

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MARC D. SEVIGNY,)
)
 Plaintiff)
)
 v.) Civil No. 98-0090-B
)
 MAINE EDUCATION ASSOCIATION-)
 NATIONAL EDUCATION)
 ASSOCIATION,)
)
 Defendant)

AMENDED RECOMMENDED DECISION

This is an action arising under the Americans with Disabilities Act, 42 U.S.C. secs. 12101-12213 [“ADA”], and the Maine Human Rights Act, 5 Me. Rev. St. Ann. secs. 4551-4632 [“MHRA”]. Defendant seeks judgment as a matter of law on the entirety of Plaintiff’s Consolidated Complaint on several grounds. The Court agrees with Defendant that Plaintiff has failed to present evidence that he is a person who is “disabled” within the meaning of the ADA, and therefore recommends judgment be entered in favor of Defendant on Counts I, and III.¹ The Court further finds that Plaintiff has failed to generate a material factual issue on the question whether Plaintiff suffered adverse employment consequences as a result of Defendant’s desire

¹ Plaintiff’s MHRA claim was dismissed by the Court by Order Affirming the Recommended Decision on August 25, 1998.

to retaliate against him for exercising his rights under the ADA, and accordingly recommends judgment enter in Defendant's favor as well on Count II of the Complaint.

The Standard for Summary Judgment

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). "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)).

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)). The Court views the record on summary judgment

in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Whether Plaintiff is “disabled.”

Defendant asserts that Plaintiff has insufficient evidence that he is disabled within the meaning of the ADA. Defendant does not dispute in this Motion that Plaintiff suffers from depression and/or attention deficit hyperactivity disorder [“ADHD” or “ADD”], or that these conditions qualify as “physical or mental impairments” within the meaning of the act. 42 U.S.C. § 12102(2). Rather, Defendant focuses its argument on whether Plaintiff can show that these conditions substantially limit him in a major life activity. *Id.*² Defendant also addresses Plaintiff’s alternative theory, that others “regard” him as disabled.

1. Whether Plaintiff is substantially limited in a major life activity.

Plaintiff’s Memorandum in opposition to the Motion for Summary Judgment asserts that his depression and/or ADHD substantially limit him in the major life activities of concentrating, thinking, communicating, focusing, sleeping, and caring

² Defendant argues that Plaintiff has based his claim only on a substantial limitation in the major life activity of “working.” Plaintiff disputes this characterization of his claim. Indeed, the Complaint alleges that Plaintiff has “a disability which substantially limits *one or more* major life activities, *including* work.” Comp. at ¶ 56 (emphasis added). Defendant has pointed to no other reason why Plaintiff should now be precluded from asserting limitations in other major life activities, and Plaintiff has not pressed any claim that he is substantially limited in the major life activity of work. The Court will therefore only address whether Plaintiff has presented sufficient evidence of a substantial limitation in the non-economic major life activities he is now asserting.

for himself. For purposes of this Motion, the Court need not analyze whether each of these activities qualify as major life activities under the ADA, although it is likely they do. *See, DeMar v. Car-Freshner Corp.*, 1999 WL 34973, *4 (N.D.N.Y. Jan. 14, 1999) (noting, in a case involving ADHD, that “sitting, standing, lifting, reaching, thinking, concentrating, and interacting with others are also considered major life activities,” although they are not listed in the statute) (citations omitted); but *cf.*, *Soileau v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997) (holding that the “ability to get along with others,” not a major life activity, while suggesting “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity.”). The more pertinent question is whether Plaintiff has presented the Court with sufficient evidence to permit a jury to conclude that he is “substantially limited” in one or more of these activities.

The definition of “substantially limited” applicable to Plaintiff’s claim requires a showing that the person is “[s]ignificantly 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). Factors relevant to this inquiry include:

- (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).

Plaintiff's evidence on this issue is as follows:

...

- 28. Dr. Risser, Mr. Sevigny's psychiatrist testified that when he first saw Mr. Sevigny in 1998, Mr. Sevigny was having difficulty sleeping and that he prescribed Trazadone for that problem and that Mr. Sevigny was very depressed and having difficulty sleeping, concentrating, focusing, and caring for himself.
- 29. Dr. Fred Risser diagnosed Mr. Sevigny as having major depression that is recurrent.
- 30. Dr. Risser also diagnosed Mr. Sevigny as having ADHD.
- 31. Dr. Risser treats Mr. Sevigny's depression with Prozac, his sleeplessness with Trazadone, and his ADHD with Cylert.

