IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID L. CLEMENTS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 02-259 JJF
	:	
DIAMOND STATE PORT CORPORATION,	:	
	:	
Defendant.	:	

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Attorneys for Defendant.

O P I N I O N

September 30, 2004
Wilmington, Delaware

FARNAN, District Judge

Pending before me is the Motion For Summary Judgment (D.I. 44) filed by Diamond State Port Corporation. For the reasons set forth, I will grant Defendant's Motion For Summary Judgment on Plaintiff's claim of failure to provide a reasonable accommodation and on Plaintiff's claim of retaliation.

BACKGROUND

This action arises from an allegation of discrimination pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("the ADA").

Defendant Diamond State Port Corporation ("Diamond State") operates the Port of Wilmington as an instrumentality of the State of Delaware. Diamond State primarily uses members of International Longshoreman's Association AFL-CIO, Local 1694-1, for its labor force. An agreement between the union and Diamond State governs the terms of employment.

The terms of the employment agreement separate union employees into two types, Chapter A and Chapter B. Chapter A employees are full-time employees; Chapter B employees are hired as needed on a day-to-day basis. Chapter B employees are not guaranteed a specific position in which to work, but may be assigned to perform the duties of lift truck operator, checker, or laborer on any given day or during any part of any day.

David Clements worked at the Port of Wilmington as a Chapter B union employee. On August 8, 1997, Mr. Clements hurt his back

while working as a laborer. Mr. Clements continued to work and his back injury progressively worsened. On August 26, 1997, he began receiving workers' compensation temporary total disability payments. On March 15, 1999, Mr. Clements' temporary total disability status was terminated and he began receiving partial disability payments.

Mr. Clements filed complaints on August 2, 1999, and September 10, 1999, with the State of Delaware Department of Labor alleging that Diamond State was discriminating against him according to the ADA because Diamond State would not allow him to return to work until he could do so with no restrictions. In November 1999, Mr. Clements requested that Diamond State make accommodations for his disability. Diamond State denied Mr. Clements' request. That same month, Mr. Clements filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In February 2001, Mr. Clements had back surgery and since that time has been unable to work. In April 2002, Mr. Clements filed this action alleging that Diamond State had violated the ADA by refusing to give him reasonable accommodations (Count I) and has retaliated against him by forcing him to accept workers' compensation after he requested an accommodation (Count II).

DISCUSSION

I. Legal Standard For Summary Judgment

In pertinent part, Rule 56(c) of the Federal Rules of Civil

Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 200 (3d Cir. 1995). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). To properly consider all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

To defeat a motion for summary judgment, the non-moving party must:

> do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). However, the mere existence of some evidence in support of the nonmovant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmovant on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Thus, if the evidence is "merely colorable, or is not significantly probative," summary judgment may be granted. Id.

II. Whether Defendants Are Entitled To Summary Judgment In Regard To The Failure To Accommodate Claim

By its Motion, Diamond State contends that it is entitled to summary judgment as to Mr. Clements' claim of failure to provide a reasonable accommodation (Count I) because Mr. Clements has not made a prima facie case of failure to accommodate for three reasons. First, Mr. Clements has not shown that he is disabled under the ADA. Diamond State argues that Mr. Clements was not substantially limited in any major life activity during the relevant period. Second, Mr. Clements has not shown he is capable of performing the essential functions of his job with the accommodation he requested. Third, accommodating Mr. Clements would have been an undue hardship for Diamond State.

Mr. Clements responds that Diamond State is not entitled to summary judgment for four reasons. First, Diamond State did not engage in good faith in an interactive process to seek an accommodation for Mr. Clements. Second, Mr. Clements is a

qualified individual with a disability under each of three independent criteria: (1) Mr. Clements' back injury constitutes a physical impairment that substantially limits one or more of his major life activities; (2) Mr. Clements has a record establishing serious physical impairment resulting from his 1997 injury; and (3) Diamond State regarded Mr. Clements as having a disability. Third, Mr. Clements was capable of performing essential functions of a fork lift operator with accommodation. Fourth, it would not be an undue hardship for Diamond State to accommodate Mr. Clements.

Because I find that Mr. Clements is not disabled within the meaning of 42 U.S.C. 12102(2)(A), (B), or (C), I will grant summary judgment as to Count I, failure to accommodate.

The ADA prevents an employer from failing to provide "a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). To establish a prima facie case of failure to accommodate, Mr. Clements must prove: 1) he is an individual with a disability under the ADA; 2) he can perform the essential functions of his position with an accommodation, 3) his employer had notice of the alleged disability, and 4) the employer failed to accommodate him. Conneen v. MBNA America Bank, 182 F.Supp.2d 370, 378-79 (D.Del. 2002).

