,  
*U.S. Department of Labor, Washington, D.C.*

*For the Respondent:*

William N. Ozier, Esq., Tim K. Garrett, Esq., *Bass, Berry & Sims PLC,*  
*Nashville, Tennessee*

**FINAL DECISION AND ORDER**

This case arises under Section 503 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. §793 (1988). The events giving rise to this case occurred in 1989. At that time, Section 503 required covered Federal contractors to “take affirmative action to employ and advance in employment qualified individuals with handicaps.”<sup>1/</sup>

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<sup>1/</sup> The Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4334 (Oct. 29, 1992), amended the Rehabilitation Act of 1973, 29 U.S.C. §701-797b, substituting the term “individuals with disabilities” for “individuals with handicaps.” Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101-12117 (1994) also addresses “disabilities,” which “represents an effort by [Congress] to make use of up-to-date, currently accepted terminology.” S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 50-51 (1990). The revision does not reflect a change in definition or substance. *Id.* In this decision we will use the terms “disabilities” and “handicaps” interchangeably.

Gary White was hired as a tire builder by Respondent, Goodyear Tire & Rubber Company (Goodyear), in 1989. During the probationary period, Goodyear discharged White because he did not meet the production standards for the job. White filed a complaint with the Department of Labor, contending that his discharge violated Section 503's affirmative action requirement.

The Department's Office of Federal Contract Compliance Programs (OFCCP) investigated White's complaint and attempted to negotiate a consent decree settling that complaint. The negotiations ultimately proved fruitless, and OFCCP filed this administrative complaint against Goodyear in 1994.

An Administrative Law Judge (ALJ) held a five-day hearing on OFCCP's complaint. In 1997, the ALJ issued a Recommended Decision and Order (RD&O) dismissing the complaint. OFCCP filed exceptions to the RD&O, and this Board asserted jurisdiction. This is the final administrative decision on OFCCP's complaint.

## ISSUES PRESENTED

This case presents the issue whether White is an "individual with handicaps" within the meaning of Section 503, and if so, whether Goodyear knew of White's current disabilities at the time of his employment.

## BACKGROUND

### I. Facts

Goodyear operates a large tire building factory in Union City, Tennessee. Administrative Law Judge Exhibit (ALJX) 1 at ¶3; RD&O at 28. Goodyear was a "covered government contractor" under Section 503 at the time the issues in this case arose.<sup>2</sup> Plaintiff's Exhibit (PX) 7 at 1; RD&O at 28.

White applied for a full-time tire production job at Goodyear's Union City facility in March 1984. Hearing Transcript (T.) 103-04; PX 9; RD&O at 28. He was not hired at the time. T. 104; RD&O at 28. Goodyear usually considered applications to be active only for 90 days unless the applicant took some action to keep his application under consideration beyond that time. T. 627; RD&O at 28. However, at the time White applied to work at Goodyear, thousands of people had

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<sup>2</sup> At the outset of this case, Goodyear admitted that "[a]t all times since January 1, 1989, Goodyear's Union City, Tennessee facility has employed individuals as tire builders to carry out its contracts with the Federal Government." PX 7, No. 1. Based on this admission, the ALJ concluded that White was an employee covered by Section 503 of the Act. Whether this admission was sufficient as a matter of law to establish that White was a covered employee is a matter of some uncertainty as a result of actions the Department of Labor took in response to *Washington Metropolitan Area Transit Authority v. DeArment*, 55 Empl. Prac. Dec. ¶40,507, 1991 WL 18516 (D. D.C. 1991). However, as Goodyear has not called into question whether White was a covered employee, we deem the matter to be waived.

waited in line for hours or even days at the Tennessee Department of Employment Security to apply for Goodyear positions. T. 627-28. RD&O at 28. The company did not hire as many applicants as it had expected, and it decided to send the March 1984 applicants periodic renewal forms to permit them to keep their applications active. T. 628; RD&O at 29. White responded to each notice, indicating that he wished his application to remain active because he still desired to be employed at Goodyear. PX 11.

White sustained a serious head injury in a 1986 automobile accident. T. 75-77; RD&O at 29. He had two surgeries to relieve brain swelling and underwent approximately two years of therapy and recovery thereafter. T. 81-82, 92-97; RD&O at 29. During the rehabilitation period, either White or a member of his family responded to Goodyear's periodic notices in order to keep White's application active. PX 11; RD&O at 29.

Goodyear informed White in June 1987 that he had been scheduled for a job interview. PX 12; RD&O at 29. White telephoned Goodyear's EEO Manager, Richard Johnson, to explain that he could not attend an interview because he was under a doctor's care following an auto accident. T. 105-06; RD&O at 29. Johnson asked White to send medical documentation. *Id.* White promptly sent Johnson a letter from his physician, Dr. James Givens, explaining that White was undergoing rehabilitation therapy. T. 106-07; PX 13; RD&O at 29.

After completing his rehabilitation in May 1988, White sent Johnson a release signed by Dr. Givens that allowed White to assume his occupational duties without any restrictions. T. 107; PX 14; RD&O at 29-30. In response to receiving the doctor's release, Johnson reviewed White's application and discovered that he had failed to keep his application current. PX 15; RD&O at 30. Johnson then told White that his application had expired.<sup>3/</sup> *Id.*

White's brother, attorney Michael White, then wrote a letter to state Representative John Tanner seeking his assistance in encouraging Goodyear to hire Gary White. PX 16; RD&O at 30. In the letter to Rep. Tanner, Michael White stated that Gary White had been in an accident, undergone rehabilitation, and "has regained all of his past skills. His intelligence is as sharp as it ever was . . . ." PX 16 at 1. The letter went on to state that Gary White had suffered an injury to the hypothalamic area of the brain, which caused him to gain an excess amount of weight, but that his weight "is not a health factor." *Id.* Nevertheless, Michael White also stated that "Gary would qualify and classify under Goodyear's Government Handicap Affirmative Action Program." PX 16 at 2.

