

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICHAEL J. DONOGHUE,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-1516-SLR
)
MORAN FOODS, INC.,)
d/b/a Save-A-Lot, Ltd., and)
SUPERVALU, INC.,)
)
 Defendants.)

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Dover, Delaware. Counsel for the Plaintiff

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Wilmington, Delaware. Counsel for the Defendants.

MEMORANDUM OPINION

Wilmington, Delaware
Dated: October 29, 2003

ROBINSON, Chief Judge

I. INTRODUCTION

Presently before the court is the motion of defendants Moran Foods, Inc., doing business as Save-A-Lot, Ltd. ("Save-A-Lot"), and Supervalu, Inc. ("Supervalu" and jointly the "defendants"), for summary judgment pursuant to Fed. R. Civ. P. 56(b). (D.I. 30) Michael J. Donoghue ("plaintiff") filed this action on October 8, 2002, alleging that he was terminated from his position as a co-manager in training based upon his disability or his perceived disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112 ("ADA"), and that his termination violated the implied covenant of good faith and fair dealing under Delaware law. (D.I. 1) This court has jurisdiction over the complaint pursuant to 28 U.S.C. § 1331 and § 1367. For the reasons stated below, the court grants defendant's motion in part and denies in part, and dismisses the remainder of the complaint for lack of subject matter jurisdiction.

II. BACKGROUND

Supervalu, a corporation organized and existing under the laws of Missouri, is a grocery wholesaler and retailer with headquarters in Eden Prairie, Minnesota, with its principal businesses comprised of retail foods, wholesale distribution, and Save-A-Lot. Save-A-Lot, organized and existing under the laws of

Delaware, is headquartered in St. Louis, Missouri, and is the wholly owned subsidiary of Supervalu. Save-A-Lot has over one thousand retail locations in thirty-six states.

Plaintiff, age fifty-two, began working in the retail industry in the 1970s. By 1982, he was the manager of a Pennsylvania store with over 300 employees and more than \$530,000 in average weekly sales. In April 1997, plaintiff suffered a massive heart attack while driving which resulted in an auto collision. As a consequence, plaintiff suffered permanent physical injuries, including nerve damage that causes a noticeable limp on his right side. Following the accident he continued to experience cardiac problems and, a year later, underwent a successful heart transplant surgery.

In and around March 2002, plaintiff attended a job fair held by Save-A-Lot in its Dover, Delaware store. He completed an application, submitted his resume, and had a brief interview with Eugene Kissinger, the district manager for Save-A-Lot. Plaintiff sought a position in retail management with Save-A-Lot. At that time, plaintiff explained that the several-year-gap in his employment stemmed from an auto accident resulting in serious orthopedic injuries to his hip and leg. He did not disclose at that time that the auto accident was a direct result of a heart attack, nor did he disclose that he had undergone heart transplant surgery. Despite his medical history, plaintiff

confirmed that he had the physical ability to meet the job requirements.

Following the initial interview with Kissinger, a second interview was held at Save-A-Lot's office in Claymont, Delaware, with Frank Calderoni, another district manager. During this interview, plaintiff inquired into the job responsibilities and was told that the position had more physical job responsibilities than his previous grocery retail employment. Plaintiff informed Calderoni of his injuries and the fact that he walked with a limp. After completing a series of employment questionnaires and tests, plaintiff was offered a position as a co-manager and informed of the management training program requirements.

On April 1, 2002, plaintiff began his employment with Save-A-Lot, participating in a two-day orientation session at a Philadelphia store. The training program consisted of eight weeks of on-the-job training designed to familiarize management trainees with all aspects of store operations. Additionally, management trainees received several days of training at the division office of Save-A-Lot, and two weeks of management training in the Missouri corporate office. The program also required completion of certain self-study modules.

On April 4, 2002, plaintiff continued his training by reporting for work at a Save-A-Lot store in Seaford, Delaware. At the Seaford store, plaintiff met Gail Twilley, the store

manager that would be responsible for this training. Plaintiff informed Twilley of his medical history at some point between the second and fifth week of training.¹

Over the course of the training program, plaintiff received two formal written evaluations which described his performance as unsatisfactory in several categories. The first formal evaluation was received by plaintiff on April 26, 2002, after three weeks of training. (D.I. 32 at 139) The performance assessment was completed by Shirley Webber after consultation with Kissinger and Twilley. On April 25, plaintiff received a failing grade on his second self-study module, although he was subsequently permitted to retake the test and received a passing grade. The second performance assessment was received on May 10, 2002. (Id. at 147) That evaluation similarly indicated that plaintiff's performance was unsatisfactory in several categories.

