

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STANLEY WHITNEY,)
)
 Plaintiff,)
)
 v.)
)
 WAL-MART STORES, INC.,)
)
 Defendant)

Civil No. 04-38-P-H

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT
AND ORDER ON MOTION IN LIMINE**

Stanley Whitney sued Wal-Mart in state court for alleged disability and age discrimination in employment. Although Whitney's complaint seeks relief for discrimination exclusively under the Maine Human Rights Act, and therefore does not raise a federal question under either the Americans with Disabilities Act or the Age Discrimination in Employment Act, Wal-Mart removed the case to this court based on diversity of citizenship. Wal-Mart now moves for summary judgment against all of Whitney's claims. I agree with Wal-Mart that summary judgment should enter against Whitney's disability discrimination claim because the record reflects that Whitney failed to meet Wal-Mart's legitimate expectations for department managers by virtue of medical restrictions placed on his ability to work more than 45 hours per week and without two consecutive days off. I also agree with Wal-Mart that summary judgment should enter against Whitney's age discrimination claim because the record is devoid of any evidence of age discrimination.

Summary Judgment Statement of Facts

Stanley Whitney was born in 1937 and is currently 67 years old. (Docket No. 41, ¶ 1.) Whitney was first hired by Wal-Mart on July 31, 1998, as a pricing coordinator and back-up grocery DSD¹ receiver in Melbourne, Florida, when he was 61 years old. (Docket No. 11, ¶ 5.) Wal-Mart promoted Whitney in February 1999 to be a manager of the sporting goods department of the Melbourne store. (Id., ¶ 7.) Whitney held this position for approximately one year before Wal-Mart transferred him in February 2000 to be the grocery manager at its store in Indian Harbor Beach, Florida. (Id., ¶ 8.) Whitney worked as grocery manager at this location for approximately 8-10 months. (Id., ¶ 11.) Thereafter, in August 2000, Wal-Mart began training Whitney to become a manager in a tire-lube express ("TLE") department. (Id., ¶ 12.) Between August 2000 and April 2001, Whitney worked as a TLE management trainee at two separate stores, West Melbourne and Merritt Island, Florida. (Id., ¶ 15.) In April 2001, Wal-Mart promoted Whitney to TLE Manager for its Orlando store at a time when Whitney was 63 years old. (Id., ¶ 16.) With this promotion, Whitney joined the ranks of Wal-Mart's salaried management-level employees, earning \$28,500 annually. (Id., ¶ 19.) Whitney continued in this position for three months, working 9 hours per day, 5 days per week, with weekends off. (Id., ¶ 22.)

At the time that he was promoted to be TLE Manager in Orlando, Whitney did not know of any other TLE Managers that were 63 years old or even in their 60s in or around the area that he worked. (Id., ¶ 17.) Of the 20 or so TLE Managers in his district, there were only one or two others that were in Whitney's age bracket. (Id., ¶ 18.)

¹ The parties do not provide the meaning of the DSD acronym. A web search suggests that it means "direct store delivery," a "system by which a manufacturer by-passes a wholesaler, delivering instead directly to the retailer." See http://www.gmdc.org/About/industry_glossary.html.

Whitney decided to leave his position as the TLE Manager in Orlando and accept a demotion in order to return to an hourly associate position at the Merritt Island, Florida, store at the end of June 2001 because he no longer wanted to commute the 70-80 miles to Orlando from his residence on the east coast of Florida. (Id., ¶ 30.) The demotion lost Whitney his salary and his hourly pay rate was set at \$10.00. (Id., ¶ 31.)

During a summer vacation in southern Maine in 2001, Whitney learned that Wal-Mart's North Windham store was seeking a TLE Manager. (Id., ¶¶ 33-34.) Whitney, then 64, met the TLE Manager for the district, Michael Swink, expressed an interest in working as the TLE Manager in North Windham, and, approximately two weeks later, was offered the position and a salary of \$29,512 by Swink. (Id., ¶¶ 35-37.) Whitney accepted and began working in the North Windham location on October 6, 2001. (Id., ¶ 41.) After starting in North Windham, Whitney worked on average 6 days per week and in excess of 70 hours per week. However, the store's TLE department, not having had a manager for six months, was in a shambles and Whitney, whose wife was still in Florida, had a lot of free time on his hands. (Id., ¶ 42; Docket No. 41, ¶ 42.) Within just over a month, on November 15, 2001, Whitney's health began to deteriorate and Whitney went under a doctor's care following a diagnosis of high blood pressure and possibly serious heart disease. (Docket No. 12, ¶¶ 43-44, Docket No. 41, ¶ 44.) Whitney brought the matter to Wal-Mart's attention with a doctor's note and took a little time off, working only three more days in November. (Id., ¶ 45.) Following visits with his physician's assistant in early December 2001, Whitney was "taken out of work" by his care provider, for reasons related to his heart condition, until he could undergo further testing scheduled for January 2002. (Docket No. 12, ¶¶ 46-47.)