Tanner in turn wrote to Johnson's superior at Goodyear, enclosing a copy of Michael White's letter, and asking that White be considered for employment. PX 17; RD&O at 30. Tanner also enclosed a copy of Gary White's resume, which stated that his health was good. Defendant's Exhibit (DX) 8; RD&O at 30. White intended his resume to represent that there were no restrictions on his ability to work. T. 150; RD&O at 30.

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<sup>3/</sup> White believed that at some time during his rehabilitation, Goodyear may have failed to send a renewal form to him. T. 110-11.

Thereafter, evidently in response to Tanner's letter, Johnson sent White another application for employment at Goodyear, which White completed and returned promptly. T. 631; PX 20; RD&O at 30-31. Six months later, in February 1989, White received a letter from Goodyear scheduling him for an employment interview. T. 112-13; RD&O at 31.

Three Goodyear employees interviewed White and asked him five out of fifteen approved questions, as they did for all applicants. T. 581-82; RD&O at 31. White stated that he knew of no reason that would prevent him from performing any job in the factory. T. 115; PX 30 (Question 11); RD&O at 31. At trial, White did not recall mentioning to the interviewers that he had been in an auto accident or that he had sustained a brain injury. T. 116; RD&O at 31. The interviewers rated White highly and expressed no reservations about his working at Goodyear. T. 657; RD&O at 31.

After the interview, White had a standard pre-employment physical. PX 7 at 5; T. 116; RD&O at 31. He filled out a medical questionnaire in which he answered "yes" to questions whether he had ever sustained a head injury, had surgical operations, been hospitalized, or filed a workers' compensation claim. PX 21; RD&O at 31. Although the questionnaire requested an explanation for any affirmative answers, White provided none. *Id.* The examining physician determined that there were no restrictions on White's employment. *Id.*

Goodyear hired White to begin work as a tire builder on March 20, 1989. PX 7 at 5; RD&O at 32. Johnson placed White in the tire builder job because the majority of the plant's openings were in that position and he considered White an excellent candidate because of his large size.<sup>4/</sup> T. 637, 657; RD&O at 32. Tire builders are piece work operators who determine the rate at which they work. T. 717; RD&O at 32. It is the best paying production job at the Goodyear plant because the income can be great if the operator works at a high rate of speed. T. 657-58; RD&O at 32. Johnson had no medical information that there were any restrictions on White's work. T. 647-48; RD&O at 32.

All new employees received a copy of Goodyear's policy for the employment of the handicapped. T. 649; PX 27; RD&O at 32. The policy statement invites "handicapped employees to make themselves known to the employer on a voluntary basis." PX 27; RD&O at 32. White did not tell anyone at Goodyear that he had a disability. T. 152-53, 650; RD&O at 32.

At Goodyear the probationary period for new employees is 30 working days. DX 9; RD&O at 32-33. The company's policies for probationary production employees were developed as part of a 1982 consent decree entered into by Goodyear and the Equal Employment Opportunity Commission (EEOC). T. 640, 644; DX 7; RD&O at 33. The EEOC had filed a lawsuit against Goodyear alleging sex discrimination in employment after Goodyear discharged three female tire builders because they did not meet the production standards during the probationary period. T. 667-69; RD&O at 33. At the same time the female workers were discharged, Goodyear transferred a male tire builder to another position when he also failed to meet the production standards during the probationary period. T. 668-69; RD&O at 33. The male employee was transferred (rather than discharged) because he had dyslexia and claimed that this condition precluded him from meeting the

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<sup>4/</sup> White's vocational goal was to be a tire builder. T. 151-52; PX 40.

production standards. *Id.* However, because Goodyear had no medical documentation supporting the claim of dyslexia, the EEOC took the position that the male employee was not a qualified handicapped individual, but rather had received preferential treatment not offered to the female employees. T. 669; RD&O at 33. As a result of the consent decree, Goodyear adopted a policy requiring medical substantiation to document an employee's claim of disability. T. 670-71; RD&O at 33. The policy requiring medical substantiation was still in effect at the time of White's employment. T. 644; RD&O at 33.

The training period for the Code 2 tire builder job to which White was assigned is 12 weeks. T. 722; RD&O at 33. The first week consists of classroom training. The second week includes additional classroom training and observing tire building on the production floor. T. 723-24; DX 9; RD&O at 33. During the third through fifth weeks, trainees build tires under the direction and supervision of a trainer. T. 724; RD&O at 33. Trainees must meet increasing production standards each week. T. 725-26; RD&O at 33. Failure to meet the production standards results in "probationary release" of the employee for unsatisfactory work performance. DX 6, 9; RD&O at 33-34.

During White's second week on the job, a labor trainer informed the training coordinator, Karen Baker, that White was not following instructions, was wandering away from his machine, and could not remember well the instructions he received. T. 730-31, 752; RD&O at 34. Baker instructed White not to wander outside of his work area and emphasized that he must follow his trainer's instructions. T. 752; RD&O at 34. Baker asked White if he had any problems and whether she could do anything to assist him. T. 545, 752. White answered that he would perform better when he could work on his own. *Id.*; RD&O at 34. Although White told Baker that he had been in an auto accident, T. 737, 750, she did not consider the accident "significant as a possible explanation as to why he could not" do the job. T. 753.

