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United States District Court, D. Maine.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff
v.
BATH IRON WORKS CORPORATION, et al., Defendants

No. Civ. 97–355–P–H. | Feb. 8, 1999.

Opinion

RECOMMENDED DECISION ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

COHEN, Magistrate J.

***1** The Equal Employment Opportunity Commission ("EEOC") commenced the instant action in November 1997, charging that a mental/nervous disorder limitation contained in a long-term disability ("LTD") plan provided to Anthony F. Campagna and other similarly situated Bath Iron Works Corporation ("BIW") employees through Fortis Benefits Insurance Corporation ("Fortis") violated Title I of the Americans with Disabilities Act ("ADA"). Complaint (Docket No. 1) at 1, ¶¶ 7, 11–12. Campagna, who intervened in the EEOC case and pled several additional causes of action, subsequently moved to dismiss all of his claims against BIW and Fortis with prejudice after reaching a settlement with both. Motion of Plaintiff Anthony F. Campagna To Dismiss His Claims With Prejudice, etc. (Docket No. 45). That motion was granted. Order (Docket No. 46).

Fortis and BIW now move for summary judgment, and the EEOC cross-moves for summary judgment, on the only remaining claim in this case, that of the EEOC that the mental/nervous disorder distinction violates Title I of the ADA.[1] Defendant, Fortis Benefits', Motion for Summary Judgment, etc. ("Fortis's Motion") (Docket No. 48); Plaintiff EEOC's Motion for Partial Summary Judgment, etc. ("EEOC's Motion") (Docket No. 50); Bath Iron Works Corporation's Motion for Summary Judgment on Plaintiff EEOC's ADA Title I Claim ("BIW's Motion") (Docket No. 52). For the reasons that follow, I recommend that Fortis's and BIW's motions for summary judgment be granted and that of the EEOC be denied.[2]

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant.... By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party....' " *McCarthy v. Northwest Airlines, Inc.,* 56 F.3d 313, 315 (1st Cir.1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes,* 116 F.3d 957, 959 (1st Cir.1997).

II. Factual Context

The summary judgment record reveals the following undisputed facts material to the grounds upon which I base this recommended decision.[3]

Fortis is a commercial insurance company that issues group LTD insurance to employers under contracts of insurance. Declaration of Mark Andruss ("Andruss Decl."), Attach. 1 to Fortis's Statement of Material Facts as to Which There Is No Genuine Dispute for Trial ("Fortis's SMF"), attached as Appendix I to Fortis's Motion, ¶ 3. Fortis, which is headquartered in Kansas City, Missouri, has more than 20,000 group LTD policy holders nationwide. *Id.*

***2** BIW is in the ship-building business. Deposition of Anthony Campagna ("Campagna Dep."), Attach. 2 to Fortis's SMF, at 15. BIW buys LTD insurance from Fortis. *Id.* at 40. BIW has done so either directly or through Fortis's predecessor, Mutual Benefit Life Insurance Company ("Mutual Benefit"), since 1986. Responses to Plaintiff Campagna's First Set of Interrogatories to Defendant Fortis Benefits Insurance Company ("First Fortis Interrog."), Attach. 3 to Fortis's SMF, at No. 2.

The BIW policy distinction between mental illness and physical illness that is the subject of this lawsuit originated in a group LTD policy issued in 1962 by Mutual Benefit to BIW's predecessor, Congoleum Industries. *Id.* at No. 15. When Congoleum Industries subsequently disaggregated and "spun off" BIW, Mutual Benefit continued to contract with BIW to provide LTD benefits. *Id.* When Fortis succeeded Mutual Benefit in 1991, the mental-illness provision was contained in the BIW policy. *Id.*

The BIW LTD policy contains a two-year limit on the duration of benefits available for mental/nervous disorders; benefits for physical conditions generally are payable through retirement age. Fortis group LTD insurance policy No. G 42,114 (the "BIW LTD Policy"), attached as Exh. 1 to Deposition of Daniel I. Roet ("Roet Dep."), Attach. 5 to Fortis's SMF, at 9, 16. The mental/nervous limitation is not based on one particular type of mental/nervous disability. *Id.* at 16. A two-year limit on mental/nervous benefits is standard in the LTD industry. Deposition of Timothy M. Harrington, Attach. 6 to Fortis's SMF, at 32.