Whitney duly completed leave of absence paperwork and submitted it to Wal-Mart. According to Whitney, Swink was displeased with Whitney's request for leave and told Whitney that "this could cost you your job." (Docket No. 42, ¶ 1.) However, Brett Walters, North Windham's store manager, approved Whitney's request for leave for the dates between November 11, 2001, and January 9, 2002. (Docket No. 12, ¶¶ 52-53.) Whitney subsequently requested an extension to his leave so that he could undergo further testing and Walters approved it, "without comment or hassle." (Id., ¶ 54; Docket No. 42, ¶ 7.)

Whitney remained out of work until January 28, 2002. (Docket No. 12, ¶ 55.) He returned to work with a "To Whom It May Concern" note from his physician's assistant that "allowed" Whitney to return to work for no more than 8 hour days and 40 hours per week with two consecutive days off. (Id., ¶ 56; Docket No. 42, ¶¶ 8-9.) On February 1, 2002, Whitney had a telephone conversation with Michael Swink, the district TLE manager, who advised Whitney that Swink and Walters had decided that in order for Whitney to return to work as the TLE Manager, he had to be able to work 48-52 hours per week. (Docket No. 12, ¶ 60; Docket No. 42, ¶ 13.) On February 8, 2002, Whitney and Swink spoke again and Swink indicated that if Whitney could not work 48-52 hours per week, Swink would assist him in locating alternative employment at Wal-Mart. (Id., ¶ 61; Docket No. 42, ¶ 28.) Swink did not ask Whitney if he felt that he could perform the essential functions of his job in 40 hours and did not offer to discuss whether Whitney could be "accommodated" in his TLE Manager position. (Docket No. 42, ¶ 14.)

Whitney maintains that his submission of a doctor's note was an implicit—if not explicit—request for an accommodation under the Americans with Disabilities Act. (Id.,

¶ 10.) He also avers that the circumstances surrounding his delivery of the note to Walters reflected that Walters interpreted the note as having exactly that significance.

(Id.)

On February 13, 2002, Whitney brought up the work-hour requirement articulated by Swink during an "open door" meeting with Kevin Robinson, the district manager, and Hope Gauer, the district assistant. (Id., ¶¶ 61-64; Docket No. 42, ¶ 31.) The situation was discussed and it was concluded that Whitney's condition would not prevent him from becoming a non-salaried department manager and receiving \$11 per hour in another position. (Docket No. 12, ¶ 66; Docket No. 42, ¶ 33.) Whitney did not contend at the meeting that he felt he was being discriminated against. Nor did he request that the TLE Manager job be modified to allow him to work 8 hours per day, 5 days per week with 2 consecutive days off. (Docket No. 12, ¶ 67.)

Subsequently, on or about February 15, Gauer notified Whitney that several manager positions were available in Wal-Mart's Biddeford store. (Docket No. 42, ¶ 36.) Whitney looked into it and notified Gauer that he was interested in three manager positions, in the following order of preference: one in the paper goods and chemical department, one in the pet department and one in "Department 82."² (Id., ¶ 37.) Gauer arranged for Whitney to interview with Andre Pepin, then assistant manager of the Biddeford store. (Id., ¶ 38.) Whitney did so but did not receive any of the positions. The first two positions went to substantially younger, and allegedly less-qualified, men, who were already employed at the Biddeford Wal-Mart. (Id., ¶¶ 73-101; Docket No. 42, ¶¶ 98-99, 104, 106-108; Docket No. 46, ¶¶ 98-99, 104, 106-108.) Pepin did not supervise

² Department 82 refers to Wal-Mart's "Impulse Department Front End." (Docket No. 12, ¶ 242.)

the Department 82 position and did not interview anyone for the third position. (Docket No. 46, ¶ 53.)

On February 22, 2002, Whitney left a telephone message for Swink asking him to provide a job description of the TLE Manager position and any company policy which would support his contention that all TLE Managers are expected to work 48-52 hours per week. He never received a response to his request. (Docket No. 42, ¶ 55.) On February 26, 2002, Whitney's attorney wrote to Swink and other Wal-Mart executives complaining that Whitney had been forced out of his job as TLE Manager in violation of laws forbidding discrimination against persons with disabilities. (Id., ¶ 66.) On February 28, 2002, Swink wrote a letter to Whitney advising him that his 12-week medical leave of absence had ended on February 27, 2002, and that because he was only permitted to work 40 hours per week with 2 consecutive days off, he did not meet the requirements to return to his job as TLE Manager in North Windham. Swink also advised Whitney in the letter that if he could not work the required hours and schedule, "Wal-Mart will help reasonably accommodate you in helping find you another position within the company." (Docket No. 12, ¶ 124; Docket No. 42, ¶ 67.) In response, Whitney sent a letter to Swink and enclosed a new note from his physician's assistant that loosened Whitney's work restrictions to 9 hours per day with two consecutive days off. (Docket No. 12, ¶¶ 125-126.) In his letter, Whitney asked Swink to accommodate his medical restrictions by permitting him to work no more than 45 hours per week. He also asserted in his letter that, in his experience, TLE Managers can, with a few exceptions, complete their job duties in 40-45 hours per week. (Docket No. 42, ¶¶ 73-74.)

