BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

LINDA MACHART, Appellant, v. LIQUOR CONTROL BOARD, Respondent.	Case No. DSEP-00-0005 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. The hearing was held at the Columbia Basin College, Student Services Building, Pasco, Washington, on October 23, 2001. LEANA D. LAMB, Member, reviewed the file, the recorded proceedings and exhibits and participated in the decision in this matter. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Linda Machart was present and was represented by Eugene Schuster, Attorney at Law, of Critchlow, Williams & Schuster, P.S. Valerie Petrie, Assistant Attorney General, represented Respondent Liquor Control Board.

1.3 **Nature of Appeal.** This is an appeal from a disability separation.

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1.4 **Citations Discussed.** Smith v. Employment Security Dept., PAB No. S92-002 (1992); WAC 356-05-102; WAC 356-35-010.

II. FINDINGS OF FACT

2.1 Appellant Linda Machart was a Liquor Store Clerk and permanent employee for Respondent Washington State Liquor Control Board. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 9, 2000.

2.2 Appellant became employed as a Liquor Store Clerk with the Liquor Control Board in 1974. Appellant worked at Kennewick Store #159. Appellant's duties included operating an electronic cash register, packing customer merchandize, stocking shelves by moving cases from the storeroom to the retail area (by carrying or using a hand truck), receiving incoming shipments of cases by moving cases by hand truck to the storage warehouse. Individual bottles weigh from 6 to 10 pounds each and cases weigh from 25 to 30 pounds and can weight up to 50 pounds per case. Occasionally, employees assist customers by lifting heavy items off shelves and/or taking them to their cars. The essential functions analysis for a Liquor Store Clerk requires employees to lift and carry up to 50 pounds on a regular basis.

2.3 On November 5, 1997, Appellant suffered an on-the-job injury to her shoulder. Following Appellant's injury, Respondent received notification from Appellant's physician, Dr. James Hazel, regarding her work restrictions. Dr. Hazel indicated that Appellant could not lift more than 15 pounds for a six-week period. Appellant was also restricted from lifting anything above her shoulder level. To assist Appellant's return to work, Respondent modified her work duties to include cashiering responsibilities only. By notification dated December 18, 1997, Appellant's

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physician extended Appellant's lifting restrictions for another six weeks. Appellant continued to in the accommodated position until January 5, 1998.

2.4 On March 3, 1998, Appellant's physician indicated that Appellant was unable to work through March 1998. On April 7, 1998, Appellant's physician again indicated that Appellant was unable to return to her "current job" through May 1998.

2.5 In June 1998, Appellant's physician completed a Physical Capacities Evaluation form. The form indicated that Appellant could "never" lift any weight over 20 pounds or reach above shoulder level. Appellant's physician indicated the projected length of the time required for Appellant to perform light duty work was "long term."

2.6 On July 7, 1998, Brian Wise, Respondent's Safety Officer, offered Appellant employment that accommodated her physical capacities. The restricted duties were that Appellant not lift any items over 20 pounds, that she not lift above shoulder level and that she not work over 30 hours. Appellant subsequently declined to accept the accommodated position for personal reasons.

2.7 On January 29, 1998, Dr. Hazel indicated that Appellant would be unable to work through February 1998.

2.8 On December 2 and 3, 1998, Appellant underwent a functional capacities evaluation. Phillip Drussel, Physical Therapist, noted his concerns with Appellant's ability to bend, stoop, and reach above her head and he indicated that her lifting capability was a maximum of 20 pounds. After comparing Appellant's physical capabilities to a job analysis of Appellant's duties, Mr. Drussel concluded that Appellant would be unable to return to work. He indicated, however, that Appellant could continue to perform light duty cashiering responsibilities with the continued

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restrictions that she not continually lift and carry more than 10 pounds throughout the day. Mr. Drussel also recommended that the light duty position could be further modified by providing open ended carts at the same level as the cashiering counter so that Appellant could slide items onto the counter rather than lifting each item out of the cart.

2.9 In May 1999, Dr. Hazel evaluated Appellant to determine whether she could perform general office clerk tasks. Dr. Hazel agreed that Appellant could perform the physical demands of clerical positions.

2.10 By letter dated October 14, 1999, Dr. Hazel wrote to Respondent indicating that Appellant could return to full-time duties if the duties could be adequately modified.

2.11 On November 22, 1999, Appellant again resumed light duty work as a Liquor Store Clerk performing cashiering tasks.

2.12 On April 17, 2000, Dr. Hazel indicated that Appellant's physical limitations were permanent and that Appellant should never reach above shoulder level but could continue to work in a light duty capacity for 20 hours per week.

2.13 Respondent has adopted a Return to Work Policy. The goal of the policy is to return an occupationally injured employee to some type of full, part-time or light duty employment as soon as the employee is medically able and released by his/her attending physician. The policy further states that the "duration of return to work under such circumstances generally should not last more than four to six months, but may last up to one year. However, each incident will be evaluated on a case-by-case basis. . . ." Respondent does not provide permanent light duty positions.