During his third week of employment White began to build tires himself. However, he did not meet the production standards for the tire builder job. T. 735-36. During that week he achieved a rating of 29.3 percent against a standard of 30 percent. PX 33; 34; RD&O at 34. Baker spoke with White about his failure to meet the standards. T. 736; RD&O at 34. Baker asked White if there was anything she could do to assist him. T. 745. Again, White did not mention any physical or mental disabilities that were causing performance problems. *Id.*; RD&O at 34. White stated that he was slow but he would do better. *Id.*

Goodyear routinely assigns labor trainers to work with a small group of tire builder trainees. T. 724. In view of his slow rate of production, during White's fourth week Baker assigned an assistant labor trainer, Dennis Montgomery, to work exclusively with White to assist him in meeting the production standards. T. 734; RD&O at 34. Montgomery, who spent five to six hours per day with White, noticed that White had certain problems performing the tire builder job and advised him daily that he was not meeting the production standards. T. 758-60; RD&O at 34. White told Montgomery about his prior automobile accident, surgeries, and rehabilitation. T. 764-65; RD&O at 35. Montgomery, who was not a management employee, assumed that White's poor performance was related to the old injury, but he did not tell anyone else about this assumption. T. 770.

Notwithstanding the assistance of a labor trainer, White did not meet the production standards. RD&O at 35. He achieved 30.9 percent against a standard of 42 percent in week four. PX 33; 34. During the first two days of week five, he achieved 25 percent and 17 percent, respectively, against a standard of 52 percent. PX 34; RD&O at 34.

In the fifth week, Baker recommended that White be given a “probationary release.” T. 741-42; RD&O at 35. Johnson concurred and Goodyear discharged White on April 18, 1989. T. 742; RD&O 35. At the meeting in which Goodyear officials informed White about his probationary release, White did not mention that he had any particular problems. T. 159; RD&O at 35. Indeed, White did not recall ever telling anyone at Goodyear that he had any mental or physical impairments. T. 160.

White’s complaint to the Department of Labor ensued.

## **II. Statutory and Regulatory Background**

### **A. The Statute and Regulations In Effect in 1989 Apply to This Case.**

Before addressing the merits of this case we must determine what law applies. This is a case brought under Section 503 of the Rehabilitation Act, which prohibits employment discrimination on account of disability by federal contractors. The adverse employment action at issue here occurred in 1989, but OFCCP’s complaint was filed in 1994. Between 1989 and 1994, the law relevant to employment discrimination claims based on disability changed in several respects. The Rehabilitation Act was amended in 1992 in ways material to this case. The Americans with Disabilities Act (ADA) was promulgated in 1990 and went into effect in July 1992. 42 U.S.C.A. §§12101, 12111 note - Effective Date (1999).

Neither the 1992 amendments to the Rehabilitation Act nor the ADA apply to employment decisions made prior to their respective effective dates in 1992. Statutes are presumed to be prospective. Only clear evidence that Congress intended otherwise can overcome that presumption. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308-09, 313 (1994); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There is no clear evidence that Congress intended the 1992 Rehabilitation Act amendments or the ADA to have retrospective effect. Thus the presumption against retroactivity is determinative.

With respect to the ADA in particular, the two-year delayed effective date is strong evidence that Congress intended the statute to apply only after affected entities had an opportunity to conform their conduct to the newly enacted norms. *Cf.*, *Martin v. Southwestern Va. Gas Co.*, 135 F.3d 307, 309 (4th Cir. 1998) (ADA not retroactive); *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047, 1049 (7th Cir. 1997) (same); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) (same); *Smith v. UPS*, 65 F.3d 266 (2d Cir. 1995); *O’Bryant v. City of Midland*, 9 F.3d 421 (5th Cir. 1993). And, of course, when the statute is not retroactive, neither are the implementing regulations. *OFCCP v. Burlington Northern, Inc.*, Case No. 80-OFCCP-6, Ass’t Sec. Final Dec. and Order of Dismissal, Dec. 11, 1991, slip op. at 11 (regulations implementing Section 503 are not retroactive).

Despite the sequential nature of the relevant statutory developments and the presumption against statutory retroactivity, the ADA, the Rehabilitation Act, and the amendments to the Rehabilitation Act intermingle and sometimes affect litigation arising out of employment decisions made prior to 1992. This is in part because the ADA was modeled on the Rehabilitation Act, and Congress specifically commanded that the ADA be applied in a manner at least as protective as the Rehabilitation Act. 42 U.S.C. §11217(b) (1994) (ADA); see also 29 U.S.C. §793(e) (Rehabilitation Act). Consequently, important tenets of the Rehabilitation Act – for example, that an individual with disabilities is “substantially limited in a major life activity” – are carried over into the ADA.

The intermingling is due in part to the fact that decisional law, unlike statutes, is always retrospective. *Rivers*, 511 U.S. at 311; *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule”). Thus, when a shared tenet such as “substantially limited in a major life activity” is litigated and refined in a post-1992 ADA case, the reasoning of that case may become applicable to a pre-1992 Rehabilitation Act case that has not yet been decided finally.

