

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT HALL,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 97-68-P-H</i>
)	
SAM'S CLUB, DIVISION OF)	
WAL-MART STORES, INC.,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

The defendant, Sam's Club, Division of Wal-Mart Stores, Inc., moves for summary judgment in this action brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, by a former employee, on the grounds that the plaintiff is not disabled within the meaning of the ADA and that the evidence cannot support a finding that it took adverse action against the plaintiff due to his disability, if indeed he was disabled. I recommend that the court deny the motion.

I. Summary Judgment Standard

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). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record reveals the following appropriately supported and undisputed facts. The plaintiff, Robert Hall, was employed by the defendant from July 1991 to October 5, 1994. Deposition of Robert Hall (“Hall Dep.”), attached to Memorandum of Law in Support of Sam’s Club’s Motion for Summary Judgment (“Defendant’s Memorandum”) (included in Docket No. 7), at 43; Exh. 2 to Deposition of Eddie Rejcek (“Rejcek Dep.”), Attachment 9 to Plaintiff’s Opposition

to Defendant Sam's Club's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 14). On April 28, 1993 Hall injured his back in the course of his employment. Hall Dep. at 44, 60. Dr. Stephen Klein performed surgery on Hall's back in July 1993. Deposition of Stephen R. Klein, M.D. ("Klein Dep."), attached to Defendant's Memorandum, at 5. Hall returned to work on December 26, 1993. Hall Dep. at 60.

Before his injury, the plaintiff had worked for the defendant in the grocery department, telemarketing, and food demonstration, and as a cashier/greeter, the position he held at the time of his injury. Hall Dep. at 43-44. After his injury, he worked as a greeter. *Id.* at 63. After an office visit on December 8, 1993, which Dr. Klein anticipated would be the plaintiff's last office visit, Dr. Klein released the plaintiff to return to work with the following restrictions: no lifting of objects over 35 pounds for the first three months, and no lifting of objects over 50 pound for the next six months; no climbing of long ladders (over three feet); no overhead work for prolonged periods of time or retrieving of merchandise from shelves. Klein Dep. at 8-12. He noted that the plaintiff was capable of returning to work as a greeter/cashier and expressed the hope that a chair would be made available for the plaintiff to sit for five minutes every ninety minutes. *Id.* at 12. Dr. Klein also stated that the plaintiff could stand for an hour and a half continually, walk for an hour and a half continually, and sit for an hour and a half continually. Klein Office Note, December 8, 1993, included in Attachment 5 to Plaintiff's Opposition.

The job of greeter involves standing at the combined entrance and exit to the store, greeting entering customers, asking if they are members, and checking packages and receipts of exiting customers. Deposition of Kevin O'Connor, Attachment 7 to Plaintiff's Opposition, at 45-50. It was considered light duty work but was the only position in the store in which the employee could not

take a break until he was relieved by another employee. *Id.* at 8; Hall Dep. at 67. The plaintiff complained to an occupational health nurse and to his supervisor and assistant managers that he was not being given a break every ninety minutes. Hall Dep. at 71; Deposition of Judith A. Brann, Attachment 1 to Plaintiff's Opposition, at 82-83. The plaintiff wrote a letter dated February 13, 1994 to the store's general manager concerning this situation. Complaint (Docket No. 1), Exh. E. In a letter dated February 25, 1994 Dr. Klein stated that the plaintiff could stand for two hours continually, walk for two hours continually, and sit for two hours continually. Letter from Stephen R. Klein, M.D., to Andrea Burton, attached to Hall Dep. The general manager of the store rejected the suggestion that the plaintiff use a stool while working as a greeter. Rejcek Dep. at 57-58.

The plaintiff applied for at least two other jobs in the store: forklift driver and marketing. Hall Dep. at 82, 88. He was not given either of these jobs. *Id.* The plaintiff's employment was terminated by the store's general manager on the same day on which the manager received a report that the plaintiff had told a customer that the store would be closing in six months, which was not in fact the case. Deposition of James A. Hurton, attached to Defendant's Memorandum, at 59-60, 92-96, 103-04; Rejcek Dep. at 63-64, 76-77. The plaintiff denied making the statement. Rejcek Dep. at 104.

III. Analysis

The defendant contends that the plaintiff cannot establish that he was disabled within the meaning of the ADA at the time of his termination.¹ The ADA prohibits a covered entity from

¹ The parties agree that the analysis of the plaintiff's claim under the ADA is the same as that under the Maine Human Rights Act. Defendant's Memorandum at 7 n.1; Plaintiff's Opposition at (continued...)

discriminating against a qualified individual with a disability because of the disability in regard to terms, conditions and privileges of employment. 42 U.S.C. § 12112(a); *Arnold v. United Parcel Svc., Inc.*, 1998 WL 63505 (1st Cir. Feb. 20, 1998) at *3.