Because Whitney was able and willing to work 40-45 hours per week, Swink never considered Whitney to be substantially limited in a major life activity. (Id., ¶¶ 127-128; Docket No. 41, ¶¶ 127-128.) Whitney concedes this point, acknowledging that Swink did not perceive any need to talk to Whitney about a reasonable accommodation because Swink did not view Whitney as substantially limited in a major life activity. (Docket No. 12, ¶ 129.) Whitney also admits that he has no evidence to suggest or otherwise support a claim that Swink's decision to take him out of the TLE Manager position had anything to do with his age. (Docket No. 12, ¶ 203.)

On March 14, 2002, Whitney remained out of work but was still being paid his regular salary as the TLE Manager at the North Windham Wal-Mart. (Id., ¶ 184.) On March 15, 2002, Swink telephoned Whitney to advise Whitney of a job opening in Wal-Mart's Falmouth store. (Id., ¶ 185.) Swink refused to talk to Whitney further about the TLE position in North Windham and Whitney did not make any effort to call Swink's supervisor to bring that to his attention. (Id., ¶ 186.) On March 22, 2002, Robinson, Gauer, Jeff Vaillancourt (then manager of Wal-Mart's Biddeford store), Andre Pepin (then assistant manager of Wal-Mart's Biddeford store) and Swink met with Whitney to discuss placing him in a new position at Wal-Mart. There was no discussion of the TLE Manager position. (Id., ¶¶ 187-192.) During the meeting, Whitney was offered a position as Inventory Control Specialist (ICS) at the Biddeford store because it met his medical restrictions, including the recommendation that Whitney have two consecutive days off. (Id., ¶ 194.) Whitney accepted the ICS position at the meeting. (Id., ¶ 195.) According to Whitney, he accepted the ICS position reluctantly, because it

was the only position discussed at the March 22 meeting that was within his medical restrictions. (Docket No. 42, ¶ 88.)

On April 4, 2002, two DSD grocery receiver positions were posted in Wal-Mart's Biddeford store. (Id., ¶ 119.) Whitney applied for both and Vaillancourt and Pepin met with Whitney to discuss his interest in the positions. (Docket No. 12, ¶ 214, Docket No. 41, ¶ 215; Docket No. 42, ¶ 120.) According to Whitney, around May 4, 2002, Assistant Manager Pepin informed him that he would receive one of the jobs because he was the most qualified candidate. (Docket No. 42, ¶ 121.) Whitney then reminded Pepin about his work restriction and Pepin indicated he would have to check with Vaillancourt since receivers normally take Wednesdays and Sundays off. (Docket No. 41, ¶ 215; Docket No. 42, ¶ 122.) At Whitney's May 2002 meeting with Vaillancourt and Pepin, Vaillancourt indicated that two consecutive days off would not work with the DSD receiver positions. (Docket No. 41, ¶¶ 216-218; Docket No. 42, ¶ 124.) In tension with this assertion is testimony by Pepin, who theorized during his deposition that two consecutive days off might be manageable, because with two receivers, one could possibly cover for the other to enable two consecutive days off per week. (Docket No. 41, ¶ 220; Docket No. 142, ¶ 135.) In any event, it was Vaillancourt's decision to make and he hired two men in their twenties to fill the positions. (Docket No. 12, ¶ 222; Docket No. 41, ¶ 223.) The fact that Whitney required two consecutive days off was a factor in Vaillancourt's decision to pass him over for the receiver positions. (Docket No. 12, ¶ 232.)

During Whitney's tenure at the Biddeford store, a new store manager took over and invited Whitney to go into a department manager training program. (Id., ¶ 240.)

Whitney indicated that he was interested, but also stated that he would prefer to pursue any such opportunities in the Scarborough or Falmouth stores, which are closer to his home. (Id.) This was arranged and in July 2003 Whitney transferred from the Biddeford store to Wal-Mart's Scarborough store, taking a position on the ICS team there. (Id., ¶¶ 239-241.) While at Scarborough, the store manager there told Whitney to apply for two department manager positions (one in grocery and one in Department 82). Whitney did so and was hired to be manager of Department 82, where he continues to work to this day, despite his work restrictions. (Id., ¶¶ 242-243.) Whitney is not a salaried manager there, but currently earns \$12.40 per hour. As of the filing of the summary judgment papers, Whitney has not applied for any other positions at Wal-Mart. (Id., ¶¶ 244-245.)

Wal-Mart associates are hired as employees at will; Wal-Mart does not enter employment contracts with its associates. (Id., ¶ 248.) Both the 1998 and 2001 Wal-Mart Associate Handbooks contain associate acknowledgement pages for associates to sign. These pages specifically state that the Handbook is not a contract and does not constitute terms and conditions of employment. (Id., ¶¶ 250-251.) Whitney's personnel records and his file reflect that he has signed more than one Handbook acknowledgement form, including one dated December 12, 1998, and one dated November 5, 2002. (Id., ¶ 253.) A review of Whitney's personnel records also reflect that on August 4, 1998, he signed a "To The New Wal-Mart Associate" form which confirms that associates are not guaranteed employment for any specific length of time or for any specific type of work. (Id., ¶ 254.)