Yet further intermingling can occur when an ADA-Rehabilitation Act tenet arises under Section 501 (prohibition on discrimination by federal agencies, 29 U.S.C. §791) and Section 504 (prohibition on discrimination by federal grantees, 29 U.S.C. §794) of the Rehabilitation Act. See, e.g., *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1098 (D. Haw. 1980) (in a case arising under Section 503, discussing Supreme Court decision under Section 504 on the definition of “handicapped individual”). Again, decisional law under one of the other Rehabilitation Act provisions can influence ADA and Section 503 cases, and can do that even as to cases arising prior to 1992. Thus, on core concepts such as “qualified handicapped individual,” “substantially limited in a major life activity,” and “reasonable accommodation,” the decisional law under the ADA and under Sections 501, 503, and 504 of the Rehabilitation Act often is interchangeable.

Accordingly, the statutory text of the Rehabilitation Act as it existed in 1989, together with the implementing regulations then in effect, applies to this case. The text of the ADA does not apply. However, decisional law from any time period under either statute that concerns shared core tenets may be applicable to this case. EEOC guidance under the ADA is also sometimes applicable to the Rehabilitation Act.<sup>5/</sup> See 41 C.F.R. Part 60-741, Appendix A (1998) (Department of Labor guidelines under the Rehabilitation Act on duty to provide reasonable accommodation are “in large part derived from, and are consistent with” EEOC guidelines on that duty; EEOC guidance may be relied upon for purposes of interpreting the Rehabilitation Act’s parallel duty of reasonable accommodation).

## **B. The Statutory and Regulatory Scheme in 1989**

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<sup>5/</sup> The three anti-discrimination provisions of the Rehabilitation Act and the ADA are different in important respects not relevant to this case. For example, it is clear that the ADA and Section 504, authorize private rights of action; the circuits are split as to whether Section 503 does. Thus, there can be no wholesale intermingling of the law of the ADA and the Rehabilitation Act.

In 1989, Section 503 required covered government contractors to take affirmative action to employ “qualified individuals with handicaps.” 29 U.S.C. §793 (1988). The Rehabilitation Act defined “handicapped individual” as “any 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) (1988). The regulations provided further that a “handicapped individual is ‘substantially limited’ if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.” 41 C.F.R. §60-741.2 (1989). *See also* 41 C.F.R. Part 60-741, Appendix A –“Guidelines on the application of the Definition of Handicapped Individual” (1989). Further, a “qualified handicapped individual . . . is capable of performing a particular job, with reasonable accommodation to his or her handicap.” 41 C.F.R. §60-741.2 (1989).

The regulations provided that a contractor has a duty to provide an accommodation to an applicant or employee with a known handicap. The regulations stated, at 41 C.F.R. §60-741.5 (1989):

(c)(1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. \* \* \* If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation. \* \* \*

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the [affirmative action] program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has actual knowledge: *Provided*, That the contractor is not obligated to search the medical files of any applicant or employee to determine the existence of a handicap.

As for enforcement of the affirmative action requirement and duty of accommodation, Section 503 authorized “any individual with handicaps” who “believes any contractor has failed . . . to comply with the provisions of a contract with the United States, relating to employment of individuals with handicaps” to file a complaint with the Department of Labor. 29 U.S.C. §793(b) (1988).

### **III. The ALJ’s Recommended Decision**

On the merits of the Section 503 claim, the ALJ found that OFCCP did not establish that White is a qualified handicapped individual because it did not show that White is substantially limited in employment:

OFCCP has not shown that White is disqualified from manufacturing jobs within the relevant geographical area. At best, the OFCCP has shown that White is disqualified from performing (without accommodation) approximately ten of the hundreds of manufacturing jobs at the Goodyear plant . . . There is simply no evidence regarding whether White could perform all or any portion of the other hundreds of jobs at Goodyear, or the hundreds of other manufacturing jobs in the local economy.

RD&O at 47.

Even assuming, for the sake of argument, that White was a qualified handicapped individual, the ALJ found that Goodyear did not know about White's disability, and therefore the company had no duty to accommodate the disability. RD&O at 49. The ALJ noted that it is the responsibility of the individual to inform the employer that an accommodation is needed, and White did not inform Goodyear. RD&O at 50-51. The ALJ rejected the testimony that persons other than White had informed Goodyear about his brain injury and disability, and instead credited only White's testimony that he did not mention having "any alleged impairment" to anyone at Goodyear prior to his discharge. RD&O at 51. The ALJ found that Goodyear correctly did not assume that White's automobile accident had caused a disability because the assumption itself would have violated the Rehabilitation Act and also would have violated the Goodyear-EEOC consent decree requiring medical documentation for any disability. RD&O at 52.

Finally, the ALJ found that, upon learning that White was not meeting the production standards, Goodyear provided a "reasonable accommodation" when it assigned an assistant labor trainer to work directly with him. RD&O at 53, 55. The ALJ also concluded that under the applicable collective bargaining agreement, Goodyear had no obligation to transfer or reassign White. RD&O at 55. Therefore, the ALJ found that Goodyear had not violated Section 503 and dismissed the complaint. RD&O at 56.<sup>6/</sup>

## DISCUSSION

### I. Standard of Review

The regulations governing adjudications by the Department of Labor's Office of Administrative Law Judges provide that, "[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554." 41 C.F.R. §18.26 (1997). The Rehabilitation Act and the regulations are silent concerning the

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<sup>6/</sup> Before the ALJ, Goodyear contended that OFCCP could not claim in this case that White was protected under Section 503 of the Rehabilitation Act because White had been found to be totally disabled for the purposes of obtaining social security benefits. The ALJ disagreed and held that judicial estoppel did not bar this Section 503 proceeding because OFCCP was not a party to the social security case. RD&O at 43. Goodyear did not file an exception to the ALJ's ruling on estoppel and therefore the issue is not before us.

burden of proof to be applied in Section 503 enforcement cases. Accordingly, the burden of proof required by the APA governs Section 503 enforcement cases.