On May 16, 2002, plaintiff had a conversation with Maurice Stevenson, an assistant manager with the Seaford store. At that time, plaintiff told Stevenson about his heart condition.

Plaintiff alleges that Stevenson indicated to him that "[Stevenson] noticed a difference in the way that [Twilley] was

¹ The exact timing of this disclosure is disputed. According to plaintiff, it was on April 18, 2002, during his second week at the Seaford store. (D.I. 38 at 43) Twilley, during her deposition, indicated that it occurred somewhere between the fourth or fifth week of training. (D.I. 32 at 115) In any event, for the reasons to be discussed below, this factual dispute is not material.

training [plaintiff] versus the training that [Stevenson] went through and the training that he has seen other ones go through.”² (D.I. 38 at 59)

On May 22, 2002, Kissinger and Twilley met with plaintiff and informed him that he was being terminated, based upon the determination that he did not have the ability to close the store by himself.

On or about July 2, 2002, plaintiff filed a complaint on the basis of disability discrimination with the Equal Employment Opportunity Commission (“EEOC”). On September 17, 2002, the EEOC issued a notice of suit rights, after concluding its investigation and determining that there was insufficient information to establish a violation of the ADA.

III. STANDARD OF REVIEW

A court shall grant summary judgment only 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 judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986).

² Stevenson, in his deposition, categorically denied this aspect of the conversation. (D.I. 40 at 20)

"Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

With respect to summary judgment in discrimination cases,

the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV. DISCUSSION

The essence of plaintiff's claims are that Twilley, as the agent of the defendants, perceived plaintiff's physical impairments as substantially limiting and, on that basis, had animus toward plaintiff that resulted in unfavorable and allegedly false performance assessments which resulted in his involuntary separation.

A. Employment Discrimination under the ADA

The ADA prohibits discrimination by an employer against a "qualified individual." 42 U.S.C. § 1112 (2001). To establish a prima facie case, a plaintiff must demonstrate that: (1) he has a disability within the meaning of the statute; (2) he is otherwise qualified to perform the essential functions of the job, with or without accommodations by the employer; and (3) that as a result of his disability, he has suffered an adverse employment action. See Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998).

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). In the present case, Plaintiff claims relief under the third classification of covered individuals, namely, those who are regarded as having a substantially limiting impairment. (D.I. 37 at 11-12)

The purpose of protecting an employee who is regarded as being disabled, but is not in fact disabled under the statute's definition, is to insure that individuals are not "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities." Sutton v. United Airlines, Inc., 527 U.S. 471, 489-90 (1999) (quoting 29 C.F.R. § 1630.2(1)). Under EEOC regulations, there are three ways in which a plaintiff can

establish that he is regarded as disabled:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;

(3) Has [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1) (2003). In the present case, plaintiff claims that the first description applies, namely, that defendants mistakenly regarded his physical impairments as substantially limiting. (D.I. 37 at 13) In support of this claim, plaintiff asserts that defendants, through their agents, were aware of his limp and his heart conditions. Awareness of these physical impairments, however, does not, without more, establish that defendants regarded him as disabled. See Kelly v. Drexel University, 94 F.3d 102, 109 (3d Cir. 1996) (holding that awareness of an employee's limp is not sufficient to show that employer regarded employee as disabled); Davis v. Tammac Corp., 127 F. Supp. 2d 625, 631 (M.D. Pa. 2000) (holding that awareness of an employee's heart condition is not sufficient to establish that the employee was regarded as disabled).

To be regarded as disabled, a covered entity must mistakenly believe "that the person's actual, nonlimiting impairment substantially limits one or more major life activities." Murphy

v. United Parcel Serv., 527 U.S. 516, 522 (1999). Plaintiff argues, in this regard, that there is a genuine issue of material fact as to whether defendants considered him "unable to perform a broad class or range of jobs requiring significant physical activity." (D.I. 37 at 16) According to plaintiff, defendants, in their performance assessment of him, "focused on [his] alleged inability to work pallets." (Id.) Even if this court accepts plaintiff's contention that this was an erroneous evaluation of his physical capabilities,³ such an assessment does not support the inference that defendants viewed his physical impairments as substantially limiting a major life activity.

In Murphy, for example, the Supreme Court held that a commercial truck mechanic who was expressly terminated because of his hypertension did not state a claim for relief under the ADA, because he did not demonstrate that his employer regarded his hypertension as substantially limiting a major life activity. Murphy, 527 U.S. at 524. Instead, the Court concluded that, at most, the employer viewed the employee as unable to perform the

³ The court notes that plaintiff's contention in this regard is tenuous and largely unsupported by evidence. The reference to his pallet work is under the heading of "Productivity." (D.I. 32 at 144) In the same sentence, plaintiff is also criticized for the time it takes him to complete the counting of the register tills. (Id.) On its face, the assessment is more clearly an evaluation of plaintiff's overall efficiency as an employee, and not his physical capabilities, a theme which reoccurs throughout his performance assessments and which is wholly unrelated to his physical impairments.

responsibilities of a particular mechanic job that required certain physical capabilities, as opposed to mechanics as a general class. Id. ("The evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills."). See also Sutton v. United Air Lines, Inc., 527 U.S. 471, 492-93 (1999) (holding that exclusion from a particular job "does not support the claim that respondent regards petitioner as having a **substantially limiting** impairment.") (emphasis in original); Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993) (holding that an employer's belief that plaintiff could not perform particular task safely does not establish that employer regarded plaintiff as disabled).

Given the absence of direct evidence that plaintiff was regarded as disabled within the meaning of the ADA, plaintiff argues that circumstantial evidence may be relied upon. (D.I. 37 at 14) Circumstantial evidence, of course, may be used to show that an employee was discriminated against once the employee has established that he is a covered individual under the ADA. See Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 667-68 (3d Cir. 1999). In this case, however, plaintiff attempts to show by circumstantial evidence that he is a covered individual but provides no case law to support this argument. To

permit plaintiff to do so would effectively vitiate the ADA's definition of disabled, and permit any person to allege discrimination simply because of the presence of some impairment in conjunction with an adverse employment action. Kelly, 94 F.3d at 109 ("[W]e hold that the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate that the employer regarded the employee as disabled or that the perception caused the adverse employment action.").

Viewing all the facts and inferences in a light most favorable to plaintiff, he has failed to show a sufficient factual basis to support his claim that he is a covered individual under the ADA and, consequently, defendants are entitled to summary judgment as a matter of law.

B. Covenant of Good Faith and Fair Dealing

Plaintiff contends that he is entitled to relief under state law for breach of the covenant of good faith and fair dealing. See Pressman v. E. I. Dupont de Nemours & Co., 679 A.2d 436 (Del. 1996). Having found summary judgment proper with respect to plaintiff's ADA claim, this court finds itself without subject matter jurisdiction over his state law claim. 28 U.S.C. § 1367(c) (2002); see Wiers v. Barnes, 925 F. Supp. 1079, 1089 (D. Del. 1996). Consequently, the court, pursuant to Fed. R. Civ. P. 12(h) (3), dismisses plaintiff's claim under the covenant.

V. CONCLUSION

Having concluded that plaintiff has failed to establish a prima facie case of discrimination under the ADA, this court grants defendants' motion for summary judgment as to plaintiff's ADA claim, and dismisses the remainder of plaintiff's complaint for lack of subject matter jurisdiction.

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O R D E R

At Wilmington this 29th day of October 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. The motion by defendants Moran Foods, Inc., d/b/a/ Save-A-Lot, Ltd. and Supervalu, Inc., for summary judgment (D.I. 30) is granted with respect to plaintiff's claim under the Americans with Disabilities Act, 42 U.S.C. § 12112 et seq.

2. The clerk of the court is directed to enter judgment in favor of the defendants and against plaintiff in connection with this claim.

3. The remainder of the complaint is dismissed pursuant to Fed. R. Civ. P. 12(h) for lack of subject matter jurisdiction under 28 U.S.C. § 1367(c).

Sue L. Robinson
United States District Judge