...

- 34. Dr. Risser testified that Mr. Sevigny's ADHD and depression interfere with his ability to think, to concentrate, and to communicate.
- 35. Richard LaRocco, M.D., Mr. Sevigny's personal physician, testified that Mr. Sevigny presented with symptoms of depression on August 24, 1994 and that he diagnosed him with depression severe enough to warrant medication.

...

- 37. Dr. LaRocco testified that even at his deposition several years after the event, he recalls Mr. Sevigny as being "significantly distracted" by symptoms from his depression.
- 38. Dr. LaRocco felt that Mr. Sevigny's depression partially disabled him in all spheres of his life.

39. Dr. LaRocco felt that when Mr. Sevigny presented in 1993 that he had been fighting depression for many years, more successfully prior to 1993.
40. On October 4, 1994, Dr. LaRocco saw Mr. Sevigny and found him to be in “some degree of remission.”
41. On March 2, 1995, Dr. LaRocco referred Mr. Sevigny to a psychiatrist telling her that he had been treating Mr. Sevigny for depression since August of 1993 and that Mr. Sevigny’s bout of depression had endured for several years.
42. Dr. Reeve agreed with Dr. LaRocco’s diagnosis of depression for Mr. Sevigny.
43. In December 1995, Dr. LaRocco felt that Mr. Sevigny had a partial remission of his depression.
- ...
46. Dr. LaRocco felt that Mr. Sevigny was “psychiatrically distressed”, that he has depression, and that Mr. Sevigny was in “a lot of pain”, “this man was hurting.”
47. Dr. LaRocco testified that Mr. Sevigny “desperately” wanted relief from his pain, that he wanted to be well.
48. Dr. LaRocco’s primary care of Mr. Sevigny included treating him for depression and possible ADD.
- ...
50. . . . Dr. LaRocco feels that Mr. Sevigny will always need treatment.
51. Robert Keteyian, M.Ed., Mr. Sevigny’s therapist testified that he has worked with Mr. Sevigny for about two years and that he believes he has ADHD.
- ...
54. Mr. Keteyian first saw Mr. Sevigny in June 1995 and worked regularly with him until March 1997.
55. When Mr. Sevigny first presented to Mr. Keteyian, he was tearful, depressed, could not concentrate well, could not sleep well, debilitated by those problems, impaired in his functioning, disorganized, was having a hard time coping with the demands of his life, and felt like his life was falling apart.
56. Mr. Sevigny was having communication problems and had been diagnosed as depressed.

- ...
61. Mr. Sevigny had a communication problem stemming from his attention deficit which required “a lot of sort of detailed trial and error problem solving.”
- ...
70. [In December, 1995,] Mr. Keteyian saw Mr. Sevigny as someone who was making progress dealing with his impairments and he did not see the benefit of disrupting Mr. Sevigny if there were things he had already improved upon.
71. He felt Mr. Sevigny had made significant gains in his communication skills by the time he was ready to return to work.
- ...
85. When he presented to Mr. Keteyian on June 20, 1995, Mr. Sevigny was in a lot of pain, not functioning well, and really needed help.
- ...
87. Mr. Keteyian believes that Mr. Sevigny was born with ADHD.
- ...
94. If language is impaired, communication will be impaired, and it was in the case of Mr. Sevigny because of ADHD.
- ...
130. Ms. Hedger’s [a speech language pathologist] opinion of Mr. Sevigny is that he can communicate if certain things are true such as medical management of his disability, medication, ongoing efforts to use his strategies and keep his focus.
- ...
146. Ms. Hedger thought that in December 1995 Mr. Sevigny had developed good strategies to deal with focusing and communicating.
147. His note-taking ability for communication and language skills had improved when he did return to work in March 1996.
148. She observed Mr. Sevigny pay attention to his tools that he had developed about taking notes and keeping track of things using a calendar in a different way and initiate conversations more successfully.
- ...

163. [Ms. Hedger] feels certain that Mr. Sevigny's ADHD caused him to miscommunicate.
164. Both Mr. Sevigny's depression and ADD are impairments he has had all his life.
165. Those impairments will be with Mr. Sevigny all his life and he will have to treat them all his life.
166. Thinking, concentrating, and communicating are activities that the average person in the population can do with little or no difficulty.
167. Dr. LaRocco's primary care of Mr. Sevigny included treating him for depression, a psychiatric disorder, and possible ADHD.
168. He treated the ADHD with Ritalin.
- ...
170. Dr. LaRocco opined that Mr. Sevigny will always need treatment for his depression because in him it is a chronic disease.

