



United States Courts
Southern District of Texas
ENTERED

MAR 29 2000

Michael N. Milby
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff

vs.

COOPER CAMERON CORPORATION,

Defendant.

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CIVIL ACTION NO. H-99-1419

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the Court is a motion for summary judgement filed by the defendant, Cooper Cameron Corporation (hereinafter, "CCC"). The plaintiff, the Equal Employment Opportunity Commission, brings this action under the American with Disabilities Act (hereinafter "the ADA"), 42 U.S.C. § 12101, *et seq.* The plaintiff filed this suit on behalf of David Bruno Kubeczka (hereinafter "Kubeczka"), a former employee of the defendant.¹ The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345.

Having carefully considered the motion, the response, the reply, the record and the applicable law, it is the opinion of the Court that the defendant's motion shall be GRANTED.

¹The plaintiff is an agency of the government of the United States charged with the administration, interpretation and enforcement of Title I of the ADA and is expressly authorized to bring this action pursuant to 42 U.S.C. § 12117(a).

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II. FACTUAL AND PROCEDURAL HISTORY

Kubeczka commenced his employment with the defendant as a machine operator in March 1974. In September 1991, he fell while operating a machine. As a result of the fall, he broke his right hip, interrupting the blood flow to his left hip. Consequently, effective May 6, 1992, Kubeczka's doctor ordered him not to work. On June 17, 1992, Dr. Edelstein performed a total right hip replacement surgery on Kubeczka. On August 26, 1992, the doctor performed a core compression on Kubeczka's left hip.

From June 3, 1993 until March 7, 1994, Kubeczka worked on a temporary light duty. On March 7, 1994, however, Kubeczka's new physician, Dr. Hugh S. Tullos, took Kubeczka off work so that he could perform a bilateral hip replacement on Kubeczka. Dr. Tullos totally replaced Kubeczka's right hip on March 8, 1994. Subsequently, on October 25, 1994, Dr. Tullos performed a total left hip replacement on Kubeczka. On December 13, 1994, Kubeczka was discharged from the hospital. He underwent rehabilitation for the next three months.

On March 29, 1995, Dr. Tullos issued a note to Kubeczka, stating that Kubeczka "could be employed in any activity that is primarily sedentary in nature, that is desk work." During an April 1995 meeting between Kubeczka and Ron Abney (hereinafter "Abney"), Human Resources Director for the defendant, Abney informed Kubeczka that, in light of Dr. Tullos' restriction, there was no work available for Kubeczka. On September 28, 1995, Dr. Tullos provided a second note to Kubeczka. In this note, Dr. Tullos stated that Kubeczka "could reasonably be employed at any activity which is sedentary in nature. Occupations which he could perform, but is not limited to, are things such as forklift driving, shipping and receiving, inspection, tool delivery, secretarial and bench work." Upon reviewing the note, Abney informed Kubeczka that,

based on Dr. Tullos' continued restrictions, there was still no available work for Kubeczka.

On November 30, 1995, Kubeczka filed a charge of discrimination with the plaintiff, alleging that the defendant was violating the ADA by refusing to return him to work. Subsequently, on March 28, 1996, Kubeczka commenced employment with Hunter's Glen Civic Association as a property assistance manager. Approximately six months later, he was constructively discharged.

At Kubeczka's request, on October 24, 1996, Dr. Tullos issued one final note. The note states:

Mr. David Kubeczka has recovered from bilateral total hip replacements to the point that he could reasonably be employed.

Mr. Kubeczka has had bilateral total hip replacements and therefore his restrictions are permanent restrictions which are unlikely to change. He could lift weight up to 50 pounds occasionally.

Depending on the job, special equipment may aid in his re-employment. This could include overhead hoister cranes and stools or chairs to sit on when operating machinery.

The same day that he received the note, Kubeczka presented it to Abney. Abney promptly returned Kubeczka to his job as a machine operator. Kubeczka maintained his employment as a machine operator with the defendant until the facility ceased manufacturing operations. Kubeczka's last day with the defendant was December 11, 1998. The plaintiff filed this suit on behalf of Kubeczka on May 11, 1999.

III. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show 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." The moving party bears this initial burden of informing the Court of the basis for its motion, and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court reviews the record by drawing all inferences most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

Once the moving party carries its burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The adverse party must show more than "some metaphysical doubt as to the material facts."

Matsushita, 475 U.S. at 586. If an adverse party completely fails to make an offer of proof concerning an essential element of that party's case on which that party will bear the burden of proof, then all other facts are necessarily rendered immaterial and the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322-23.

Hence, the granting of summary judgment involves a three-tier analysis. First, the court determines whether a genuine issue actually exists so as to necessitate a trial. Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Second, the court must ascertain whether that genuine issue pertains to material facts. Fed. R. Civ. P. 56(c). The substantive law of the case identifies the material facts, that is, those facts that

potentially affect the outcome of the suit. *Id.* at 248. Third, assuming no genuine issue exists as to the material facts, the court will decide whether the moving party should prevail solely as a matter of law. Fed. R. Civ. P. 56(c).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327.

IV. CONTENTIONS OF PARTIES

The plaintiff contends that the defendant violated the ADA by refusing to enable Kubeczka to return to work after Kubeczka underwent a double hip replacement. More specifically, the plaintiff avers that the defendant declined to allow Kubeczka to return to work from March 29, 1995 until November 4, 1996 (hereinafter, "the relevant time period"), although Kubeczka was a qualified individual with a disability whose rights were protected under the ADA. As evidence that Kubeczka was qualified, the plaintiff argues that, when Kubeczka was ultimately permitted to resume his work with the defendant, he satisfactorily performed his job. Additionally, according to the plaintiff, the evidence is sufficient to entitle the plaintiff to a trial on the question of whether Kubeczka was an "individual with a disability," as defined by the ADA, under one of two theories: (1) that he was actually disabled, or (2) that he was "regarded as" being disabled.

As a consequence of his hip condition, and the complications that ensued, the plaintiff avers that Kubeczka was limited in the following activities: sexual intercourse, standing, lifting, walking, running and participation in athletic activities. The plaintiff maintains that Kubeczka's sexual impairment qualifies as an actual disability under the ADA. Moreover, according to the plaintiff,

the defendant regarded Kubeczka as disabled as defined by the ADA. Additionally, the plaintiff argues, the defendant should have done more to ascertain what Kubeczka actually could do.

The defendant asserts that Kubeczka was not disabled during the relevant time period. Thus, the defendant argues, Kubeczka was not protected by the ADA. Further, the defendant maintains that, irrespective of whether Kubeczka was “regarded as” disabled, only actually disabled employees are entitled to a reasonable accommodation. Assuming that Kubeczka was actually disabled during the relevant time period, however, the defendant asserts that Kubeczka’s claim would fail, nonetheless, because he was unqualified for the job. The defendant maintains that Kubeczka was not medically released to perform the job of a machine operator. Simply stated, the defendant argues that it complied with the ADA mandates.

V. DISCUSSION

To establish an ADA claim, the plaintiff must prove that: (1) he has a disability, (2) he was qualified for the job in question, and (3) an adverse employment decision was made based on his disability. *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 853 (5th Cir. 1999).

Section 12111(8) of Title 42 of the U.S.C. provides:

Qualified individual with a disability

The term “qualified individual with a disability” means 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. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

To establish that Kubeczka is qualified for the position, the plaintiff is required to demonstrate that he is able to perform the essential functions of the job, with or without reasonable accommodation, regardless of his physical limitations. *Robertson v. The Neuromedical Center*, 161 F.3d 292, 294-95 (5th Cir. 1998). Thus, to prove that Kubeczka was a “qualified individual” for the job, the plaintiff must prove that Kubeczka was physically able to perform the machine operator job. *Burch v. City of Nacogdoches*, 174 F.3d 615, 622-23 (5th Cir. 1999). Self-serving testimony by Kubeczka is insufficient to meet this burden. *Id.*