The BIW LTD Policy provides a standard package of benefits for all salaried employees. Campagna Dep. at 28–30. Every salaried employee has the opportunity to obtain coverage under the same plan with the same schedule of benefits. Deposition of Mark Andruss ("Andruss Dep."), Attach. 4 to Fortis's SMF, at 119–21. The BIW LTD Policy provides for payment of benefits if either of two definitions of disability are met:

Disability or *disabled* means:

Occupation Test

> during the first 36 months of a *period of disability* (including the *qualifying period*), an *injury,* sickness, or pregnancy requires that you be under the regular care and attendance of a *doctor,* and prevents you from performing the material duties of your regular occupation; and
>
> after 36 months of *disability,* an *injury,* sickness, or pregnancy prevents you from performing the material duties of any occupation for which your education, training, and experience qualifies you.

Earnings Test

> If you are not considered *disabled* under the occupation test, you may be considered *disabled* in any month in which you are working, but an *injury,* sickness, or pregnancy prevents you from earning more than 50% of your *monthly pay.*
>
> If you meet either the Occupation Test or the Earnings Test, limited employment will not interrupt the *qualifying period* or the *period of disability.*

***3** BIW LTD Policy at 4 (emphasis in original). These definitions apply to all claims for LTD benefits, regardless of whether the employee's condition is physical or mental. Andruss Dep. at 51–52.

Campagna began employment with BIW in February 1986 as a purchase order administrator. Campagna Dep. at 13–14. At the time of hire, as a salaried BIW employee, Campagna automatically became covered by the BIW LTD Policy. *Id.* at 25–26, 30; BIW Benefits Information for Salaried Employees and Their Families ("Summary Plan Description"), attached as Exh. 2 thereto, at 25. In July 1993 Campagna became unable to work because of a mental illness – rapid cycling bipolar disorder. Campagna Dep. at 18–19.

On July 20, 1993 Campagna left active employment at Bath to commence short-term disability leave, triggering a six-month qualifying period for payment of LTD benefits. Campagna Dep. at 18; Summary Plan Description at 25. On October 12, 1993 Campagna filed a discrimination charge against BIW with the Maine Human Rights Commission (the "MHRC'). Campagna Dep. at 43; Charge of Discrimination ("MHRC Complaint"), attached as Exh. 6 thereto. The charge, filed solely against BIW, alleged that the two-year mental/nervous benefits limitation violated the ADA and the Maine Human Rights Act. MHRC Complaint.

In October 1993 Campagna completed an application for LTD benefits. Campagna Dep. at 47–49; LTD benefits application dated October 29, 1993, attached as Exh. 17 thereto. In February 1994 Fortis notified Campagna that, based on the medical information in its files at that time, Campagna's condition appeared to be a mental/nervous disorder under the BIW policy, for which benefits were limited to two years. Campagna Dep. at 49; Letter from Sheila Sloyer to Anthony Campagna dated February 22, 1994, attached as Exh. 9 thereto. Fortis paid Campagna consistent with this determination, and benefits ceased on January 19, 1996. Amended Complaint (Docket No. 36) ¶¶ 20–22; Defendant Fortis Benefits Insurance Co.'s Answer to Plaintiff Campagna's Amended Complaint, etc. (Docket No. 37) ¶¶ 20–22.

The MHRC Complaint was dismissed in October 1995 because the EEOC was conducting its own investigation of the matter. Campagna Dep. at 56; Letter from Patricia E. Ryan to Anthony F. Campagna dated October 23, 1995, attached as Exh. 12 thereto. In April 1996 Campagna amended his charge of discrimination to name Fortis as a respondent for the first time. Campagna Dep. at 58–60; amended Charge of Discrimination, attached as Exh. 14 thereto. The EEOC subsequently filed the instant suit. Complaint.

Campagna remained a BIW employee until he voluntarily resigned his employment on November 9, 1998. Campagna Dep. at 12, 16; resignation letter dated November 9, 1998, Attach. 9 to Fortis's SMF. Before his resignation, he could have returned to work at BIW if he became well enough by advising BIW that he wanted to return and obtaining BIW medical department approval. Campagna Dep. at 16; Roet Dep. at 42–43. Campagna, however, did not become well enough to resume employment, with or without accommodation. Campagna Dep. at 130.