Pltf's Rev. Stmt. of Material Facts (citations omitted).

Plaintiff's evidence on the issue of the duration of his impairment is without fault. All of his expert witnesses opine that Plaintiff has and will continue to suffer from both his ADHD and depression for his lifetime, although it is unclear to what degree, Plaintiff having experienced partial remission at various times. There is also no question that Plaintiff has presented evidence that these conditions affect his ability to communicate, focus, and sleep. The "permanent or long term impact" resulting from these conditions is not apparent from Plaintiff's submission. It is clear that Plaintiff has had to adopt particular methods of coping with his lack of focus and communication difficulties, but he has apparently done so successfully. There is nothing remarkable about developing tools "about taking notes and keeping track of

things using a calendar in a different way and initiate conversations more successfully,” St. of Facts at ¶ 148, or having to use “a lot of sort of detailed trial and error problem solving.” St. of Facts at ¶ 61. Quite likely Plaintiff’s impairments have simply forced him to acquire skills which would benefit most people.

Most glaringly, however, Plaintiff’s only attempt to compare the manner in which he has to communicate, think, or sleep with the manner in which the average person can do these things is the one paragraph stating that “[t]hinking, concentrating, and communicating are activities that the average person in the population can do with little or no difficulty.” St. of Facts at ¶ 166.³ While this may be true, it says nothing about how *well* the average person does them with little or no difficulty, nor does it assess Plaintiff’s relative abilities when he is not assisted by therapy or medication. *Criado v. IBM Corp.*, 145 F.3d 437, 442-43 (1st Cir. 1998); *Arnold v. United Parcel Serv.*, 136 F.3d 854, 859 (1st Cir. 1998) (“Both the explicit language and the illustrative examples included in the ADA’s legislative history make it abundantly clear that Congress intended the analysis of an ‘impairment’ and of the question whether it ‘substantially limits a major life activity’ to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative

³ Plaintiff’s statements of fact describing generally the effects of ADHD and depression on unidentified “individuals” offer no assistance in this regard.

effects of medication, prostheses, or other mitigating measures.”). Plaintiff is asking the Court to conclude from the mere fact that his conditions *affect* these aspects of his life that he is substantially limited in his abilities when compared to the average person. There is no evidence in the record to support this conclusion. *See, DeMar*, 1999 WL 34973 (N.D.N.Y. Jan. 14, 1999) (on a similar record, concluding that “Plaintiff mistakenly leaps to the conclusion that because he has ADHD, his ability to concentrate is substantially limited as compared to the average person.”).

2. *Whether Plaintiff is “regarded as” disabled.*

Plaintiff argues in the alternative that he is “regarded” as disabled by Defendant, which requires Plaintiff to show both that Defendant knew of the impairment and that it considered the impairment to be substantially limiting. *Cooper v. Thomson Newspapers*, 6 F. Supp. 2d 109, 113 (D.N.H. 1998). There is no question on this record that, at least by December 4, 1995, Defendant was aware that Plaintiff had been diagnosed with ADHD and depression. There is also no suggestion in this record that Defendant considered these impairments to be substantially limiting in the areas identified by Plaintiff and discussed in connection with the analysis of whether Plaintiff is actually disabled. Plaintiff’s argument, rather, is that the hostility of Plaintiff’s co-workers, although present prior to his diagnosis, worsened after they became aware of his impairments.

Plaintiff is apparently asserting that Defendant considered his impairments to substantially limit his ability to “work,” a major life activity under the ADA. 29 C.F.R. § 1630.2(i). To succeed on this basis, however, Plaintiff is required to show not only that Defendant perceived him as unable to work for Defendant, but rather unable to perform “a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. § 1630.2(j)(3)(i); *Cooper*, 6 F. Supp. at 113. Certainly had Plaintiff been fired on the basis of his diagnoses, it could be inferred that Defendant perceived him to be substantially limited in his ability to work. *Cooper*, 6 F. Supp. 2d at 113. Plaintiff’s claim that prior hostility in the workplace simply increased following his return to work is more problematic.

