

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHEN G. COLE,)
)
 Plaintiff)
)
 v.) Civil No. 95-0188-B
)
 LINCOLN PULP & PAPER CO.,)
)
 Defendant)

MEMORANDUM OF DECISION¹

Plaintiff, Stephen G. Cole, and Defendant, Lincoln Pulp & Paper Co. (LPP), cross-filed Motions for Summary Judgment on various counts of Cole's Complaint against LPP seeking, *inter alia*, damages and injunctive relief pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101--12213 (1995 & Supp. 1996); Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. 1996); and the Maine Human Rights Act (MHRA), 5 M.R.S.A. §§ 4551-- 4633 (1989 & Pamph. 1996). Concluding that some genuine issues of material fact exist for the fact finder's determination, the Court denies Cole's Motion in its entirety and grants LPP's Motion in part.

I. Summary Judgment

A summary judgment is appropriate 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). An issue is genuine, for these purposes, if "the evidence is such that

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

II. Background

This matter arises out of Cole's contention that LPP has subjected him to employment discrimination based on his disability, sexual harassment, retaliatory dismissal from employment, defamation, and both negligent and intentional infliction of emotional distress.

Employed by LPP since 1986, Cole has worked for most of his time at the plant as an electrician and instrumentation journeyman. Prior to being hired by LPP, Cole was involved in a motor vehicle accident that resulted in an injury to his neck. Serving in the United States Navy at the time, Cole was assessed a veteran's disability benefit rating based on a 10% permanent impairment of his neck. Cole reinjured his neck in another, non-work-related motor vehicle accident in 1990. He initially was out of work for a six-month period and, since that time, has been absent from the plant for various periods of time in conjunction with his neck pain. Cole subsequently obtained from the Veterans Administration (VA) an assessment rating of 20% permanent impairment of his neck for purposes of disability benefits.

Following the new assessment of his disability by the VA and consultation with his physician, Cole requested that LPP consider him as suffering from a disability pursuant to the ADA, and that it accommodate his disability through modified work assignments. Cole also asked that

LPP suspend its absenteeism policies as they pertained to him.² Among the work restrictions Cole sought were the following: (1) that he not be required to work with his neck hyper- extended or with his arms placed overhead; (2) that he not work outside in the cold weather for extended periods of time; and (3) that he continue to be permitted to use muscle relaxants so long as he attempted to work forty hours per week. LPP obtained an independent medical opinion regarding Cole's work restrictions. The opinion was that Cole ought to avoid overhead work.

Cole claims that, notwithstanding his requests, LPP assigned him to various work tasks between January and May 1994 that violated his doctor's recommendations, and that, as a result, his neck became aggravated and he was forced to miss or leave work on several occasions. LPP contends that it made repeated, good faith efforts to assign Cole work within these restrictions, and even formulated, along with Cole's labor union, special job projects for Cole when it became apparent, by June 1994, that he no longer could perform adequately the essential job functions of an electrician and instrumentation journeyman.

Around this time, offensive graffiti directed at Cole began to appear on a somewhat regular basis in the workplace. Cole contends that he was subjected to sexual harassment by his co-workers and that LPP failed to remedy what he terms a "hostile work environment." By June 1995, LPP apparently told Cole that it would be eliminating many of the projects on which he was working. At that time, the company explored with Cole and his union alternative work options, but Cole, considering himself in effect terminated from employment at this time, was dissatisfied and ultimately brought suit against LPP. LPP states that it continues to consider Cole to be an employee,

² Cole brought a state law disability claim in 1992 against LPP based on the company's absenteeism policy. The parties subsequently entered into an agreement on this matter.

and notes that he periodically continues to accept work assignments that comport with his physical limitations.

Cole claims LPP discriminated against him in violation of the ADA, Title VII, and the MHRA. He further contends that he was subjected to unwanted sexual harassment by male co-workers and that LPP failed to take adequate steps to improve a "hostile work environment." Plaintiff also alleges that Defendant took retaliatory action against him in violation of federal and state law by terminating his employment after he exercised his rights under federal and state law. Cole also asserts that LPP made defamatory statements regarding him with malicious intent, and thus seeks punitive damages as a result of the same. Cole also seeks damages for both negligent and intentional infliction of emotional distress. Both parties filed Motions for Summary Judgment with respect to either part or all of Plaintiff's complaint.

III. Plaintiff's Motion for Summary Judgment

Because Plaintiff did not fashion his Motion for Summary Judgment based on the various counts of the Complaint but, rather, based on requests for specific findings by the Court, and because the Court finds that genuine issues of material fact remain, the Court shall set forth each of Plaintiff's proffered statements individually and discuss them collectively.

