

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ROBERT E. BARTOS,** )  
 )  
 **Plaintiff** )  
 )  
 v. ) **Civil No. 03-175-P-S**  
 )  
 **BATH IRON WORKS CORPORATION,** )  
 )  
 **Defendant** )

**RECOMMENDED DECISION ON DEFENDANT’S  
MOTION TO DISMISS**

In this action alleging disability-based discrimination, defendant Bath Iron Works Corporation (“BIW”) moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint against it for failure to state a claim upon which relief can be granted. *See* Bath Iron Works Corporation’s Motion To Dismiss, etc. (“Motion”) (Docket No. 3). For the reasons that follow, I recommend that the Motion be denied.

**I. Applicable Legal Standard**

“In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).



## II. Factual Context

For purposes of the Motion I accept the following as true.

Plaintiff Robert E. Bartos has been employed by BIW since 1982. Complaint, attached to Defendant Bath Iron Works Corporation's Notice of Removal (Docket No. 1), ¶3. Bartos has chronic anxiety and depression. *Id.* ¶4. As a result of his emotional impairments, Bartos was unable to work without being allowed to take medical leave and to work less than a full work shift on several occasions. *Id.* ¶5. His emotional disability is permanent. *Id.* ¶6.

For years, Bartos has taken strong medications to ease the symptoms of his anxiety and depression and has participated in weekly counseling sessions with his mental health providers. *Id.* ¶7. After consulting those mental health providers, BIW's company doctor sent a memorandum to Bartos's supervisors on June 15, 2001 stating that Bartos had a "qualifying disability" that required the company to "make reasonable accommodations." *Id.* ¶8. In her June 15, 2001 memorandum, the company doctor stated that the company should accommodate Bartos's disability by reducing extraneous noise in his work area and that employees who worked near him should be required to wear headphones if they chose to play radios or CD players at their work stations. *Id.* ¶9.

Bartos's supervisors refused to enforce this accommodation, as a result of which employees in Bartos's work area continued to play their radios and CD players in a loud and disturbing manner. *Id.* ¶10. This situation caused Bartos to suffer increased anxiety and emotional distress, which caused him to lose time from work. *Id.* ¶11. Although Bartos complained on several occasions to representatives of management that the company doctor's reasonable accommodation was not being enforced, no one advised him that it had been withdrawn or offered to discuss with him what alternatives were available to accommodate his disability by reducing extraneous noise in his work area. *Id.* ¶12.

In addition to subjecting Bartos to noise from radios and CD players, several of his co-workers intentionally harassed him by activating sound effects on their computers when he was in the area, including a voice saying “OH NO” and the sounds of screeching brakes, drive-by shootings and farm animals. *Id.* ¶ 13. Although Bartos complained to management about these distracting and disturbing computer noises that were intended to harass him, his supervisors did nothing to stop the noises or discipline the employees who were activating them. *Id.* ¶ 14. As a result of these computer-activated sounds and his supervisor’s refusal to do anything about them, Bartos suffered increased anxiety and emotional distress that caused him to lose time from work. *Id.* ¶ 15.

Had BIW enforced the reasonable accommodation proposed by the company doctor and stopped the harassment to which Bartos was exposed, he could have performed his job duties in a reasonable manner. *Id.* ¶ 16. Bartos filed a complaint of discrimination on account of his disability with the Maine Human Rights Commission, which issued a right-to-sue letter on May 30, 2003. *Id.* ¶ 17.

### **III. Analysis**

Bartos brings parallel disability-discrimination claims pursuant to the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4551 *et seq.* Complaint ¶¶ 18-24; *see also* Plaintiff’s Objection to Motion To Dismiss, etc. (“Objection”) (Docket No. 4) at 1.

BIW initially moved to dismiss on the ground that Bartos failed to state a claim for disability-based hostile work environment. *See generally* Motion. Bartos rejoined that this was irrelevant inasmuch as he did not intend to state such a claim; rather, his complaint took BIW to task for failure to reasonably accommodate his “qualifying” disability. *See* Objection at 1. In response, BIW shifted its basis for seeking dismissal, arguing that Bartos’s complaint fails to allege that he is disabled within

the meaning of the ADA or that his disability substantially limits one or more major life activities. *See* Bath Iron Works Corporation’s Reply to Plaintiff’s Opposition to Its Motion To Dismiss (“Reply”) (Docket No. 5) at 1.

Although this latter point is raised for the first time in a reply memorandum – a circumstance that typically would counsel its disregard, *see, e.g., In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum) – BIW in this instance fairly responds to points put in play by Bartos, *see* Loc. R. 7(c) (reply memorandum “shall be strictly confined to replying to new matter raised in the objection or opposing memorandum.”). Accordingly, I address the merits.

The ADA proscribes discrimination by a covered entity “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

“Disability,” in turn, is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).<sup>1</sup> As regards the third of these categories, the Supreme Court has observed:

There are two apparent ways in which individuals may fall within this statutory definition [of perceived disability]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or

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<sup>1</sup> The MHRA definition of “disability” is substantially the same as that of the ADA. *See, e.g., Bilodeau v. Mega Indus.*, 50 F. Supp.2d 27, 32-33 n.2 (D. Me. 1999); *Winston v. Maine Tech. Coll. Sys.*, 631 A.2d 70, 74 (Me. 1993).

that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

*Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

Bartos's complaint alleges that BIW's own doctor characterized him, in a memorandum sent to his supervisors, as having a "qualifying disability" that required BIW to "make reasonable accommodations." See Complaint ¶ 8. One reasonably can infer that (i) the term "qualifying disability," as used by the company doctor, meant a disability meeting the ADA/MHRA definition, (ii) the company doctor accordingly regarded Bartos as "disabled" for purposes of the ADA/MHRA, and (iii) the company doctor was either directly employed by, or acting in a capacity as an agent of, BIW.

Inasmuch as the complaint sufficiently alleges that BIW regarded Bartos as "disabled," as that term is defined by the ADA and the MHRA, and, in the First Circuit, "an employee may maintain a cause of action for failure to reasonably accommodate a perceived disability," *Jewell v. Reid's Confectionary Co.*, 172 F. Supp.2d 212, 218 (D. Me. 2001), the complaint withstands BIW's motion to dismiss.

#### IV. Conclusion

For the foregoing reasons, I recommend that BIW's motion to dismiss 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.*

Dated this 19th day of August, 2003.

David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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V.

**Defendant**

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