III. Discussion

***4** Fortis and BIW seek summary judgment in the instant action primarily on the ground that the mental/nervous benefits limitation at issue does not violate the ADA. Fortis's Motion at 7–15; BIW's Motion at 3–11. They argue, alternatively, that (i) Campagna is not a qualified individual with a disability for purposes of the ADA, (ii) the BIW LTD Policy falls within the ADA's "safe harbor" provision and, in the case of Fortis, (iii) Fortis is not a covered entity for ADA purposes and (iv) the charge against it was untimely filed. Fortis's Motion at 15–32; BIW's Motion at 11–18. The EEOC seeks summary judgment on grounds that (i) Fortis is a covered entity and (ii) the BIW LTD Policy does not qualify for safe-harbor protection inasmuch as the defendants fail to proffer actuarial justification for singling out mental/nervous disorders. EEOC's Motion at 5–12. Assuming *arguendo* that Campagna and others similarly situated are qualified individuals with a disability on whose behalf the EEOC may properly challenge the limitation at issue, I find that Fortis and BIW are entitled to summary judgment on grounds that the limitation does not violate the ADA.

The ADA prohibits discrimination against a "qualified individual with a disability" on the basis of that disability in, *inter alia,* the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability," in turn, is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of" an individual, "a record of such an impairment" or "being regarded as having such an impairment." 42 U.S.C. § 12102(2).

As Fortis and BIW point out, three circuit courts of appeal have considered the precise question whether a durational limit on LTD benefits for those with mental/nervous disorders violates the ADA. Fortis's Motion at 7; BIW's Motion at 4. All have determined that it does not. *Ford v. Schering–Plough Corp.,* 145 F.3d 601, 610 (3d Cir.1998); *Parker v. Metropolitan Life Ins. Co.,* 121 F.3d 1006, 1019 (6th Cir.1997); *EEOC v. CNA Ins. Cos.,* 96 F.3d 1039, 1044 (7th Cir.1996). A fourth circuit court has reached an analogous conclusion with respect to limitations on infertility treatment. *Krauel v. Iowa Methodist Med. Ctr.,* 95 F.3d 674, 678 (8th Cir.1996). These findings, in turn, have echoed those reached in a body of parallel caselaw interpreting the closely analogous Rehabilitation Act. *See, e.g., Traynor v. Turnage,* 485 U.S. 535, 548–49 (1988) (limitation on access to GI benefits if disability caused by "willful misconduct" permissible because applied evenhandedly to disabled

and non-disabled); *Alexander v. Choate,* 469 U.S. 287, 309 (1985) (upholding fourteen-day Medicaid limitation on inpatient hospital benefits); *Modderno v. King,* 82 F.3d 1059, 1062 (D.C.Cir.1996) ($75,000 lifetime cap on mental health benefits not violative of Rehabilitation Act).

***5** A limitation on LTD benefits for those with mental/nervous disorders is, as a matter of pure semantics, discriminatory.[4] It also raises serious and difficult public-policy concerns. However, as the circuit courts confronting this issue have recognized, Congress has not seen fit to proscribe this type of discrimination under the ADA. This is so, these courts conclude in carefully reasoned opinions, inasmuch as:

(i) during debate on enactment of the ADA, the Senate Labor and Human Resources Committee report stated:

> [E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e .g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition.... All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

S.Rep. No. 101–116, at 29 (1989), *quoted in Ford,* 145 F.3d at 610.

(ii) in 1996 Congress defeated a proposed amendment to the Health Insurance Portability and Accountability Act of 1996 that would have required parity of coverage for mental and physical conditions. *See CNA,* 96 F.3d at 1044 (noting that this illustrates the proposition that "[f]ew, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA").

(iii) on September 26, 1996 Congress enacted the Mental Health Parity Act, 42 U.S.C. § 300gg–5, mandating equality in health-insurance caps on both medical/surgical and mental-health benefits; however, per 42 U.S.C. § 300gg–91(c)(1)(A), Congress specifically exempted disability income insurance from coverage under the Act. *See Parker,* 121 F.2d at 1017–18 (observing that "it appears that Congress did not believe the necessity for parity between mental and physical disabilities in long-term disability plans was sufficiently compelling to include them within the purview of the Act").