Plaintiff avers that he is entitled to a summary judgment with respect to each of the following propositions: (1) that Plaintiff as a matter of law must be said to have a "disability" within the meaning of the ADA; (2) that Plaintiff as a matter of law may be deemed a "qualified individual" for purposes of the ADA; (3) that Defendant as a matter of law violated the ADA by failing to make "reasonable accommodations" for Plaintiff; (4) that Defendant may be said to have violated the ADA as a matter of law because it failed to accept or follow the medical directions of Plaintiff's

physicians; (5) that Defendant as a matter of law violated the ADA by implementing a "no overtime" rule for persons on restrictive duties; (6) that Defendant as a matter of law violated Title VII by creating, tolerating, and failing to remedy a "hostile work environment"; (7) that Defendant violated the ADA as a matter of law by removing Plaintiff from his usual work crew on the grounds that there was insufficient work for him within his physical restrictions; and (8) that Defendant violated the ADA as a matter of law by seeking and negotiating a provision in the 1994-1996 collective bargaining agreement between union members and the company concerning the demotion of disabled workers. The Court denies Plaintiff's Motion for Summary Judgment with respect to each of the above statements.

The Court is unable to conclude that as a matter of law Plaintiff suffers from a "disability" within the meaning of the relevant provision of the Americans with Disabilities Act, 42 U.S.C. § 12102(2). The Court finds that genuine issues of material fact exist in the record as to whether Defendant regarded Plaintiff as being so substantially limited in his physical abilities to be "disabled" within the meaning of the Act. Likewise, the Court declines to find that as a matter of law Cole is a "qualified individual" pursuant to 42 U.S.C. § 1211(8). The Court concludes that it is unable, based on the record, to find that no genuine issues exist as to whether Plaintiff has been able to perform the essential functions of his job with or without reasonable accommodation on the part of Defendant. The Court finds also that genuine issues of fact exist as to whether LPP failed to accommodate Cole's needs at work relating to his physical impairments. The Court also denies that part of Plaintiff's Motion that alleges Defendant violated the ADA because it did not follow the advice of Cole's doctors concerning his physical limitations in the workplace. Insufficient evidence

has been generated on this issue by Plaintiff to support such a finding, or that such a finding necessarily would mandate a per se violation of the Act.

The Court also is unpersuaded by Cole's contention that he has generated sufficient record evidence to support a conclusion of law by the Court that the adoption of a "no overtime" work rule by LPP is violative of the ADA. The evidence Cole presented regarding the failure by LPP to take reasonable steps in response to the presence of graffiti in the workplace directed at him does not suffice for a finding, as a matter of law, that LPP violated the ADA. The Court also denies that part of Plaintiff's Motion relating to whether the removal of Cole from his regular work assignment was violative of the ADA. The Court is unable to conclude, based on the record, that no genuine issue of material fact exists on this issue, or that such action, even accepted as fact, would necessarily be violative of the Act. Last, the Court is unpersuaded by Plaintiff's contention that Defendant violated the Act by negotiating with the union a provision in the recent collective bargaining agreement relating to the demotion of disabled workers. Insufficient evidence has been generated in the record to support a conclusion of law on this issue.

IV. Defendant's Motion for Summary Judgment

Defendant has moved for Summary Judgment with respect to all counts of Plaintiff's Complaint. For the reasons discussed below, the Court denies the Motion with respect to Counts I, II, and III, but grants the Motion with respect to Counts IV, V, VI, VII, and VIII.

A. Counts I, II, and III: Disability Discrimination

Because Plaintiff has intermingled various of his claims concerning the ADA and the MHRA throughout Counts I, II, and III, the Court discusses such claims collectively. Defendant's Motion for Summary Judgment with respect to Plaintiff's claims that he is disabled and otherwise qualified

to perform his duties, that his employer discriminated against him on account of his disability, and that LPP failed to make reasonable accommodations regarding his disability in the workplace, is denied. Those portions of Plaintiff's Counts I, II, and III discussing issues of sexual harassment, retaliatory termination, defamation, and negligent and/or intentional infliction of emotional distress, however, are not subject to this denial of summary judgment.

The Court is satisfied that sufficient evidence in the form of affidavits, deposition testimony, and pleadings exist to withstand Defendant's Motion with respect to Plaintiff's ADA-based claims. Evidence submitted by Plaintiff regarding his medical condition and his employment with LPP suffices, for the time being, to raise genuine issues of fact concerning his discrimination-based suit against Defendant. The Court accordingly denies Defendant's Motion as it relates to Plaintiff's ADA-based claims in Counts I, II, and III of the Complaint.

B. Count IV: Sexual Harassment

Defendant also has moved for a summary judgment with respect to Count IV of Plaintiff's Complaint. In Count IV, Plaintiff alleges that he was subjected to a "hostile work environment" that amounted to sexual harassment. The gravamen of Plaintiff's complaint is that by failing to take action against the inappropriate sexual conduct (in the form of offensive graffiti) of his co-workers, LPP is responsible for the creation of a "hostile work environment."