The evidence to which Plaintiff would refer the Court is that his supervisor sought to place him in the Augusta office after his return from medical leave, over the objection of Plaintiff and his medical providers. In the light most favorable to Plaintiff, the evidence shows that she refused to listen to suggestions about how to assist Plaintiff in his return to the Bangor office, and that she seemed unsupportive of Plaintiff. Plaintiff’s evidence establishes at most that Defendant thought him unable to adequately perform in the Defendant’s Bangor office, given his prior history of poor performance and bad relationships with his coworkers. Defendant’s solution,

however, was to have him do the same job in another office. A jury could not reasonably conclude from these facts that Defendant thought him unable to perform a broad class of jobs because of his impairment.

Plaintiff's claims in Counts I, III and IV of his Complaint depend upon a finding that he was disabled, or perceived as disabled. Because the Court concludes that no genuine issue of material fact exists on these questions, and that Plaintiff has not shown on this record that he was either disabled or perceived to be so, judgment is appropriately entered in Defendant's favor on these Counts.

3. *Retaliation.*

Plaintiff's claim in Count II of his Complaint is that he was subjected to adverse employment conditions in retaliation for his asking for reasonable accommodations and for filing a grievance through his union, and a complaint with the Maine Human Rights Commission. This claim is not dependent upon a finding that Plaintiff is actually disabled, or perceived to be disabled by his employer. *Soileau*, 105 F.3d at 16 (citing *Mesnick v. General Elec.*, 950 F.2d 816, 827 (1st Cir. 1991)).

The section of the ADA prohibiting retaliation provides that an employer may not discriminate against an employee because the employee "has opposed any act or practice made unlawful by this chapter or because such individual made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.⁴ The analysis of this claim involves the familiar *McDonnell Douglas* burden-shifting scheme. *Soileau v. Guilford of Maine*, 928 F. Supp. 37, 52 (D. Me. 1996) (citations omitted). Defendant does not assert that Plaintiff has failed to set forth a prima facie case, as required under the first *McDonnell Douglas* prong. *Id.* Nor does Plaintiff suggest Defendant has failed to articulate legitimate, nondiscriminatory reasons for any action about which Plaintiff complains. *Id.* Accordingly, the Court need not make findings as to these two prongs.

It is the final step of the *McDonnell Douglas* analysis to which Defendant focuses the Court's attention. Specifically, Defendant asserts that Plaintiff has insufficient evidence that Defendant's proffered reasons for its actions were actually a pretext for retaliation. *Id.* At 53. Plaintiff's burden on this prong is to "proffer specific evidence from which a reasonable factfinder could conclude that [Defendant's] justification for [the adverse employment action] was no more than a

⁴ It is also unlawful for an employer to "coerce, intimidate, threaten, or interfere" with an employee's exercise of his or her rights under the ADA. 42 U.S.C. § 12203(b). Plaintiff's Complaint actually appears to mix the two sections, alleging that Defendant "coerced, intimidated, threatened and/or interfered with Mr. Sevigny's employment." Comp. at ¶ 72 (emphasis added). Indeed, Plaintiff asserts in his response to the Motion for Summary Judgment that he has alleged violations of both subsections (a) and (b). There are no facts presented in support of the opposition, however, which indicate any interference with Plaintiff's attempts to seek redress under the ADA.

pretext, and that the real reason that [the action was taken] was precisely because [Plaintiff] requested a reasonable accommodation.” *Id.* (Citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993)). It is insufficient for Plaintiff to “merely cast doubt upon the employer’s justification.” *Id.* (quoting *Lawrence v. Northrop Corp.*, 980 F.2d 66, 69 (1st Cir. 1992)). Rather, Plaintiff “must ‘elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer’s real motive: [retaliation].’” *Mesnick v. General Elec.*, 950 F.2d 816, 824 (1st Cir. 1991) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco*, 896 F.2d 5, 9 (1st Cir. 1990)). The evidence is assessed from the employer’s point of view. In other words, Plaintiff must offer some evidence that the employer did not believe its own justification for the action taken. *Id.* (citing *Gray v. New Eng. Tel. and Tel.*, 792 F.2d 251, 256 (1st Cir. 1986)).

Plaintiff directs the Court to the following portion of his Statement of Material Facts in support of his assertion that Defendant was engaged in a sham intended to cover up its true motive to retaliate against him for seeking an accommodation and filing complaints through the union and with the EEOC:

175. Also, Annette Sawyer routed my telephone calls to Augusta rather than paging me, leaving messages on my voice mail, leaving a written note for me, or calling me at home and never discussed with me the fact that I had received calls that she had forwarded to the Augusta office even though I did not work in Augusta.

That only came to light when constituents complained they were having trouble reaching me. Ms. Sawyer told me, after the fact, that that is what she had been doing.