During the time period discussed herein, Wal-Mart had in effect numerous policies regarding employees with disabilities. The policies flagged by Whitney in his summary judgment filings are the following:

Policy PD-58, which sets forth the procedure that is to be followed when an employee requests an accommodation on account of a disability under the ADA. (Docket No. 42, ¶ 18.) Among other things, the policy requires Wal-Mart supervisors to engage in an "interactive" process with employees who request an accommodation because of a disability. (Id.)

Policy PD-05, which indicates that disabled employees "will have priority placement consideration for any open position for which they are qualified" when they apply for transfer from one "division" to another. (Id., ¶ 83.)

Policy PD-44, which allows management to permit employees to return to work even though they are not at 100% of their physical abilities if they nevertheless are able to perform the essential functions of their job. (Id., ¶ 76.)

Policy RRG 311, which addresses "reasonable accommodation" under the ADA, and encourages supervisors to have the individual requesting an accommodation suggest what might serve as a possible accommodation. (Id., ¶¶ 155-156.)

Discussion

Summary judgment is warranted 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

Whitney contends that Wal-Mart's refusal to let him remain in his TLE management position at its Windham store was motivated by discriminatory animus toward his heart condition. In addition, Whitney alleges that Wal-Mart's failure to transfer him to his preferred alternative positions at the Biddeford store was motivated by discriminatory animus toward both his physical impairment and his age. Both of these claims are advanced in a solitary count in Whitney's second amended complaint and are based exclusively on the protections afforded by the Maine Human Rights Act. (Docket No. 4, Elec. Attach. 5.) In a second count, Whitney contends that Wal-Mart failed to follow employment policies regarding the treatment of disabled employees and that such failures amounted to a breach of contract under the common law of Maine. (Id.) Wal-Mart has moved for summary judgment on all of Whitney's claims. With regard to disability discrimination, Wal-Mart argues, inter alia, that Whitney's heart condition does not make him a qualifying individual with a disability under the MHRA. (Docket No. 11 at 5-8.) With regard to age discrimination, Wal-Mart argues that the record is devoid of any evidence that Whitney's age had any negative impact on his efforts to transfer into one of the alternative positions of his choice and that Whitney suffered no harm in connection with his transfer to ICS (Id. at 14-16). With regard to the breach of contract claim, Wal-Mart argues that its employment policies did not form part of its bargain with Whitney and do not afford Whitney any contractual remedies (Id. at 17-19). I take up each of these contentions in turn.

A. Disability Discrimination

Wal-Mart's primary challenge to Whitney's disability discrimination claim is that Whitney's heart condition does not substantially limit him in any major life activity. In

response, Whitney contends that he does not need to demonstrate a substantial limitation in a major life activity because he is proceeding under the MHRA, not the ADA, and the MHRA does not expressly require such a showing. (Docket No. 43 at 5-7.) I conclude that Maine law, like federal law, requires a plaintiff to show a substantial limitation in order to obtain relief under the MHRA.

The Maine Legislature has defined the term "disability" as follows:

"Physical or mental disability" means any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, and includes the physical or mental condition of a person that constitutes a substantial disability as determined by a physician or, in the case of mental disability, by a psychiatrist or psychologist, as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services.

5 M.R.S.A. § 4553(7-A). Contrary to the ADA, there is no textual basis in the MHRA that limits or qualifies the term "disability" to include only those disabilities or impairments that "substantially limit . . . major life activities." 42 U.S.C. § 12102(2)(A). However, in 1992 the Maine Human Rights Commission (MHRC) promulgated a regulation interpreting the MHRA consistently with the ADA, concluding that a qualifying disability is one that substantially limits the plaintiff in his or her performance of a major life activity. See Winston v. Me. Tech. College Sys., 631 A.2d 70, 74-75 (Me. 1993) (citing Me. Human Rights Comm'n, Employment Reg. § 3.02(C)(1), describing the regulation as a "supplementation" of the MHRA definition, and looking to federal precedent in search of "guidance in determining when it is appropriate to impose categorical limits on the definition of a disabled individual"). See also Bilodeau v. Mega Indus., 50 F. Supp. 2d 27, 33 (D. Me. 1999) (rejecting the contention that the MHRA has

a less stringent standard for liability and citing Winston); Doyle v. Me. Dept. of Human Serv., 2002 WL 1978907, *4 (Me. Super. July 10, 2002) (ruling that the plaintiff suffered from a physical impairment but was nevertheless not substantially limited in the major life activity of working because she was able to perform a range or class of jobs).³

Whitney argues that Winston is not on point because "the Law Court mentions the regulation only in passing and it played no part in its ultimate decision." (Docket No. 43 at 7.) Whitney also argues that the MHRC's regulation has no persuasive force because the regulation is at odds with the plain language of Section 4553(7-A) and because the MHRC describes the regulation as the commission's "interpretation."⁴ (Id. at 9-10.) Finally, Whitney observes that the Law Court has issued two opinions construing earlier versions of the MHRA in a way that makes even asymptomatic impairments qualify as disabilities under the Act. See Rozanski v. A-P-A Transport, Inc., 512 A.2d 335, 340 (Me. 1986) (affirming lower court's recognition of asymptomatic spinal "malformations" as physical defects under the MHRA); Me. Human Rights Comm'n v. Canadian Pac. Ltd., 458 A.2d 1225 (Me. 1983) (same-involving asymptomatic heart murmur). (Docket No. 43 at 8.) Despite these concerns, I conclude that the Law Court would most likely hold that a disability discrimination litigant must demonstrate a substantial limitation of a major life activity in order to qualify for relief under the MHRA's remedial scheme.