The APA standard of proof “is the traditional preponderance-of-the-evidence standard.” *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (construing the provision at 5 U.S.C. §556(d) that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (reaffirming *Steadman*). Evidence meets the preponderance of the evidence standard when it is more likely than not that a certain proposition is true. *E.g.*, *United States v. Gibbs*, 174 F.3d 762, 799 (6th Cir. 1999) (“the district court could find, under the preponderance of the evidence standard, that it is more likely than not that Needum obtained the drugs from Curtis’s apartment . . .”).

In reviewing an ALJ decision under Section 503 of the Rehabilitation Act, the Board is not bound by the ALJ’s decision, but rather retains complete freedom of decision:

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision, as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. [citation omitted] Similarly, the third sentence of section [557(b)] provides that “On appeal from or review of the initial decisions of such [hearing] officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.”

Att’y Gen. Manual on the Administrative Procedure Act, Chap. VII §8 pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (same).

## **II. White is Substantially Limited in the Major Life Activity of Employment.**

OFCCP takes exception to the ALJ’s finding that White is not substantially limited in the major life activity of employment.<sup>27</sup> Exceptions (Excep.) at 16. Citing *E.E. Black v. Marshall, supra*, an early case under the Rehabilitation Act, OFCCP contends that we must examine on a case by case basis whether an individual’s impairment substantially limits a major life activity. We proceed to that examination now.

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<sup>27</sup> There is no dispute that White is not substantially limited in any other major life activities. OFCCP expert witnesses testified that White is not limited in his ability to communicate, to ambulate, to care for himself, to socialize, to transport himself, or to house and feed himself. T. 289-90; 520-21. *See* 41 C.F.R. Part 60-741, Appendix A (1989): “‘Life activities’ may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.”

In the *E.E. Black* case, the district court fashioned a test for establishing whether an individual is substantially limited in working: “[a] person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities.” 497 F.Supp. at 1099. We believe this test leads to a fair result. As the court noted in *E.E. Black*, “a person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist’s job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger.” *Id.*<sup>8/</sup>

In the *E.E. Black* decision, the judge announced several factors to be considered in determining whether a person is disqualified from employment: the number and types of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual’s job expectations and training. 497 F.Supp. at 1100-01. *See also Byrne v. Board of Education, School of West Allis-West Milwaukee*, 979 F.2d 560, 564 (7th Cir. 1992) (under Section 504 of the Rehabilitation Act); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985) (under Section 504); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) (under Section 501). The *E.E. Black* court concluded:

If an individual were disqualified from the same or similar jobs offered by employers throughout the area to which he had reasonable access, then his impairment or perceived impairment would have to be considered as resulting in a substantial handicap to employment.

\* \* \*

Certainly, if an applicant were disqualified from an entire field, there would be a substantial handicap to employment. But, questions as to subfields and the like must be answered on a case-by-case basis, after examining all the factors discussed above.

497 F.Supp. at 1101-02. *See also Forrisi*, 794 F.2d at 934 (the test is whether the employee’s impairment “foreclose[s] generally the type of employment involved”).

Employers need not be concerned that applying this test of disqualification from employment will expand their liability under the Rehabilitation Act. Where a person is disqualified only from one particular position, but still is able to work in many, if not most, other positions in his chosen field, the employee is not substantially limited in working. *See, e.g., Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139, 2150-51 (1999), *Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 26 (1st Cir. 1993); *Forrisi*, 794 F.2d at 934; *McKay v. Toyota Mfg. Co.*,

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<sup>8/</sup> Even after the passage of the ADA and the 1992 revisions to the Rehabilitation Act, the test of disqualification from employment in one’s chosen field remains valid. *See, e.g., Cochrum v. Old Ben Coal Co.*, 102 F.2d 908, 911 (7th Cir. 1996) (under the ADA, the court reversed a grant of summary judgment to the employer because the plaintiff’s shoulder injury, which restricted him from overhead work, heavy lifting, or pushing or pulling out from his body, “could disqualify him from any position” in his chosen field, coal mining, or in related construction work).

110 F.3d 369, 372 (6th Cir. 1997); *Byrne*, 979 F.2d at 565; *Helfter v. United Parcel Svc.*, 115 F.3d 613, 617 (8th Cir. 1997); *Welsh v. City of Tulsa*, 997 F.2d 1415, 1419 (10th Cir. 1992).

Turning to the facts of this case, we examine first White's job expectations and training. There is no dispute that White identified working at Goodyear, and particularly in the tire builder position, as his vocational goal. T. 151-52; PX 40. Although White had no prior experience or training in manufacturing, PX 20, the tire builder job did not require prior, similar work experience, as the hiring of White and the position's lengthy training period indicate. Moreover, White, who recently had finished his education, did not have a lengthy work history in any field. For these reasons, we find that White's chosen field was manufacturing.

Disqualification from only the tire builder job is not sufficient to show that White is substantially limited in working. *See Cook* and the other cases cited above. Therefore, we will examine the evidence concerning White's disability to ascertain whether he was disqualified generally from positions in manufacturing (the number and types of job factor).

White's impairment began with a brain injury caused by an auto accident. Neuropsychologist Charles Long examined White and concluded in 1995, well after White's accident, therapy, and rehabilitation, that he still had several impairments from that injury:

While [White] is functioning within the normal range on some functions, he remains impaired on psychosensory functions with the right hand, [and has] difficulty with psychomotor functions with the right hand, difficulty with integrative functions requiring manipulation of objects, and delayed memory. Reaction time testing indicates that Mr. White's speed of processing is slow.