176. I asked Ms. Hastings if I could attend training on May 18, 1996. For the first time in my employment with Defendant, she told me the request would have to be referred to the “training committee because it was not MEA-NEA training.” Prior to that request all other requests had always been approved without referring them to a training committee.
177. Prior to filing a charge of discrimination against Defendant, I had never had a problem obtaining approval to take a vacation. I took a vacation in June 1996 because neither Jan Hastings or Milton Wright had responded to my timely requests and I believed that the Collective Bargaining Agreement allowed me to do so if there was no response to the request after 15 days.
178. I was suspended without pay for taking the vacation, but I grieved that and the pay was restored.
179. On August 5, 1996 when I asked Robert Barkley, interim Deputy Executive Director, if I could attend the summer leadership program he told me Defendant would only be approving attendance and expenses to the summer leadership program for staff who have specific responsibilities and functions. He said “Therefore, since you have none your attendance will not be approved.” Prior to filing charges of discrimination against the Defendant I was never denied such a request. In fact, prior to that, I had been encouraged to attend such programs.
180. In the fall of 1996, Timothy Fitzgerald reprimanded me for not sending him copies of letters to the editor that he believed I had written. I never wrote such letters, but he reprimanded me anyway.
181. Annette Sawyer admitted to me, after it had been called to my attention that I was not responding to my telephone calls, that after I returned to work in the Bangor office, she had been routing my telephone calls to the Augusta office without telling me either by a note, in person, by voice mail, or e-mail that I was receiving telephone calls. Ms. Sawyer routed my telephone calls to the Augusta office even though I did not work in the Augusta office.
182. Defendant suspended me for one week without pay in April 1997 for allegedly not preparing for a Legislative reception in Eastport, Maine. A constituent called me at home during that week and requested

assistance which I provided. I have never been paid for working that day.

183. Jan Hastings completed an evaluation of Mr. Sevigny on June 7, 1996 and wrote no negative comments, even though she had the opportunity to do so.

Pltf's Rev. Stmt. of Material Facts (citations omitted).

The Court concludes that this evidence provides an insufficient basis upon which a jury could conclude that Defendant's justification was intended to cover up its desire to retaliate against Plaintiff. Plaintiff has asserted only that he was treated differently after he reported his diagnosis. Assuming, without deciding, that this different treatment rises to the level of "adverse employment action," there is nevertheless no evidence that the different treatment resulted from Defendant's desire to retaliate against him for either requested accommodation, or filing complaints.

Each of these differences could just as well have occurred because of changes in policy, or simple error. For example, Plaintiff's assertion that he never before had to request training through a committee suggests nothing more than a new policy requiring such approval. There is no allegation that other employees were not similarly inconvenienced.⁵ Plaintiff's allegation regarding his unauthorized vacation indicates that his union grievance resolved in his favor. Presumably, this is the

⁵ Interestingly, there is also no evidence as to whether Plaintiff's request for training was approved.

purpose of participating in a union; there is no suggestion that Plaintiff is the only union member to ever require such assistance. Plaintiff's assertion regarding his reprimand concedes his supervisor believed he had written the letters that were the subject of the reprimand.

In short, Plaintiff has done nothing more than cast doubt on Defendant's rationale for the actions Plaintiff asserts amount to retaliation. There is no suggestion in the record that Defendant did not apply its policies to all employees, or even make mistakes as to other employees. *See, Mesnick*, 950 F.2d at 828 (citing *Sumner v. United States Postal Serv.*, 899 F.2d 203, 210 (2d Cir. 1990) (evidence of differential treatment); *McDonnell Douglas v. Green*, 411 U.S. 792, 805 (1973) (statistical evidence of disparate treatment)). Nor has Plaintiff pointed to any comments by Defendant's agents suggesting a retaliatory intent. *Id.* Even Annette Sawyer is not alleged to have admitted she took actions tending to undermine Plaintiff specifically *because* he sought assistance or complained of discrimination. In the end, the only evidence Plaintiff has proffered that supports in any way his claim of retaliation is the temporal proximity of the actions about which he complains to his request for accommodation. *Id.* (citing *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 202 (1st Cir. 1987)). This factor alone, however, is simply an insufficient basis upon which a jury

could find that Defendant's actions were taken, not for the legitimate reasons offered by Defendant, but for the purpose of retaliating against him.

Conclusion

For the foregoing reasons, I hereby recommend Defendant's Motion for Summary Judgment be GRANTED.

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) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of 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.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on June 14, 1999.