(iv) the Supreme Court has determined that the Rehabilitation Act does not affirmatively require that benefits extended to any one category of disabled persons be extended to any other category. *See, e.g., Ford,* 145 F.3d at 608–09 (*quoting Traynor,* 485 U.S. at 549).

(v) as a corollary, the Supreme Court has concluded that the Rehabilitation Act requires merely that the disabled be treated evenhandedly, *e.g.,* be afforded the same access to available benefits as the non-disabled. *See, e.g., Parker,* 121 F.3d at 1016 (*quoting Traynor,* 485 U.S. at 548); *see also Modderno,* 82 F.3d at 1066 (Ginsburg, J., concurring).

(vi) the EEOC, in its own policy guidance in the health-insurance context, has stated:

> ***6** Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. Similarly, some health insurance plans provide fewer benefits for "eye care" than for other physical conditions. Such broad distinctions which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.

EEOC: Interim Enforcement Guidelines on Application of ADA to Health Insurance (June 8, 1993), *quoted in Parker,* 121 F.3d at 1018 (citation and internal quotation marks omitted).

Applying these principles to the case at bar, it is clear that the limitation at issue does not violate Title I of the ADA. All salaried employees automatically are covered by the BIW LTD Policy, which offers the same levels of benefits to each. As Fortis correctly observes, a person may qualify for benefits under the BIW LTD Policy and yet not be "disabled" for purposes of the ADA. Defendant, Fortis Benefits', Reply to Plaintiff's Opposition to Fortis' Motion for Summary Judgment

(Docket No. 63) at 3. As Fortis posits, for example, a pregnant in-house attorney for BIW who had previously worked twelve to fourteen hours a day, six days a week and was advised to reduce her work hours so substantially that her income fell below fifty percent of her pre-pregnancy earnings would qualify for LTD benefits under the "earnings" test. *Id.* at 3 n .4. Yet, the attorney would not be regarded as substantially limited in performing a major life activity (and hence, "disabled") for purposes of the ADA. *Id.* The BIW LTD Policy's restrictions thus equally impact all salaried BIW employees, disabled or not. Conversely, each salaried BIW employee has equal access to the benefits available under the plan.

The EEOC struggles unsuccessfully to swim against the current of the well-reasoned and persuasive authority upon which Fortis and BIW rely. It leans heavily on *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308 (1996), in which the Supreme Court held that an age-discrimination plaintiff need not demonstrate that he or she was replaced by someone outside of the protected class (*e.g.,* under age 40) to make out a *prima facie* case. In so doing the court observed, "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." *Id.* at 312. Transplanting this reasoning to the instant context, the EEOC argues that Campagna and others similarly situated are persons with disabilities who have "lost out" to other members of the protected class (those with physical disabilities) on the prohibited basis of their mental disability. Plaintiff EEOC's Consolidated Response to Defendants Fortis' and BIW's Separate Motions for Partial Summary Judgment ("EEOC Opposition") (Docket No. 56) at 13. *O'Connor,* however, is inapposite to the case at bar. In addressing the narrow question whether one prong of a *prima facie* test was conceptually sound, the court did not speak to the larger and wholly different issue whether parallel benefits must be provided among classes of the disabled. To the extent the court has addressed that larger question in construing the Rehabilitation Act, it has indicated that the answer is no. *See, e.g., Alexander,* 469 U.S. at 301 ("an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers").

***7** The EEOC next suggests that the circuit courts upon whose decisions Fortis and BIW rely erred in extending the Supreme Court's holdings in *Alexander* and *Traynor,* which blessed facially neutral limitations, to cases explicitly limiting benefits available to a discrete class of the disabled, those with mental disorders. EEOC Opposition at 15, 16 n. 7. The EEOC, however, overlooks the fact that the circuit courts' reliance on *Alexander* and *Traynor* was bolstered by consideration of compelling legislative history of the ADA and other relevant statutes.[5]