PX 46 at 1.<sup>2/</sup> Long further found that White was functioning "within the average range of intelligence," "within the average range for short-term memory abilities," and that "long-term memory abilities are in the mildly impaired range." *Id.* Dr. Long concluded as to White: "Particular areas of deficit relate to psychosensory functions with the right hand, motor sequencing with the right hand, complex integrative functions using his hands, delayed recall, and information processing." *Id.* at 3.

OFCCP's evidence also addressed White's ability to perform jobs other than tire builder. Expert witness Dr. Erich Prien, a psychologist, visited Goodyear's Union City plant on behalf of

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<sup>2/</sup> Dr. Long evaluated White in 1986, shortly after the accident, and again in 1995, more than eight years post-accident. Concerning White's status and abilities in 1989 (the time of his employment at Goodyear), Dr. Long stated that in light of the nature of White's brain injury, "in all probability, his cognitive functions in those intervening years, two years after his injury, 1988, 1989, are going to be about the same as the level of performance we got in 1995." T. 262. *See also* PX 46 at 3 ("Maximal recovery would be expected to require approximately 24 months for individuals of his age group, and residual weaknesses are likely to remain.").

OFCCP and observed, videotaped, and analyzed 20 manufacturing jobs there.<sup>10/</sup> See PX 52. Dr. Long, who twice evaluated White's impairments, worked with Prien to identify which of the observed jobs White was capable of performing without accommodation. T. 320. Of the 20 jobs analyzed, Dr. Prien found that White would be able to perform only five without some form of accommodation. T. 330; PX 52 at 25-26, 29-30. Thus, according to Prien, the other 15 jobs would require some accommodation in order for White to perform them. T. 330; PX 52 at 33.

OFCCP's evidence was not limited to jobs at Goodyear. Rather, based upon his testing and evaluations, Dr. Long testified that White would have difficulty with any work that required meeting production quotas or keeping up with the speed of an assembly line, the types of jobs found in many manufacturing environments. T. 269.

Another expert, vocational evaluator Carole Barnes, agreed with Long's evaluation. Barnes also tested White in 1995 and found that he fell below industry standards on tests for repetitive physical manipulation, size discrimination, upper extremity range of motion, manual multi-level sorting, simulated assembly, and eye-hand-foot coordination. T. 470-77; PX 50 at 310-313. Based on observing 17 jobs at the Goodyear plant and on testing White, Barnes concluded that he could successfully perform only two of the 17 jobs. T. 487; PX 50 at 316.

Turning to the question of employment in general, Barnes concluded that White could not work successfully in assembly type jobs involving fine motor skills and hand coordination, such as where he had to put parts together at a productive pace, including piece work. T. 471-72, 503. Barnes found, however, that White was qualified to perform other jobs in industrial settings, such as material handling and quality control or inspector positions. T. 503. Barnes also testified that in the relevant geographic area there were other major manufacturers' facilities similar to Goodyear's Union City plant, including another tire manufacturer, a poultry processor, and a manufacturer of air compressors. T. 517-18.<sup>11/</sup>

Under the analyses of Prien, Long and Barnes, White was disqualified from performing assembly tasks requiring speed, manual dexterity or piecework with production standards, but he was qualified to perform certain other jobs in manufacturing such as quality control and material handling. Neither Dr. Long nor Ms. Barnes limited their assessment of White's abilities to jobs at Goodyear; both testified that White was disqualified from certain types of jobs no matter what the

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<sup>10/</sup> OFCCP states that Prien analyzed 20 separate jobs, but Goodyear states that he analyzed only 17 different jobs. The difference is not material to our analysis.

<sup>11/</sup> Johnson, Goodyear's EEO Manager, also named a number of large manufacturing plants in the geographic area. T. 676-79. OFCCP introduced census data showing that 60 percent of the positions in Obion County (which includes Union City, the site of Goodyear's plant, were "precision production, craft, and repair occupations," consisting of "mechanics and repairers, construction trades, and precision production occupations," and "operators, fabricators, and laborers," consisting of "machine operators and tenders, except precision; fabricators, assemblers, inspectors, and samplers; transportation occupations; handlers, equipment cleaners, helpers, and laborers." PX 64.

industry. Thus, we disagree with the ALJ's statement that "[t]here simply is no evidence regarding whether White could perform all or any portion of the other hundreds of jobs at Goodyear [that were not analyzed by Barnes or Prien], or the hundreds of other manufacturing jobs in the local economy." RD&O at 47.

The ALJ also found that OFCCP's evidence was deficient because it did not contain a detailed analysis of White's qualifications for any specific manufacturing jobs other than the Goodyear jobs that were analyzed:

There is no evidence from which the Court can infer that, since White apparently would need accommodation in approximately two-thirds of the jobs examined, the same ratios would apply to all manufacturing jobs at the Goodyear plant or in the relevant geographical area. Such speculation would be inappropriate, especially given the detailed analysis which Dr. Prien applied to the jobs which he examined and the lack of any such detailed analysis for any other jobs.

RD&O at 48.