³ The Superior Court's ruling in Doyle was affirmed on appeal, but in a manner that avoided addressing this aspect of the ruling. Doyle v. Dept. of Human Serv., 2003 ME 61, ¶ 16, 824 A.2d 48, 54 n.8.

⁴ Whitney also points to a 2002 ruling by the MHRC in the administrative matter of Kleban v. University of Maine Systems, in which the MHRC affirmed a hearing examiner's finding that a professor with severe asthma had successfully made out a claim under the MHRA. (Docket No. 43 at 9-10; see also Investigator's Report EO1-0466, Kleban v. Univ. of Me. Sys., at 10, ¶ 6; Docket No. 42, Elec. Attach. 2 & 3; MHRC Executive Director's Statement of Finding re. same, Docket No. 42, Elec. Attach. 4.) I find no basis in the Kleban administrative action to infer a repudiation by the MHRC of its 1992 regulation. The hearing officer in that matter expressly found that the complainant's "asthma substantially limits his ability to breath as determined by a medical expert." (Docket No. 42, Elec. Attach. 3, at 12, ¶ 16.) The Kleban matter did not involve the more problematic major life activity of "working."

To be sure, the MHRA has a curious jurisprudential history. However, if there is anything consistent about its application in this court, and in the courts of Maine, it is that the MHRA will be construed consistently with the ADA. See, e.g., Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (noting that the standards applicable to the ADA, the Rehabilitation Act and the MHRA "have been viewed as essentially the same"); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 14 (1st Cir. 1997) ("Interpretation of the ADA and of the Maine Human Rights Act [has] proceeded hand in hand."); Winston, 631 A.2d at 74 ("We have stated that because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA."). In addition, I am not inclined to think that the MHRA "plainly compels a different result," such that the MHRC's regulation should be disregarded,⁵ Lydon v. Sprinkler Serv., 2004 ME 16, ¶ 21, 841 A.2d 793, 799 (quoting Competitive Energy Serv. v. Pub. Util. Comm'n, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046), particularly insofar as "the MHRA generally tracks federal anti-discrimination statutes," making it "appropriate to look to federal precedent for guidance in interpreting the MHRA," and the Law Court has described the regulation as supplementing the Act. Winston v. Me. Technical Coll. Sys., 631 A.2d 70, 74-75 (Me. 1993). Under these circumstances, I conclude that the MHRC regulation reflects an appropriate "supplement" to an otherwise puzzling provision. Id. at 74. Accordingly, I analyze Whitney's MHRA disability claim in a manner consistent with how that claim would be analyzed under the ADA.

⁵ In my view, the manner in which the Legislature used the language "and includes" generates ambiguity as to whether the Legislature perhaps intended the MHRA to pertain only to individuals with a "substantial disability" or a disability requiring "special education, vocational rehabilitation or related services." 5 M.R.S.A. § 4553(7-A). In other words, if "physical or mental disability" truly means any disability or infirmity without some limitation, then the "and includes" clause is reduced to a redundancy. In the context of this ambiguity, the MHRC's regulation affords a pragmatic standard for determining what constitutes a "substantial disability" under the MHRA.

Whitney has established that he has a heart condition. Although this condition amounts to a physical impairment, it is not one that substantially limits his ability to engage in the major life activity of working. To the contrary, Whitney's evidence demonstrates that his only physical limitation on working is that he must not work more than 9 hours per day and must have two consecutive days of rest. Such a limitation on the ability to work does not amount to a substantial limitation. Tardie v. Rehab. Hosp., 168 F3d 538, 541-42 (1st Cir. 1999).

Whitney also asserts that the medicine he takes for his heart condition has substantially limited his sexual functioning (Docket No. 43 at 10-11), which in all likelihood would be held by the Supreme Court to constitute a "major life activity." See Bragdon v. Abbott, 524 U.S. 624, 638 (1998) ("Reproduction and the sexual dynamics surrounding it are central to the life process itself."). However, Whitney's presentation concerning the substantial limitation aspect of his impairment is less than compelling. On this score, Whitney reports that he now engages in sexual activity roughly four to six times per year, as opposed to weekly. (Docket No. 42, ¶¶ 188-192.) In my view, such a presentation is simply not capable of setting the McDonnell-Douglas gears in motion; particularly here, where there is not a scintilla of evidence that the employer had any knowledge or concern over the plaintiff's ability to engage in sexual activity, let alone animus toward such a limitation, and where the plaintiff's theory of liability turns on the employer's failure to accommodate his limitation or engage in an "interactive process" in order to determine the appropriate accommodation. Obviously, Whitney's sexual limitation cannot be accommodated in the workplace. Finally, Whitney's evidence concerning substantial limitation is about as thin as it could be, amounting exclusively to