The EEOC in addition cites *Lewis v. Aetna Life Ins. Co.,* 982 F.Supp. 1158 (E.D.Va.1997), for the proposition that a durational limit on LTD benefits for mental/nervous disorders does indeed violate the ADA.[6] The *Lewis* court embraced the argument, premised on *O'Connor,* that a limitation on benefits for a class of the disabled is tantamount to discrimination against individuals within that class on the basis of disability. *Lewis,* 982 F.Supp. at 1168–69. This holding rests on faulty underpinnings, for the reasons discussed above.[7]

The EEOC finally attempts to distinguish its own interim health insurance guidance on grounds that it blesses only across-the-board limitations affecting the disabled and non-disabled alike. EEOC Opposition at 16–17. Both people who are disabled and non-disabled for ADA purposes may seek mental-health benefits such as psychological counseling, the EEOC notes. *Id.* In the instant case, it argues, LTD benefits inherently are available only to the disabled. *Id.* at 17. This latter point, however, misconstrues or ignores the evidence of record. Both persons who do, and do not, qualify as disabled for purposes of the ADA are eligible for LTD benefits provided by BIW through Fortis. Thus, the BIW LTD Policy is conceptually indistinguishable from health plans limiting benefits for the treatment of mental disorders that the EEOC itself concedes pass muster under the ADA.

Inasmuch as the EEOC cannot prevail in its claim that the mental/nervous disorder limitation at issue violates the ADA, BIW and Fortis are entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, I recommend that Fortis's and BIW's motions for summary judgment be GRANTED, and the EEOC's motion for summary judgment be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo *review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

Failure to file a timely objection shall constitute a waiver of the right to de novo *review by the district court and to appeal the district court's order.*

Footnotes

[1] Although the EEOC styles its motion as one for "partial" summary judgment, the grant of summary judgment in its favor would dispose of the only remaining issue in this case.

[2] The defendants have requested oral argument on the pending motions. Docket Nos. 49 & 54. I am satisfied that the written submissions of the parties adequately address the issues raised. Therefore, the requests for oral argument are denied.

[3] On grounds that the EEOC failed to submit a separate statement of material facts with its summary-judgment motion or attach relevant record excerpts as required by Local Rule 56, Fortis asks the court to strike the EEOC's motion. Defendant Fortis Benefits' Opposition to Plaintiff EEOC's Motion for Partial Summary Judgment, etc. (Docket No. 61) at 1 n. 1. The EEOC's failings warrant disregard of any proferred facts not properly presented in accordance with Local Rule 56. *See, e.g., Pew v. Scopino,* 161 F.R.D. 1, 1 (D.Me.1995). The proferred facts are, however, disregarded in any event inasmuch as they are immaterial to the grounds for this recommended decision.

[4] One discriminates, in the sense relevant here, by "mak[ing] a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Webster's Third New International Dictionary of the English Language Unabridged 648 (1981).

[5] In this regard, the EEOC argues that because the ADA applies to all aspects of employee compensation, including benefit plans, passage of the Mental Health Parity Act does not mean that the ADA does not apply to the BIW LTD Policy. EEOC Opposition at 17–18. While this is true, it does not necessarily follow that the ADA bans durational limitations of the type found in the BIW LTD Policy.

[6] The EEOC also offers a MHRC decision finding reasonable grounds to believe unlawful disability discrimination occurred as the result of a two-year limitation on disability benefits for a plaintiff with a mental condition, bipolar disorder. Investigator's Report E97–0541 dated April 15, 1998, Attach. A to Plaintiff EEOC's Statement of Additional Material Facts as to Which There Is No Genuine Issue To Be Tried (Docket No. 57). The case is distinguishable in that the plaintiff lost his right to re-employment upon the termination of disability benefits. *Id.* at 5. Campagna continued to be eligible for re-employment after his disability benefits lapsed. In addition, the MHRC decision, which was predicated on violations of the ADA as well as parallel Maine law, omits any discussion of the extensive caselaw and legislative history addressing that precise question with respect to the ADA. *Id.*

[7] This aspect of the *Lewis* decision has, moreover, been criticized and rejected by two district courts. *Conway v. Standard Ins. Co.,* 23 F.Supp.2d 1199, 1201–02 (E.D.Wash.1998); *Rogers v. Department of Health & Envtl. Control,* 985 F.Supp. 635, 639–40 (D.S.C.1997).