The ALJ's requirement that the complainant must provide a detailed analysis of many (or even some) of the other manufacturing jobs in the area is too onerous.<sup>12/</sup> Requiring such a substantial evidentiary burden would make proof of substantial limitation in working excessively complicated. In keeping with the remedial nature of the Rehabilitation Act, we decline to require a plaintiff to provide a detailed job analysis of many jobs in the employee's chosen field, as the ALJ did. Rather, we find that the testimony of Barnes and Dr. Long meets the preponderance of the evidence standard: it is more likely than not that White cannot perform, without accommodation, any assembly line and piecework manufacturing jobs requiring manual dexterity, speed, or production standards.

The preponderance of the evidence establishes that White's impairment disqualifies him from many, if not most, jobs in his chosen field, manufacturing, in the geographic area to which he had access. The testimony and reports of Drs. Long, Prien, and Ms. Barnes underscore the difficulty White would have in securing, retaining, and advancing in employment in manufacturing. Consequently, we find that White was and is substantially limited in the major life activity of employment.

This finding does not end the inquiry, however, because Goodyear's lack of knowledge of White's impairments is dispositive in this case.

### **III. The Preponderance of the Evidence Demonstrates That Goodyear Did Not Know That White Still Had Impairments At the Time**

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<sup>12/</sup> We note the very significant effort made by Drs. Prien and Long and Ms. Barnes, who analyzed 17 or 20 jobs at the Goodyear plant. *See, e.g.*, PX 52, 66-70.

## of His Employment.

The parties dispute whether Goodyear knew about White's disabilities, which were not readily apparent upon meeting and talking with him. The issue can be dispositive because an employer may not be held liable under the Rehabilitation Act for failing to accommodate an employee when it did not have knowledge of the employee's disability. *Landefeld v. Marion County General Hospital*, 994 F.2d 1178, 1181 (6th Cir. 1993) (no liability under Section 504 of the Rehabilitation Act where there is no showing that the Board members who suspended the plaintiff had any knowledge of plaintiff's mental illness); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (8th Cir. 1995) (under ADA, employee has the initial duty to inform the employer of a disability before liability may be triggered for failure to provide accommodation); *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995) (where employee falsely indicated on two occasions that she did not suffer from any physical or medical condition and did not tell anyone that she suffered from a mental impairment, employer did not know of the impairment and therefore did not violate the ADA); *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 932 (7th Cir. 1995) (employer cannot be held liable under the ADA for firing an employee when it indisputably had no knowledge of the disability).

OFCCP contends that Goodyear knew about White's disability long before employing him, and therefore it had a duty to provide a reasonable accommodation. Excep. at 26. While it is evident that Goodyear knew prior to hiring him that White had been seriously injured in an automobile accident and had required a lengthy recovery, Goodyear also had received information from several sources, including White himself, indicating that he was not impaired at the time Goodyear employed him. The question, then, is what, how, when and from whom did Goodyear "know" about White's condition. We evaluate the evidence under the preponderance of the evidence standard.<sup>13/</sup>

In 1987 there was a clear expression of White's impairment because he and his family informed Goodyear that he had been in an auto accident, was still under a doctor's care, and could not come for a job interview. PX 12; RD&O at 22-23. In addition, White's mother testified that in 1987 she informed Johnson about White's two brain surgeries and his denial of his impairments, and predicted that White would tell Goodyear that he could do any job at the plant. T. 198.<sup>14/</sup>

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<sup>13/</sup> The ALJ "rejected" the evidence presented by various witnesses that they informed Goodyear about White's disability and instead "credited" White's testimony that he did not tell anyone at Goodyear that he had an impairment. RD&O at 51. The ALJ did not state that he was discrediting the other witnesses' testimony based on their demeanor and did not give any other reason for "rejecting" their testimony. Therefore we are free to give a different weight to the other witnesses' testimony. See *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983) (contrasting exceptional weight accorded to ALJ credibility findings that rest on demeanor and lesser weight accorded to credibility findings based on other aspects of testimony, such as internal discrepancies or witness self-interest).

<sup>14/</sup> Mrs. White claimed to have sent a three page letter to Johnson, T. 197, but it is not in evidence because she did not keep a copy of it. T. 199. Johnson recalled receiving a letter from  
(continued...)

A state legislator wrote to a Goodyear official in 1998 to encourage him to hire White. PX 17. The Representative included a copy of a letter from White's brother, Michael. Michael White explained that after the accident Gary "had to relearn all of his physical skills[:] walking, writing, speech, etc." PX 16 at 1. However, he went on to state that "Gary has regained all of his past skills. His intelligence is as sharp as it ever was. . . ." *Id.* The letter also explained that Gary White had sustained an injury to the hypothalamic area of the brain that caused him to gain an excess amount of weight, although Michael White stated that Gary's weight was not a "health factor." *Id.* Notwithstanding these strong indications that Gary White had no continuing impairments, Michael White also stated, without additional explanation, that "Gary would qualify and classify under Goodyear's Government Handicap Affirmative Action Program." *Id.* at 2.

Later, in December 1988, about three months prior to White's employment at Goodyear, vocational counselor Debbie Ferguson notified two Goodyear employees, including Johnson, that her clients were disabled, discussed White's injury and rehabilitation, and stated that she was trying to help White obtain employment at Goodyear. T. 177-80; PX 59 No.1 (Response). Ferguson did not recall that she informed Goodyear about the nature or status of White's impairment. T. 180.

Notwithstanding this information implying that White could be viewed as having a disability, Goodyear also received several clear indications that White no longer was impaired after he completed his rehabilitation. The earliest was the 1988 physician's release allowing White to resume employment without any restrictions. T. 107; PX 14. Another indication was White's resume, stating that his health was good, which Goodyear also received in 1988. DX 8. And as we discussed above, Michael White's letter implied strongly that Gary was completely recovered from the effects of his brain injury, with the exception of a weight problem.