the frequency of his (and his wife's) past and present sexual relations. This limited and subjective evidence is simply insufficient to demonstrate a substantial limitation.⁶ See, e.g., Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198-99 (2002) (discussing the kind of evidence that is helpful to the analysis, such as the availability of medications to compensate for the limitation); 29 C.F.R. § 1630.2(j) (defining "substantially limited" as "unable to perform a major life activity that the average person in the general population can perform" or "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"). See also Contreras v. Suncoast Corp., 237 F.3d 756, 764 (7th Cir. 2001) (opining that Bragdon "does not stand for the proposition that a change in the frequency with which an individual can engage in intercourse, as a result of a bad back, constitutes an impairment which substantially limits a major life activity").

⁶ **Order on Motion in Limine.** There is a motion in limine currently before the court that has been referred to me for a disposition. The motion concerns the admissibility of testimony by Whitney's medical care providers concerning the tendency of Whitney's heart medication to impede sexual function. The motion in limine is not germane to the summary judgment motion because Whitney has not sought to support any of his summary judgment factual statements by reference to a deposition or affidavit of the subject medical professionals. According to Wal-Mart, Whitney should be precluded from introducing at trial testimony from a Dr. Wright or a Dr. Carter "that medication prescribed to Mr. Whitney for his heart condition and high blood pressure can cause erectile dysfunction." (Mot. in Limine, Docket No. 13, at 1.) Whitney did not designate Dr. Carter as an expert witness and Whitney fails to object to Wal-Mart's request that no such evidence come in through Dr. Carter. (Pl.'s Obj., Docket No. 44, Elec. Attach. 1.) Accordingly, I **GRANT** the motion with respect to Dr. Crater. Dr. Crater may not provide such testimony. However, Whitney did designate Dr. Wright as an expert and the fact that Whitney might raise the issue of his sexual dysfunction in this litigation does not come as a surprise to Wal-Mart. There is no suggestion on the part of Wal-Mart that it would have chosen to depose Dr. Wright—something Wal-Mart voluntarily declined to do—had it known he might offer this testimony. I fail to see any reason why Dr. Wright could not testify to the fact that "beta blockers" prescribed in connection with vascular disease commonly impede sexual function. I therefore **DENY** the motion with respect to Dr. Wright.

B. Age Discrimination

Wal-Mart argues that Whitney cannot make out a prima facie case of age discrimination because Whitney did not suffer an adverse employment action in connection with his failure to get the alternative job placement of his choice. (Docket No. 11 at 15-16.) In essence, Wal-Mart's argument is that Whitney simply was not a good candidate for these positions because of his work restrictions. (Id.) In response, Whitney contends that he was more qualified for the positions than the younger individuals who were hired simply by virtue of his experience, which he contends is sufficient to both establish a prima facie case and to demonstrate that Wal-Mart's justification is pretext for age discrimination. (Docket No. 43 at 22.)

Pursuant to § 4572(1) of the MHRA: "It is unlawful employment discrimination, . . . except when based on a bona fide occupational qualification[,] . . . for any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . age, . . . or because of [age], to . . . discriminate with respect to hire [or] transfer." 5 M.R.S.A. § 4572(1). The analysis of an age discrimination claim under the MHRA follows the analysis utilized for claims under the federal analogue, the Age Discrimination in Employment Act (ADEA). Ricci v. Applebee's Northeast, Inc., 297 F. Supp. 2d 311, 316-317 (D. Me. 2003); Maine Human Rights Comm. v. City of Auburn, 408 A.2d 1253, 1261-62 (Me. 1979) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). Accordingly, Whitney's ultimate burden is to prove that he would have been hired or transferred to one of the alternative positions he sought in the Biddeford store but for his age. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991). Because there is no direct evidence of age

discrimination in the record, Whitney's claim must be evaluated under the McDonnell Douglas burden shifting framework. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Thus, he must first make a prima facie showing of age discrimination. In the context of this case, Whitney must demonstrate (1) that he qualified for protection under the MHRA by virtue of his age, (2) that he was capable of meeting Wal-Mart's legitimate job expectations, (3) that he did not receive the positions, and (4) that Wal-Mart did not treat age neutrally (i.e., that the position went to a younger employee with similar or lesser qualifications). Rivera-Aponte v. Rest. Metropol # 3, Inc., 338 F.3d 9, 11 (1st Cir. 2003); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 (1st Cir. 1999); Woods v. Friction Materials, 30 F.3d 255, 259 (1st Cir. 1994). Proof of these elements generates a rebuttable presumption of unlawful discrimination. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). The burden then shifts to Wal-Mart to articulate⁷ a legitimate, non-discriminatory reason, or reasons, for not filing the position with Whitney. Rivera-Aponte, 338 F.3d at 11. With this showing, the burden returns to Whitney to present evidence sufficient to establish that Wal-Mart's stated rationale is not worthy of credence and serves only as pretext for age discrimination. Id.