In order to support a proper claim for sexual harassment pursuant to a "hostile work environment" theory, the Plaintiff must present evidence that his workplace was permeated with discriminatory intimidation, ridicule or insult, or a combination thereof, that was sufficiently severe or pervasive as to alter the conditions of his employment and create an abusive working environment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897-98 (1st Cir. 1988). In order

to impute liability to the Defendant-employer, Plaintiff must demonstrate that LPP knew or should have known of the hostile environment and failed to promptly act to correct the environment. *Id.* at 902.

Cole has failed to respond adequately to LPP's motion with respect to this Count. He fails to present sufficient factual evidence to overcome LPP's evidence that no supervisor at LPP sexually harassed him, and that LPP took prompt and appropriate action to correct the incidents of graffiti at the plant. Fed. R. Civ. P. 56(e). There thus is no basis in the record to impute liability to the Defendant, and the Defendant's Motion for Summary Judgment on this Count accordingly is granted.

C. Count V: Retaliatory Termination

Defendant moves for a summary judgment with respect to Count V of Plaintiff's Complaint, which alleges that LPP retaliated against him because he filed a disability and sex discrimination complaint with state and federal agencies.

In order to sustain a claim of retaliation, Plaintiff must present evidence that: 1) he engaged in legally protected conduct; 2) that Defendant took an adverse action against him either at the time or after the protected conduct occurred; and 3) that there was a causal link between the protected conduct and the adverse employment action. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996).

Plaintiff has failed to respond adequately to Defendant's contention that he has not presented evidence to support a causal link between the protected conduct and the adverse actions alleged. Nor is it at all clear from the record that Plaintiff is justified in his contention that he has in fact been terminated from employment. The Court concludes that there is no record evidence to warrant a

finding in Plaintiff's favor by a reasonable jury on this matter, that no genuine issues of fact remain to be decided, and accordingly grants Defendant's motion with respect to this Count.

D. Count VI: Defamation

Defendant moves for a summary judgment with respect to Plaintiff's Count VI alleging defamation. Although Plaintiff initially sought recovery for defamation in his Complaint, he apparently has not pursued the issue further in the subsequent motions, memoranda, and responses before the Court.

To state a claim for defamation in Maine, a plaintiff must present evidence of: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991).

Because Plaintiff failed to present any evidence to sustain the elements of this claim, the Court grants Defendant's Motion on this Count.

E. Counts VII and VIII: Negligent and Intentional Infliction of Emotional Distress

Finally, Defendant moves for Summary Judgments with respect to Plaintiff's claims for negligent and intentional infliction of emotional distress. In Count VII of his complaint, Cole seeks damages for negligent infliction of emotional distress on the part of LPP. Cole contends that due to the difficult work environment he experienced, he became extremely distressed. He argues that LPP is responsible for his distress through its negligence.

A defendant will be liable for the negligent infliction of emotional distress under Maine law if: 1) he was negligent; 2) the plaintiff suffered emotional distress that was a reasonably foreseeable

result of the defendant's conduct; and 3) the plaintiff suffered severe emotional distress as a result of the defendant's negligence. *Bolton v. Caine*, 584 A.2d 615, 617-18 (Me. 1990).

Defendant contends that insufficient evidence has been presented to establish that it breached any duty of care owed to Plaintiff. Defendant also contends that this claim is barred in this action in light of the exclusivity provisions of the Maine Workers Compensation Act, 39-A M.R.S.A. § 104 (Supp. 1996). Although the Court does not address this alternative argument, it does find that Cole has not alleged enough facts from which a reasonable jury could make a finding that Cole suffered severe emotional distress. See *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282, 1285 n.8 (Me. 1987) (defining serious mental distress as being "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event."). The Court grants Defendant's Motion for a Summary Judgment with respect to Count VII.

Plaintiff also alleges in Count VIII that Defendant caused him to suffer outrageous conduct that resulted in emotional distress sufficient to permit recovery for intentional infliction of emotional distress.

In Maine, a defendant may be liable for the intentional infliction of emotional distress if his conduct was "so extreme and outrageous as to exceed all possible bounds of decency." *Dempsey v. National Enquirer*, 702 F. Supp. 927, 930 (D. Me. 1988) (citation omitted). Additionally, "[i]t is for the Court to determine, in the first instance, whether Defendant's conduct may reasonably be regarded as so extreme and outrageous [as] to permit recovery, or whether it is necessarily so." *Id.* (quoting *Rubin v. Matthews*, 503 A.2d 694, 699 (Me. 1986)).

The Court is persuaded that there is no basis for a finding that Defendant's alleged conduct could be found by a reasonable jury to be "so extreme and outrageous as to exceed all possible bounds of decency." *Id.* (quoting *Gurski v. Culpovich*, 540 A.2d 764, 766-67 (Me. 1988)). The Court grants Defendant's Motion for a Summary Judgment with respect to Count VIII.

V. CONCLUSION

The Court accordingly DENIES Plaintiff's Motion for Summary Judgment and GRANTS Defendant's Motion for Summary Judgment as to Counts IV, V, VI, VII, and VIII, but DENIES the Motion as to Counts I, II, and III.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on January 27, 1997.