To obtain relief under the Act, a plaintiff must prove three things. First, that he was disabled within the meaning of the Act. Second, that with or without reasonable accommodations he was able to perform the essential functions of his job. And third, that the employer discharged him in whole or in part because of his disability.

Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996). Here, the defendant addresses its argument to the first and third of these elements.

A. Disability

“Disability” is defined by the ADA as, with respect to an individual,

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). A “physical impairment” is “[a]ny physiological disorder, or condition . . . affecting one or more of the following body systems: neurological, musculoskeletal . . .” 29 C.F.R. § 1630.2(h)(1). “Major life activities” is defined as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). Sitting, standing, lifting and reaching also constitute major life activities. 29 C.F.R. pt. 1630, App. § 1630.2(i) at 350. See *Cook v. State of Rhode Island, Dep’t of Mental Health, Retardation & Hospitals*, 10 F.3d 17, 25 (1st Cir. 1993).

“Substantially limits” is defined as:

¹(...continued)
9 n.3.

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

Factors to be considered in assessing whether an individual is substantially limited in a major life activity are:

(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). When the major life activity at issue is working, the following regulation also applies:

(i) The term *substantially limits* means significantly restricted in the ability to perform either 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3). In this regard, the First Circuit has quoted with approval a section of the Equal Employment Opportunity Commission's Compliance Manual to the effect that impairments that are long-term or potentially long-term, "in that their duration is indefinite and unknowable or is expected to be at least several months," may constitute disabilities, if severe. *Katz*, 87 F.3d at 31, quoting 2 EEOC Compliance Manual, Interpretations (CCH) § 902.4, ¶ 6884, p. 5319 (1995).

The defendant contends both that the evidence cannot establish that the plaintiff is substantially limited in one or more major life activities and that the plaintiff cannot prove that he is substantially limited in the major life activity of working, determinations that are to be made separately. 29 C.F.R. Pt. 1630, App. § 1630.2(j) at 351. The reported case law differs widely on the question whether limitations like those imposed on the plaintiff when he returned to work after his surgery constitute a substantial limitation on a major life activity other than working. *Compare, e.g., Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (25-pound lifting limitation does not constitute significant restriction on ability to lift or perform any other major life activity), and *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (same); *with Nieves v. Individualized Shirts*, 961 F. Supp. 782, 785, 794 (D. N. J. 1997) (evidence that plaintiff is limited to three consecutive hours of standing raises fact question for trial as to existence of substantial limitation on a major life activity), and *Abbasi v. Herzfeld & Rubin, P. C.*, 4 A.D. Cases 797, 1995 WL 303603 at *2 (S. D. N. Y. 1995) (allegation that plaintiff cannot walk up flights of stairs, stand for long periods, or carry heavy boxes or files states claim that major life

activities have been substantially limited).

It is not necessary to resolve this issue in this case because, assuming without deciding that the plaintiff cannot establish a substantial limitation on a major life activity other than working, analysis of the summary judgment evidence concerning the “working” prong of the test demonstrates that the plaintiff is entitled to trial on the issue of his alleged disability under the ADA. The Interpretive Guidance to the relevant regulations² provides:

For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual’s impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs.

29 C.F.R. Pt. 1630, App. § 1630.2(j) at 352. Here, the expert witness offered by the plaintiff has reported that the plaintiff “is substantially restricted from performing in a broad range of jobs in various classes, such as the very heavy duty, heavy, medium, light and sedentary duty exertional ranges. He is completely restricted from performing work in the heavy and very heavy duty categories.” Exh. 11 to Deposition of Susan McCarron, included in Defendant’s Reply Memorandum to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Reply Memorandum”) (Docket No. 18), at [4]. This evidence meets the regulatory description of substantial limitation in the major life activity of working.

The defendant attacks McCarron’s opinion based on her lack of familiarity with the ADA regulations and the factual basis of her assumptions concerning the plaintiff’s current condition.

² While not controlling on the courts, the interpretive guidelines are a proper source of guidance for the courts and litigants. *Meritor Sav. Bank, FSB v. Vinson*, 477 U. S. 57, 65 (1986); *Arnold*, 1998 WL 63505 at *9.

Reply Memorandum at 4-6. However, both points, while perhaps appropriate for consideration by the factfinder at trial, have no effect on the summary judgment analysis. They do not establish as a matter of law that the plaintiff cannot prove that he is substantially limited in the major life activity of working, or that he was so limited at the time he was discharged. The defendant also argues that McCarron's opinion that the plaintiff "is disqualified from medium or heavy duty jobs because of his limitations" is "meaningless" because the plaintiff never worked in such jobs. Reply Memorandum at 7. However, the regulations do not appear to require that the plaintiff be substantially limited in his ability to perform a class of jobs in which he previously worked in order to be considered disabled under the ADA. *See, e.g., Kazel v. Principal Communications, Inc.*, 6 A. D. Cases 1359, 1997 WL 278058 at *1 (S. D. N.Y. 1997) (inability to stand, walk or sit for more than two hours at a time restricts plaintiff's ability to perform a broad range of jobs and meets ADA definition of disability).

