

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
and)
)
AHMET DEMERELLI,)
)
Plaintiff-Intervener)
)
v.)
)
CONVERGYS CUSTOMER)
MANAGEMENT GROUP INC.,)
)
Defendant.)

*Directed
CV 2
4/12/06*

No. 4:04CV00846CAS

MOTION FOR DIRECTED VERDICT

COMES NOW, Defendant Convergys Customer Management Group, Inc. (“Convergys”) pursuant to Rule 50 of the Federal Rules of Civil Procedure, and in anticipation of Plaintiffs resting their case and to expedite the presentation of evidence, moves the Court, as of the close of the evidence offered by Plaintiffs, to direct a verdict in favor of Convergys and against Plaintiffs for the reasons that the evidence presented by Plaintiffs fails to establish that Plaintiffs are entitled to relief as a matter of law. In particular, Convergys states the following reasons require judgment in favor of Convergys:

1. **Plaintiff Yigit Demirelli is not qualified within the meaning of the Americans with Disabilities Act because he is unable to perform the essential functions of his job with reasonable accommodation.** The Court has already held that punctuality is an essential function

of the job. (Memorandum and Order). Plaintiffs failed to demonstrate that Demirelli could be punctual at Convergys, with or without reasonable accommodation. Plaintiffs admit during Demirelli's direct examination that he could not be punctual. In fact, the only accommodation Demirelli testified that would have allowed him to work is that he not be punctual.

The Eighth Circuit has unequivocally held time and again, that as a matter of law, an employer is not required to eliminate an essential job function as an accommodation for a disabled employee. *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d at 681-82. Like Demirelli, Maziarka claimed that he should have been accommodated for by receiving time off without pay or to make up the missed work time later. Noting that "dependable attendance is often an essential part of a job", the Court found that the plaintiff's job required that he be capable of regular and predictable attendance at a specified location in order to perform the tasks of a receiving clerk." *Id.* at 681. Affirming summary judgment, the Court held that make-up time was not a reasonable accommodation:

His proposed accommodation does not address the crucial problem – the unpredictability of Maziarka's absences – which left Fleet Farm unable to rely on its schedule in order to efficiently receive and process merchandise. His proposal instead presumes that regular, predictable attendance is not an essential function of his job. "It is well settled that an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform.

Id. (quoting *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998)).

Likewise, in *Buckles v. First Data Res., Inc.*, 176 F.3d 1098 (8th Cir. 1999), the Eighth Circuit reversed the District Court's denial of summary judgment where the employee was chronically absent from his job. Although the Plaintiff argued that he was qualified to perform the duties with the accommodation of leaving work at any time an air-borne irritant aggravated his condition, the Court disagreed. The Court held that "[u]nfettered ability to leave work at any

time is certainly not a reasonable accommodation” and an employer is not required by the ADA to provide an unlimited absentee policy. *Id.* at 1101. *See also Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000) (*affirming* summary judgment for employer and *holding* that ability to clock in at whatever time plaintiff arrived without reprimand and permit her to make up missed time at end of a shift is not a reasonable accommodation. “A request to arrive at work at any time, without reprimand, would in essence require Appellee to change the essential functions of Appellant’s job, and thus is not a request for a reasonable accommodation.”).

2. Plaintiffs have failed to present evidence that Convergys failed to accommodate Demirelli with an accommodation that would have permitted him to be punctual.

Plaintiffs have the burden to prove that Demirelli could have been punctual but for the reasonable accommodation he allegedly did not receive. It is not disputed, and the Court has found, that Demirelli was dismissed because, ultimately, he was excessively late returning from his meal break, even after receiving certain accommodations that effectively allowed him to report to work on time.

However, Plaintiffs have failed to present any evidence to support a judgment in their favor, that Demirelli failed to receive an accommodation that would have allowed him to be punctual. As such, judgment should be granted in favor of Convergys.

3. Plaintiffs’ proposed accommodation is not reasonable, as a matter of law, because it requests only that Demirelli be forgiven for his tardies or that Convergys allow him to work without the essential function of punctuality.

4. Plaintiffs’ failed to show that Convergys failed to accommodate Demirelli because the alleged accommodation was never requested by Demirelli and such accommodation was not so

obvious as to require Convergys to provide it without Demirelli's request. *Mole, supra* (precluding relief where employee failed to request accommodation).

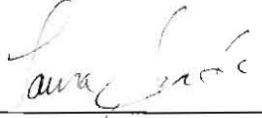
5. Plaintiffs' are not entitled to compensatory damages, or punitive damages, because Convergys has established that it acted in good faith in an attempt to accommodate Demirelli. *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1217 (8th Cir. 1999); *See also, e.g., Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1045 (8th Cir. 2005) ("A mere assertion that an accommodation [is] needed is insufficient; the employee must inform the employer of the accommodation needed.") (emphasis added); *McClellan*, 314 F. Supp.2d 911, 918-19 (employee's post-termination affidavits suggesting additional accommodations "were never communicated to [the employer] at the time the interactive process was occurring, so Plaintiff cannot demonstrate bad faith on [the employer's] part by now informing the company of accommodations.").

6. Plaintiffs are not entitled to an award of backpay because Plaintiff failed to mitigate his damages.

7. Plaintiffs are not entitled to an award of emotional distress damages because Plaintiffs' have failed to establish that Convergys was the cause of Demirelli's emotional distress.

Respectfully submitted,

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