This brings us to White's February 1989 employment interview with Goodyear. Dr. Long testified that White's impairments were not obvious to most people in casual encounters. T. 255. Long explained that:

[Y]ou wouldn't know whether somebody had a memory problem unless you saw them over several periods of time or unless it was very severe and they keep asking the same thing over again. You wouldn't know whether a person had problems with manipulation and sensory processing of the right hand unless you saw them doing something related to that.

*Id.* As Dr. Long's opinion indicates, it is not surprising that the three Goodyear employees who conducted the interview with White rated him highly and expressed no concern about his working at the plant. T. 657. Apparently White did not tell the interviewers that he had been in an accident, had sustained a brain injury, or had any impairments. T. 116.

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<sup>14</sup>(...continued)

Mrs. White, although he did not recall its contents. T. 624. Mrs. White also talked with Johnson on the phone, T. 199-200, which Johnson confirmed. T. 624-26.

The next occasion for Goodyear to observe White was the standard pre-employment physical. On the medical history form, White did not provide any explanation for the notation indicating that he had experienced head injuries, surgical operations, and hospitalizations. PX 21. The examining physician did not perceive any impairments, and he cleared White for employment without any restrictions. *Id.*

White also failed to avail himself of several opportunities to volunteer the information about his impairments. The Rehabilitation Act regulations require employers to invite employees and candidates for employment to identify themselves as handicapped. 41 C.F.R. §60-741.5(c)(1) (1989).<sup>15/</sup> Goodyear gave White, like all new employees, a copy of its commitment to hire individuals with handicaps, including the invitation to “handicapped employees to make themselves known to the employer on a voluntary basis,” with a promise to keep the information confidential to the extent possible. PX 27. Nevertheless, White did not identify himself as handicapped.

White also did not self-identify as handicapped when he had trouble doing the tire builder job. On two occasions Goodyear’s training coordinator specifically asked White whether he had problems in performing the tire builder job, or if there were something she could do to help him do his job. T. 752. Although given this invitation to disclose his disability, White did not mention it to the training coordinator. Nor did White speak up at the meeting in which he was discharged. T. 159-60.

OFCCP contends that, notwithstanding the conflicting information about White’s abilities, the company should have known that his difficulties in performing the tire builder job “were related to a disabling condition.” Excep. at 31. OFCCP stresses that one of the manifestations of White’s brain injury was “to attempt to prove to others that [he] did not have weaknesses” and that he lacked an appreciation for his disabilities. Excep. at 33. However, we conclude that, based on the information Goodyear possessed at the time, a duty to inquire about the cause of White’s difficulties never arose.<sup>16/</sup>

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<sup>15/</sup> This regulation now appears at 41 C.F.R. §60-741.23(c) (1998).

<sup>16/</sup> It is not surprising that, absent self-identification by White that he was disabled, Goodyear did not make a more pointed inquiry about White’s inability to do the tire builder job. One of the aims of Section 503 is to prohibit employers from discriminating against employees who have a record of impairment. See 41 C.F.R. §60-741.2 (1989) (“‘Handicapped individual’ means any person who (1) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) *has a record of such impairment*, or (3) is regarded as having such an impairment”) (emphasis added). Consistent with this statutory aim, the regulations implementing Section 503 now contain an express prohibition against inquiring about an employee’s disability, 41 C.F.R. §60-741.23 (1998):

(a) *Prohibited medical examinations or inquiries.* \* \* \* [I]t is unlawful for the contractor to \* \* \* make inquiries as to whether an applicant or employee is an individual with a disability or as to the

(continued...)

Goodyear had other reasons not to assume a disability on White's part. Dr. Long testified that there were reasons other than a brain injury that could cause a person to demonstrate cognitive weaknesses in a work environment, such as "lack of education or experience." T. 266. He also explained that in an industrial setting, many people who have no mental or physical defects nevertheless "are unable to do particular types of jobs," for many different reasons. T. 281. In addition, Johnson stated that many people cannot perform the tire builder job. T. 638.

On this record, we find that Goodyear did not know that White had impairments at the time he was employed. The regulations implementing the Rehabilitation Act are clear that an employer has a duty to accommodate only for *known* physical or mental limitations. 41 C.F.R. §60-741.5(c)(3) (1989) ("Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has *actual knowledge*." ) (emphasis added).<sup>17/</sup> Therefore, in view of Goodyear's lack of knowledge in 1989 that White had a current impairment, Goodyear is not liable under the Rehabilitation Act for failure to accommodate White's disabilities.<sup>18/</sup> The record is clear that, in the absence of medical documentation of a disability, Goodyear routinely discharges employees who do not meet the production standards for the tire builder position during the probationary period. T. 638.

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<sup>16/</sup>(...continued)

nature or severity of such disability.

<sup>17/</sup> The regulation now appears at 41 C.F.R. §60-741.44(d) (1998).

<sup>18/</sup> The ALJ also found that, even if Goodyear were aware of White's current disability at the time of employment, the company nevertheless would not be liable under the Rehabilitation Act because it provided a reasonable accommodation in the form of an assistant labor trainer assigned to help White. RD&O at 35. Because Goodyear did not know about the existence and nature of White's disability, however, it was inappropriate for the ALJ to conclude that the company made a reasonable accommodation. Employer knowledge of a disability is a prerequisite to making an accommodation.

## **CONCLUSION**

The complaint is **DISMISSED** because Goodyear did not know of White's current impairments at the time it discharged White.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member