The defendant is not entitled to summary judgment on this basis.

B. Pretext

The defendant's alternative argument is that the plaintiff will be unable to prove that the defendant's legitimate, non-discriminatory reason for discharging him was a pretext.³ The plaintiff

³ The defendant briefly argues that the plaintiff cannot prove that its decision to discharge him was related to his disability because the plaintiff only spoke to the general manager once about his need for rest breaks, no employee of the defendant ever spoke to the defendant's insurer's vocational rehabilitation specialist who was working with the plaintiff about the plaintiff's injury or need for accommodation or gave her any reason to believe that the defendant was not dealing with the plaintiff in good faith, and other employees of the defendant who requested accommodations received them. Defendant's Memorandum at 18-19. This evidence may be undisputed, but it is insufficient as a matter of law to overcome the evidence offered by the plaintiff, which includes his repeated complaints to various supervisors and managers and the occupational rehabilitation specialist overseeing the plaintiff, Brann Dep. at 82-83, Hall Dep. at 71-72 & Exhs. 5 & 8 (included (continued...))

has not provided any direct evidence of a discriminatory reason for his discharge, so the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-05 (1973), will apply. *Katz*, 87 F.3d at 30 n.2. The defendant challenges only the first element of the plaintiff's burden to demonstrate that he can establish a *prima facie* case — that he has a disability within the meaning of the ADA definitions — and I have concluded that the defendant is not entitled to summary judgment on this basis. Therefore, under *McDonnell Douglas*, the defendant must articulate a legitimate, non-discriminatory reason for the discharge, and the defendant here has presented evidence of such a reason — that the plaintiff falsely told a customer that the store would close in six months.

The burden then shifts to the plaintiff to present evidence from which a reasonable factfinder could conclude that the defendant's articulated reason is a pretext. The defendant argues that the plaintiff cannot meet this burden because three employees testified that they spoke to the customer to whom the plaintiff was alleged to have said that the store was closing, making it necessary for the plaintiff to prove that these three individuals conspired with the general manager, a claim which the defendant asserts is "patently absurd." Defendant's Memorandum at 19.⁴ However, there is

³(...continued)
in Attachment 3 to Plaintiff's Opposition); many days on which rest breaks were not timely provided, Hall Dep. Exh. 7; a letter from the plaintiff to the general manager, Hall Dep. at 71 & Complaint, Exh. E; and the defendant's refusal to move the plaintiff into two or more available jobs that would better suit his restrictions, Hall Dep. at 82, 88 & Exh. 6 (included in Attachment 3 to Plaintiff's Opposition); Rejcek Dep. at 113-20.

⁴ The defendant also asserts as evidentiary support for this argument that the employee who first reported the alleged statement did not even know that the plaintiff had a back injury. Defendant's Memorandum at 20. This asserted fact is not included in the defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried (Docket No. 8) and therefore may not be considered by the court in addressing its motion for summary judgment.

evidence in the summary judgment record that calls into question the credibility of these witnesses, including, but not limited to, the following: (1) Neither the defendant nor any of these employees is able to produce the name of the customer. (2) The employee who reported the plaintiff's alleged statement and identified the plaintiff as the maker of the statement stated that the false statement was made and reported a day before he reported it to supervisors, who reported it to the store manager on the day the plaintiff was discharged. Deposition of Sean [sic] Kenniston, Attachment 4 to Plaintiff's Opposition, at 31-32, 47; Deposition of James P. Hurton ("Hurton Dep."), Attached to Defendant's Memorandum, at 95-96. The plaintiff did not work the day before he was fired. Affidavit of Robert Hall (Docket No. 17) ¶ 4. The defendant has been unable to produce the plaintiff's time cards for his final week of work. Affidavit of Jeffrey Neil Young, Esq. (Docket No. 16) ¶ 2. (3) The store manager has testified inconsistently about whether he made the decision to discharge the plaintiff before speaking to him about the alleged statement to the customer. Rejcek Dep. at 76-80. (4) The defendant's established employee disciplinary procedures may not have been followed in connection with the plaintiff's discharge. Hurton Dep. at 101-02.

On balance, I cannot conclude that a reasonable factfinder could not find that the defendant's stated reason for discharging the plaintiff was a pretext and that a motivating factor in the decision to discharge him was in fact his disability. Accordingly, the defendant is not entitled to summary judgment on this ground.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment

be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of March, 1998.

*David M. Cohen
United States Magistrate Judge*