Wal-Mart's challenge to Whitney's claim of age discrimination focuses on the issue of Whitney's qualifications for the positions he applied for in the Biddeford store, which serves both as a challenge to Whitney's ability to generate a prima facie case and as Wal-Mart's legitimate, non-discriminatory reason for giving these positions to others. Wal-Mart points to Pepin's stated rationale for passing over Whitney: that Whitney's

⁷ The employer's burden is merely a burden of production, not persuasion. Rodriguez-Cuervos, 181 F.3d at 19 n.1 (citing Burdine, 450 U.S. at 253).

work restrictions made him a less than ideal candidate for the manager positions and that Pepin knew that within months Whitney would be applying for a DSD grocery position, which Whitney had stated was his preferred placement. (Docket No. 12, ¶¶ 83-85.) Wal-Mart also points to Vaillancourt's statement, which Whitney acknowledges, that Whitney's need for two consecutive days off was a factor in Vaillancourt's decision to deny him the grocery receiver positions. (Docket No. 12, ¶ 232.) Whitney's opposition focuses entirely on the issue of pretext. (Docket No. 43 at 22-24.) Like Wal-Mart, Whitney focuses on the issue of his qualifications, but his discussion focuses heavily on the narrower issue of whether his experience was greater than the individuals who filled the position, virtually disregarding the fact that his work restrictions impinged directly on his ability to meet Wal-Mart's job expectations. (Id.; see also Docket No. 41, ¶ 84; Docket No. 42, ¶¶ 50, 57.) In effect, Whitney assumes that Wal-Mart was legally obligated to modify its schedules and expectations, even if only slightly, to account for his work restrictions.

At the summary judgment stage, it is appropriate for the court to view the evidence pertaining to Whitney's experience in Whitney's favor. Nevertheless, I am not persuaded that Whitney's relative experience establishes that he was the better qualified candidate for the positions or that Wal-Mart's stated justifications are pretext for age discrimination. Whitney focuses exclusively on the other applicant's lack of managerial experience, but ignores the fact that his work-hour limitations bore directly on his qualifications to take a department manager position. (Docket No. 41, ¶ 215.) In particular, with respect to the position in the paper goods and chemical department, the record reflects that the position demanded a lot of hours and that the department was

about to go through a large expansion in connection with the store's transformation into a Wal-Mart "supercenter," which would only place additional demands on the department manager to work long hours. (Docket No. 12, ¶¶ 85, 93; Docket No. 41, ¶¶ 85, 93.) Indeed, the man who took the position stepped down or was removed after six months because of his frustration with the job, which he described as "[c]onstant work," which Pepin's testimony revealed to be on the order of 60 hours per week. (Docket No. 41, ¶ 93, citing Chan Say Depo. Trans., Docket No. 12, Elec. Attach. 17, at 14; Docket No. 12, ¶ 93.) With respect to the pet department position, the circumstances are somewhat different. The man who received that position had worked in that department for a long time, unlike Whitney, and was a manager-in-training in the store's electronics department, which makes Whitney's one-and-one-half year managerial experience less of a factor. (Docket No. 12, ¶¶ 92, 104.) He also had certain experience with Wal-Mart's Telzon (hand-held computer system) that Pepin considered relevant to his job qualifications. (*Id.*, ¶ 92.) And Whitney does not controvert that his work restrictions were a reason why Vaillancourt later passed him over for the DSD grocery receiver positions as well. (Docket No. 12, ¶ 232.) In the end, the factual record plainly demonstrates that filling a department manager position at Wal-Mart with an individual who can only work 45 hours per week and requires two consecutive days off creates additional supervisory responsibilities for store managers like Pepin and Vaillancourt because a candidate with such restrictions does not fit the mold. As Whitney concedes, placing him in one of these department manager positions would have required Wal-Mart to reconfigure its standard expectations for the job by, among other things, reassigning non-essential functions to subordinate employees and/or scheduling other workers to pick

up the slack when Whitney's restrictions prevented him from fully performing his duties.⁸ (Docket No. 41, ¶¶ 215, 217, 220; Docket No. 42, ¶¶ 45, 62-65, 76, 124-126, 131-132.⁹) Under these circumstances, the record reflects that Whitney is advancing an age discrimination claim not because there is any reasonable basis to believe that his age was ever treated as a negative factor with respect to his employment with Wal-Mart, but solely because he happened to be in his sixties at the time.¹⁰

Based on this record, I conclude that Whitney fails to establish a prima facie case of age discrimination. Alternatively, even if such evidence is sufficient to demonstrate that Whitney was generically "qualified" for these positions, albeit with some adjustments to Wal-Mart's scheduling expectations, the evidence is not sufficient to support a finding that Wal-Mart's justifications are pretext for age discrimination. Wal-Mart first hired Whitney when he was 61 years old and employs him to this day (presently in a managerial position) at age 67. This fact "demonstrates [Wal-Mart's] willingness to have older employees on its staff." Rivera-Aponte v. Rest. Metropol #3, Inc., 338 F.3d 9, 12 (1st Cir. 2003). Taken in tandem with Whitney's evidentiary failure

⁸ Although I agree with Whitney that Pepin and Vaillancourt could have made arrangements for Whitney to fill any of the department manager positions for which he applied—witness Whitney's current placement as a department manager—they had no legal obligation to do so under the MHRA because Whitney was not substantially limited in his ability to engage in a major life activity.