In its Original Complaint, the plaintiff alleges that Kubeczka was, during the relevant time period, a “qualified individual with a disability” under the ADA. As evidence that Kubeczka was qualified to perform the position of machine operator during the relevant time period, the plaintiff cites to Kubeczka’s return to work in November 1996, and his subsequent satisfactory work performance. The Court cannot yield to the force of this reasoning. It is a doubtful course to argue that, since one is qualified for a particular job one day, he also was qualified nineteen months earlier. That is, the fact that Kubeczka was qualified for the position in November 1996 is not indicative of his qualifications from March 29, 1995 until November 1996. Nevertheless, this is the only evidence that the plaintiff furnishes to support its contention that Kubeczka was qualified during the relevant time period. This is simply an inadequate basis on which to state an ADA claim.

The summary judgment evidence establishes that Abney’s rationale for disallowing Kubeczka to return to work as a machine operator was Abney’s reliance on Dr. Tullos’ use of the

word “sedentary” in the first two letters provided to Abney.² Instead, the plaintiff maintains that the defendant should have ignored these restrictions and returned Kubeczka to work as a machine operator. This argument is posed by the plaintiff although, according to Kubeczka, the machine operator position was not sedentary in nature, but entailed “physically challenging . . . rough work.” Moreover, Kubeczka testified that, even if modified, as Dr. Tullos’ note, dated September 28, 1995, suggested, his job would not be sedentary in nature.³

Furthermore, Kubeczka admits that he never asked Abney to ignore Dr. Tullos’ restrictions. In fact, it was Abney who suggested to Kubeczka that he should obtain a revised note from Dr. Tullos. Once Kubeczka obtained the revised restrictions from Dr. Tullos, Abney immediately returned Kubeczka to work as a machine operator.

In sum, Kubeczka has failed to demonstrate that he was able to perform the job of machine operator from a physical standpoint. Thus, his claim that he was qualified for the position must necessarily fail. Since the plaintiff is unable to establish this element of a prima facie ADA claim, the Court need not address the myriad of arguments as to whether Kubeczka was disabled.

As to the other jobs that might have been available, the plaintiff has the responsibility of demonstrating that: (1) Kubeczka was qualified for the positions in question, (2) CCC knew of his interest, and (3) he was denied the job or jobs because of his disability. *Id.* The plaintiff failed in all regards. Dr. Tullos’ assertion that Kubeczka was able to perform the job of, for instance,

²Dorland’s Illustrated Medical Dictionary 1501 (28th ed. 1994) defines sedentary: “1. sitting habitually; of inactive habits. 2. pertaining to a sitting posture.”

XIV The Oxford English Dictionary 857 (2nd ed. 1989) defines sedentary “[o]f persons: Accustomed . . . to sitting still . . . inactive . . . not engaged in active business”

³In his testimony on this point, Kubeczka noted that he was referring to the Dorland’s Illustrated Medical Dictionary definition of “sedentary.” *See* note 2.

forklift driving, goes only to Kubeczka's ability to perform the job from a medical stand point. The doctor is certainly incapable of rendering a valid opinion as to Kubeczka's skill-related qualifications for the position. Yet, no other evidence was proffered by the plaintiff to prove that Kubeczka was qualified for that, or any other position. Furthermore, the summary judgment evidence before the Court establishes that Kubeczka failed to indicate to CCC an interest in another position with CCC. The only work in which he exhibited an interest was the machine operator position. Thus, since the defendant never considered Kubeczka for any position except as a machine operator, the third element, that Kubeczka was denied the other jobs because of his disability, is moot.

VI. CONCLUSION

In light of the foregoing analysis, it is the conclusion of the Court that there is no genuine issue of material fact that Kubeczka was unqualified for the machine operator position. Therefore, the plaintiff is unable to establish a prima facie ADA claim. Hence, it is the judgment of the Court that the defendant's motion for summary judgment shall be GRANTED.

It is so ORDERED.

Signed this 28th day of March, 2000.



KENNETH M. HOYT
United States District Judge