A. Whether Mr. Clements is Disabled for the Purposes of the ADA

Mr. Clements can establish that he has a disability if he has a physical impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2). Mr. Clements argues that he can satisfy each of these standards.

1. Whether Mr. Clements Is Disabled Within The Meaning Of The ADA Based On A Physical Or Mental Impairment That Substantially Limits A Major Life Activity

Mr. Clements contends that because he is unable to engage in the activities of work and manual lifting, he is disabled.

Diamond State contends that Mr. Clements cannot establish elements one and two of the prima facie case for establishing a disability for the purposes of the ADA. Specifically, as to element one, Diamond State contends that Mr. Clements is not disabled because he does not have "a physical or mental impairment that substantially limits one or more of [his] major life activities." 42 U.S.C. § 12102(2)(A).

There is no dispute that Mr. Clement's back injury is a "physical impairment" and that lifting and working are "major life activit[ies]." The issue is whether Mr. Clements' back injury "substantially limits" his ability to lift and work.

(a) Whether Mr. Clements Is Substantially Limited In The Major Life Activity Of Lifting

The EEOC's regulations define "substantially limits" as follows: "(i) Unable to perform a major life activity that the

average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1). The regulations include the following factors for evaluating when someone is substantially limited in a major life activity, such as lifting: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

Although the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), left unresolved what deference, if any, these regulations are due, the Third Circuit applies 29 C.F.R. § 1630.2(j). See, e.g., Taylor v. Phoenixville School Dist., 184 F.3d 296, 307 (3d Cir. 1999).

As evidence he is substantially limited in the major life activity of lifting, Mr. Clements submits a November 8, 1999 accommodation request letter signed by Dr. Bose. This letter was written to inform Diamond State that Mr. Clements could return to his job as a lift truck operator with certain accommodations. "No manual lifting" was among the accommodations.

This letter was seemingly not meant to establish that Mr.

Clements was incapable of any lifting whatsoever. Rather, the letter requests that Mr. Clements be accommodated as a lift truck operator without having to perform the manual lifting function of that job. Mr. Clements' other medical records indicate he could occasionally lift up to 20 pounds, and indicate that his impairment was temporary in nature. (D.I. 60 Ex. C.)

In Marinelli v. City of Erie, Penn., testimony of a physician that an employee could not lift more than ten pounds did not satisfy the employee's burden on his ADA claim to prove that such lifting restrictions substantially limited him in the major life activity of lifting. 216 F.3d 354, 364-365 (3d Cir. 2000). In the instant case, Mr. Clements' twenty pound restriction is less restrictive than the ten-pound restriction that the Third Circuit has found not to render one disabled under the ADA.

Moreover, there is no evidence in the record that Mr. Clements is unable to perform the daily tasks of living alone that require some lifting, such as housework and yard work.

Therefore, I conclude that Mr. Clements is not sufficiently different from the general population such that he is substantially limited in the major life activity of lifting.

(b) Whether Mr. Clements Is Substantially Limited In The Major Life Activity Of Lifting

"A plaintiff attempting to establish disability on the basis of substantial limitation in the major life activity of working,

must, at minimum, allege that he or she is unable to work in a broad class of jobs." Tice v. Centre Area Transp. Authority, 247 F.3d 506, 512 (3d Cir. 2001) (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 492-93 (1999)). Even a medically documented, moderate lifting restriction is not sufficient to withstand summary judgment if an employee cannot demonstrate how a lifting restriction substantially limits his or her ability to engage in the major life activity of working. 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(j)(3)(i); Howell v. Sam's Club No. 8160/Wal-Mart, 959 F. Supp. 260 (E.D. Pa. 1997), judgment aff'd without published op., 141 F.3d 1153 (3d Cir. 1998).

Mr. Clements contends that his back injury is permanent and precludes him from working in a large class of jobs. As evidence of this disability, Mr. Clements offers his medical evaluations and the fact that Diamond State stated that Mr. Clements is unable to perform any of the jobs at the port. Mr. Clements also offers an accommodation request letter from Dr. Bose stating that Mr. Clements can return to work as a lift truck operator as long as he does not engage in manual lifting, among other accommodations.

In the instant case, Mr. Clements' back injury prevents him only from working as a lift truck operator, checker or laborer. Mr. Clements has been employed as a salesman, cashier, file clerk, auditor, and labor negotiator. (D.I. 45 at 12.)

Therefore, because I find that Mr. Clements' back injury does not prevent him from working in a broad class of jobs, I conclude that Mr. Clements is not limited in the major life activity of working.