⁹ See also Docket No. 42, ¶¶ 157-181, in which Whitney discusses the kind of accommodations he would expect to make it possible for him to retain his preferred position as the TLE department manager.

¹⁰ Whitney himself focuses on the fact that his work restrictions undermined his efforts. In particular, Whitney asserts that "Pepin resented the fact that Mr. Whitney's medical restrictions had not been accommodated at the North Windham store and instead were dumped on him to resolve in Biddeford." (Docket No. 42, ¶ 65, citing Pepin Depo. Trans., Docket No. 12, Elec. Attach. 14, at 52-54 & 82.) A review of the transcript reflects that the statement is not entirely off the mark. In fact, Pepin testified that Whitney's medical restrictions made it "very difficult" to put him in the manager positions in Biddeford. (Pepin Depo. Trans., Docket No. 12, Elec. Attach. 14, at 54, lines 3-4.) Subsequently, Pepin testified that, although he did not consider Whitney to have a physical condition "that would limit him to be qualified as an ADA" or "cause him to differ from any major life activities," he felt that the managers of the North Windham store should have given Whitney "the things he needed in that store instead of saying, okay [Biddeford], here's a candidate for you." (Id. at 81-82.) This evidence does not even hint at age discrimination. Rather, it reflects that Pepin did not want to have to deal with the problems attendant to having a work-hour restricted department manager at the Biddeford store.

regarding his ability to meet Wal-Mart's hours worked and scheduling expectations for the subject department manager positions, this record, at best, perhaps, "fits into the category Reeves described of [a] plaintiff creating (at best) a weak issue of fact as to pretext on the face of strong independent evidence that no [age] discrimination occurred." Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 47 (1st Cir. 2002) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000)).¹¹

C. Employment Contract

In Maine, an employer has a common law right to discharge at will an employee hired for an indefinite term, absent an agreement restricting this right or a clearly expressed intention by the employer that it will only discharge the employee for cause. Taliento v. Portland W. Neighborhood Planning Council, 1997 ME 194, ¶ 9, 705 A.2d 696, 699; Bard v. Bath Iron Works Corp., 590 A.2d 152, 155 (Me. 1991); Larrabee v. Penobscot Frozen Foods, 486 A.2d 97, 99 (Me. 1984). Whitney contends that Wal-Mart's policies and procedures governing how supervisors should handle requests for ADA accommodations "became part of [his] employment agreement with Wal-Mart" and provided him contractual assurances that he would receive whatever reasonable accommodations were necessary to enable him to retain his TLE job or to receive a preferential transfer to one of the other department manager positions he desired. (Docket No. 43 at 18-20.) All of the policies Whitney points to are or were internal policies for supervisors to observe when handling requests for accommodations under the ADA. There is no suggestion in the record that any of these policies amounted to terms

¹¹ **Motion to Submit Additional Case Authority.** On November 11, 2004, four days after Wal-Mart filed its summary judgment reply brief, Whitney filed a motion asking the court to consider Olson v. Northern FS, Inc., 387 F.3d 632 (7th Cir. 2004), when rendering judgment on Wal-Mart's summary judgment motion. (Docket No. 48.) Wal-Mart has objected. (Docket No. 49.) I previously granted the motion. (Docket No. 51.) I have considered that case in fashioning this recommended decision.

and conditions presented to Whitney in an offer of employment or in connection with his acceptance of employment with Wal-Mart, as opposed to internal policies and guidelines discovered in the course of litigation. In addition, the policies identified by Whitney, merely provide "procedure[s] to be followed," not clear limitations on Wal-Mart's discretion to discharge or transfer an employee. Taliento, 1997 ME 194, ¶ 11, 705 A.2d at 699. Furthermore, the notices actually provided to Whitney, and which Whitney signed, reflect that Wal-Mart made no guarantee of continued employment or employment in any particular job or involving any particular type of work. Finally, and in any event, because Whitney was not substantially limited in a major life activity these employment policies were inapplicable to him and could not afford him any contractual rights or remedies.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** Wal-Mart's motion for summary judgment.

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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: December 3, 2004

WHITNEY v. WAL-MART STORES
INCORPORATED

Assigned to: JUDGE D. BROCK HORNBY

Related Case: 03-CV-65

Case in other court: Maine Superior Court,
Androscoggin County, 04-CV-
25

Cause: 42:1983 Civil Rights (Employment
Discrimination)

Date Filed: 02/11/2004

Jury Demand: Plaintiff

Nature of Suit: 442 Civil Rights:
Jobs

Jurisdiction: Federal Question

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