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2.14 Wendy Jolly, Human Resource Consultant, reviewed the statements from Appellant's physician to determine whether permanent accommodation could be provided to return Appellant to work. The agency reviewed whether a hydraulic cart would enable Appellant to stock shelves; however, the cart would not reach high enough to enable Appellant to stock top shelves without reaching above her shoulder. In addition, Appellant had difficulties lifting and bagging heavy bottles, and she was unable to unload and carry stock to customer cars. Kennewick Store #159 normally operates with two employees on duty at the same time; however, there are occasions when an employee will have to work alone without the assistance of another individual. This created concerns that Appellant could not work in the store alone due to her inability to lift items over 20 pounds.

2.15 After reviewing this information, Ms. Jolly reviewed Appellant's work history and skills to determine what other positions Appellant was qualified to perform, however, Appellant had held no other state positions and there were no clerical positions within the department in the Kennewick area. In addition, because of Appellant's medical restrictions, she was limited to cashiering duties only, however, Respondent did not have any positions for cashier only jobs.

2.16 Prior to implementing Appellant's separation due to disability, appointing authority Gary J. Ferko, Deputy Director of Retail Services, consulted with human resources staff. Mr. Ferko reviewed medical information that concluded that Appellant could not perform essential lifting duties or lift anything above her shoulders. Mr. Ferko considered information that these tasks are essential functions of a Liquor Store Clerk and were not functions that could be waived. Mr. Ferko concluded that the agency had accommodated Appellant as much as possible but that based on information from Appellant's physician that she could not perform the essential functions of her position and that her condition was permanent, Mr. Ferko concluded that separating Appellant due to her disability was the appropriate action.

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2.17 By letter dated May 12, 2000, Mr. Ferko officially notified Appellant of her disability separation from her position as Liquor Store Clerk effective July 16, 2000.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts that it accommodated Appellant's disability on a temporary basis by placing her in a light duty assignment. Respondent argues, however, that Appellant's physician ultimately concluded that Appellant was unable to perform lifting requirements or to reach above shoulder level. Respondent contends that it looked for alternative ways to modify the position so that Appellant could perform the essential duties of the position, but that no viable accommodation existed. Respondent argues that lifting is an essential function of Appellant's position and that it has no duty to waive the essential functions of a job when reasonable alterations cannot be made to the position. Respondents further argues that Appellant could not perform essential functions of a Store Clerk with or without accommodation and that the agency was not able or required by law to provide her with permanent light duty. Respondent asserts that there were no other positions for which Appellant qualified and that her appeal should be denied.

3.2 Appellant admits that she cannot return to her full former duties as a Liquor Store Clerk. She asserts that the department accommodated her on two occasions and that she fulfilled the majority of her duties. Appellant argues that Respondent have continued to accommodate her and that more of her duties could have been fulfilled with slight expenditures to the agency. However, Appellant asserts that the agency failed to make those expenditures and separated her from almost 25 years of employment. Appellant contends that Respondent can accommodate her. Appellant contends that although her physician released her medically for work as a general office clerk, however, she asserts she not qualified for such work because of her limited educational and

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vocational experience. Appellant contends that she needs seven months of service to reach 25 years and that her separation has resulted in markedly reduced retirement benefits.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving that Appellant was unable to perform the duties of the position as specified in the letter of separation and that reasonable accommodation cannot be provided. Smith v. Employment Security Dept., PAB No. S92-002 (1992).

4.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010 when it separated Appellant from her position as a Liquor Store Clerk due to her disability. WAC 356-05-120 defines a disability as "[a]n employee's physical and/or mental inability to perform adequately the essential duties of the job class." In this case, lifting and carrying up to 50 pounds are fundamental duties to the Liquor Store Clerk position. Appellant's physician stated that Appellant could not lift more than 20 pounds. Appellant is unable to perform the essential duties of her position, and she currently remains disabled. Therefore, Appellant's condition meets the definition of a disability.

4.4 WAC 356-35-010(1) provides, in part, that an appointing authority "may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided. . ." After receiving information that Appellant was restricted to lifting a maximum of 20 pounds and that she was unable to reach above her shoulders, the department looked at ways that would

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reasonably enable Appellant to perform the essential duties of her position. Despite good faith efforts, Respondent was not able to make reasonable adjustments to Appellant's position and as such, Appellant was not qualified to perform the essential functions of a Liquor Store Clerk. Furthermore, the department had no obligation to reallocate or alter the essential functions of Appellant's position. Therefore, the appointing authority reasonably concluded that accommodation could not be provided which would allow Appellant to perform the essential duties of her position.

4.5 Finally, as a part of its accommodation process, Respondent then conducted a search for positions for which Appellant was qualified. However, Appellant held status in no other positions during her tenure as a state employee and there were no clerical positions that Respondent could offer her. We conclude, therefore, that Respondent made good faith efforts to accommodate Appellant.

4.6 Respondent has met its burden of proof that Appellant could not perform the essential duties of her position and that reasonable accommodation could not be provided. Therefore, the disability separation of Linda Machart should be affirmed and her appeal denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Linda Machart is denied.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Leana D. Lamb, Member

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