2. Whether Mr. Clements Is Disabled Within The Meaning Of The ADA Based On A Record Of Impairment

Plaintiff contends that he is disabled under the "record of impairment" prong of the ADA's definition of disabled. See 42 U.S.C. § 12102(2) ("The term "disability" means ... (B) a record of such impairment....).

A person is regarded as having a record of impairment if he "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k); Buskirk v. Apollo Metals, 116 F.Supp.2d 591, 601 (E.D.Pa. 2000).

As evidence that he had a record of impairment, Mr. Clements offers his medical records and introduces Dr. Bose's November 8, 1999, accommodation request letter. Mr. Clements' records demonstrate that Mr. Clements possesses a physical impairment. However, I am not persuaded that these records demonstrate that Mr. Clements' impairments substantially limit a major life activity. Following the reasoning of Buskirk, "if an impairment does not substantially limit a major life activity, a history of those same impairments cannot constitute a record of impairment."

Buskirk v. Appollo Metals, 116 F.Supp.2d 591, 600 (E.D. Pa. 2000). As discussed above, the evidence does not support the contention that Mr. Emory is substantially limited in any major life activity. Therefore, a history of those same impairments cannot constitute a record of impairment. Furthermore, Mr. Clements has offered no evidence that Diamond State misclassified him as having such an impairment. For these reasons, I conclude that Mr. Clements has not demonstrated a record of impairment.

3. Whether Mr. Clements Is Disabled Within The Meaning Of The ADA Based On Being Regarded As Having An Impairment

Finally, Mr. Clements contends under § 12102(2)(C) that Diamond State "regarded" him as having the requisite ADA impairment. He argues that Diamond State regarded him as "possessing significant limitations that would likely constitute substantial limitations on many major life activities." (D.I. 56 at 23.)

A person is "regarded as" having a disability if the person:

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

Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187-188 (3d Cir. 1999)(quoting 29 C.F.R. § 1630.2(l))(brackets in original).

Although Mr. Clements does not explicitly so state, his argument appears grounded on the first definition above, that is, that he has an impairment that is not substantially limiting, but that Diamond State treated his impairment as if it were so limiting. Specifically, Mr. Clements contends that because Diamond State found he was unable to perform the various duties required of a Chapter B employee, Diamond State regarded him as being precluded from performing a class or range of jobs. Diamond State counters Mr. Clements' claim by contending that it was well aware of Mr. Clements' injury and that no misperception ever existed. Diamond State argues that, because of the nature of its operations and its contract with the union, no non-labor intensive positions were available. (D.I. 60 at 17.) Diamond State further contends that, even if it had non-labor intensive positions available, it is restricted by its contract with the union from permanently assigning Chapter B employees, such as Mr. Clements, to non-labor intensive positions. Id.

It is important to recognize that "to be covered under the regarded as prong of the ADA the employer must regard the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled." Rinehimer v. Cemcolift, Inc., 292 F.3d 375,

381 (3d Cir. 2002)(internal quotation marks and citations omitted). However, in Buskirk v. Appollo Metals, the Third Circuit indicated that where an employer excludes an employee from any position with the organization, a finding that the employer regards the employee as having a disability may be appropriate. 307 F.3d 160, 167 (3d Cir. 2002).

In these circumstances, Diamond State contends that it had no other positions to offer Mr. Clements and thus has excluded Mr. Clements from any position within the organization. Therefore, under Buskirk, a finding that Diamond State regards Mr. Clements as disabled may be appropriate. However, Mr. Clements has not suggested that he was denied another job because of a belief that his condition would prevent him from performing adequately, nor has he presented any evidence that other jobs were available. The Third Circuit has repeatedly held that unsubstantiated arguments made in briefs are not evidence to be considered by the Court. Versarge v. Township of Clinton N.J., 984 F.2d 1359, 1370 (3d Cir. 1993). Thus, even viewing the facts in the light most favorable to Mr. Clements, I conclude that Diamond State did not regard Mr. Clements as disabled within the meaning of the ADA.

In sum, I find that Mr. Clements' impairment does not satisfy the requirements of any of the three alternatives for having the requisite "disability" under the ADA. Because I

conclude that Mr. Clements is not disabled within the meaning of 42 U.S.C. 12102(2)(A), (B), or (C), I will grant summary judgment as to Count I, failure to accommodate.

II. Whether Defendants Are Entitled To Summary Judgment In Regard To The Retaliation Claim

Diamond State contends it is entitled to summary judgment as to Mr. Clement's retaliation claim (Count II) because Mr. Clements has not made a prima facie case of retaliation. Specifically, Diamond State contends that Mr. Clements has not shown that Diamond State took any adverse action after or contemporaneous with his filing a claim under the ADA.

Mr. Clements contends that "by forcing [him] to accept Worker's Compensation in response to his request for an accommodation, Diamond State retaliated against [him]." (D.I. 1.) Mr. Clements further contends that he has established a prima facie case of retaliation because Diamond State has accommodated injured employees in the past.

To establish a prima facie case of retaliation under the ADA, Mr. Clements must show "(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567-68 (3d Cir. 2002) (quoting Krouse v. Am. Sterilizer

Co., 126 F.3d 494, 500 (3d Cir.1997)).

In the Third Circuit, analysis for a claim of retaliation proceeds in three stages. First, the plaintiff must establish a prima facie case of retaliation. If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751, 760 (3d Cir. 2004). Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the allegedly legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id.

A. Whether Mr. Clements Has Established A Prima Facie Case Of Retaliation

Mr. Clements began receiving workers' compensation in the fall of 1997. Mr. Clements appears to base his retaliation claim on complaints he filed on August 2, 1999 and September 10, 1999 with the State of Delaware Department of Labor. These complaints alleged that Diamond State was discriminating against him under the ADA because Diamond State would not allow him to return to work until he could do so with no restrictions. There is no dispute that the filing of such complaints is protected employee activity for purposes of the ADA. Thus, I find that Mr. Clements

has satisfied the first prong for establishing a prima facie case of retaliation.

In regard to adverse action, Mr. Clements contends that Diamond State then took such an action when it denied his accommodation request in November 1999. Mr. Clements argues that this action left him with workers' compensation payments in lieu of employment at Diamond State.

In response, Diamond State contends that Mr. Clements cannot show an adverse action that occurred after or contemporaneous with his filing of the complaints with the State of Delaware Department of Labor. Diamond State contends that Mr. Clements sought to return to work in 1999, after he had already been receiving workers' compensation for approximately two years. Therefore, Diamond State's denial of his accommodation request did not result in his being forced to receive workers' compensation in 1999. Diamond State further contends that its continued unwillingness to allow Clements to return to work in 1999 does not constitute a separate discriminatory act for the purposes of the ADA.

Because the issue as to whether Mr. Clements has established a prima facie case of retaliation may be resolved on other grounds, I decline to entertain these arguments at this time. Instead, for the purpose of deciding the motion for summary judgment, I assume that Mr. Clements has met his burden of

showing an adverse action that occurred after or contemporaneous with his filing of the complaints.

In regard to a causal connection between Mr. Clements' protected activity and Diamond State's act, Mr. Clements asserts that Diamond State did not want him to return to work because "he challenged management and was not afraid to lodge complaints" with Diamond State management or other state officials. (Answer Br. at 33.) Mr. Clements also argues that Diamond State has accommodated other injured employees. In support of this contention, Mr. Clements offers deposition testimony from various Diamond State employees. Some depositions are of Category A employees and are, therefore, not relevant to the circumstances of this case. (D.I. 57 at B187, B189.) Testimony in two depositions alleges racially discriminatory practices at Diamond State. (D.I. 57 at V176, B179.) Other depositions establish that Diamond State has made some accommodations for employees suffering from mental conditions, for one employee suffering from a wrist injury, and, for four weeks, for one employee suffering from a foot injury. (D.I. 57 at B164-65, B139-40, B166, B167.)

Because Mr. Clements has failed to proffer any evidence of retaliation other than that some other employees with dissimilar injuries have been accommodated, I find that no reasonable jury could conclude that Mr. Clements' complaints and Diamond State's subsequent refusal to accommodate him shared a causal link for

purposes of an ADA retaliation claim. For these reasons, I will grant summary judgment as to Count II, retaliation.

Conclusion

In sum, because I find that no reasonable jury could conclude that Mr. Clements is not disabled within the meaning of 42 U.S.C. 12102(2)(A), (B), or (C), I will grant summary judgment as to Count I, failure to accommodate. Because I find that no reasonable jury could conclude that Mr. Clements' complaints and Diamond State's subsequent refusal to accommodate him shared a causal link for purposes of an ADA retaliation claim, I will grant summary judgment as to Count II, retaliation.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID L. CLEMENTS,	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No. 02-259 JJF
	:	
DIAMOND STATE PORT CORPORATION,	:	
	:	
Defendant.	:	

O R D E R

At Wilmington, this 30th day of September 2004, for the reasons discussed in the Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motion For Summary Judgment (D.I. 44) on Plaintiff's claim for failure to accommodate and Plaintiff's claim for retaliation is **GRANTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE