IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT PETERS,

Plaintiff,

v.

CITY OF MAUSTON,

Defendant.

OPINION AND ORDER

01-C-0247-C

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This is a civil action for monetary and injunctive relief brought pursuant to the Rehabilitation Act of 1973. Plaintiff Robert Peters alleges that defendant City of Mauston discriminated against him on the basis of his disability by failing to reasonably accommodate his needs. The case is before the court on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b). I conclude that although defendant may have regarded plaintiff as having an impairment that substantially limited his ability to work, the Rehabilitation Act did not require defendant to accommodate plaintiff's impairment by eliminating essential functions of his job. Accordingly, defendant is entitled to summary judgment in its favor.

For the purpose of deciding defendant's motion for summary judgment, I find from

the parties' proposed findings of fact and the record that the following material facts are undisputed.

UNDISPUTED FACTS

Plaintiff Robert Peters began his employment with defendant City of Mauston in 1968. At the time of his termination on March 15, 1995, he had most recently worked as an operator. According to the job description for an operator, plaintiff was required to perform the duties of a laborer. These duties included excavating trenches for replacement or repair of existing water, wastewater and storm water mains and laterals; installing new mains and laterals; removing snow and ice accumulations from streets and sidewalks; loading and transporting refuse, construction materials and brush; performing daily maintenance on equipment; performing general street maintenance; trimming trees and cutting brush; installing signage and performing maintenance on existing signage; operating valves, flushing hydrants, reading meters, checking pumps and performing daily tests of water and wastewater; operating trucks for snow and ice control, refuse disposal and transportation of construction materials; and maintaining parks and park equipment.

Plaintiff injured his right shoulder in 1992. He left work beginning in June 1992, had surgery on his shoulder in August of 1992, and returned to his regular duties in the late fall

of 1993. While plowing snow in the winter of early 1994, plaintiff was thrown against the windshield of his plow, injuring his left shoulder. The shoulder injury ultimately required surgery in June of 1994 to repair a torn left rotator cuff and partially torn left bicep. As a result of his injury, plaintiff missed work from June of 1994 through the date of his termination, March 15, 1995.

Plaintiff's surgery and post-operative care was provided by Dr. Thomas G. Hoeft. On October 6, 1994, Dr. Hoeft indicated that plaintiff was doing quite well. Although plaintiff was experiencing pain in his left shoulder, plaintiff thought that it was just a matter of getting his shoulder in shape. Dr. Hoeft concurred with plaintiff's view, and recommended that plaintiff return to work on a light duty basis with a restriction of no lifting over thirty pounds, no repetitive shoveling and no overhead use of the left hand.

Defendant's worker's compensation insurance company sent plaintiff for an independent medical examination. This examination was performed by Dr. Ronald C. Rudy on September 1, 1994. Dr. Rudy's report of September 22, 1994, provides an extensive assessment and background on plaintiff. In his report, Dr. Rudy concludes as follows:

> The claimant may return to work as a heavy equipment operator following completion of his physical therapy. He should avoid heavy overhead lifting, excessive carrying of weights over 50 pounds. After one month, he may return to full duties without any restrictions.

With the conflicting reports of Dr. Hoeft and Dr. Rudy, defendant was uncertain

about how to proceed during the fall of 1994. On November 17, 1994, plaintiff spoke with his supervisor, Patrick Giesendorfer, the Director of Public Works. Plaintiff advised Giesendorfer that he had been released for work by Dr. Rudy and that he could report to work on November 15, 1994. Giesendorfer advised plaintiff that he needed to secure a release from Dr. Hoeft, who was still indicating that plaintiff had work restrictions. Plaintiff told Giesendorfer that he had been working hard and had painted three rooms in his house, had varnished floors in his house, had cleaned out his garage and was building deer stands. Giesendorfer wrote a memo including these statements by plaintiff on November 18, 1994.

In response to Giesendorfer's memo, Devin Willi, City Administrator, wrote to plaintiff and Dr. Hoeft on November 21, 1994, asking plaintiff to secure a release from Dr. Hoeft and undergo a functional capacity evaluation. Willi asked Dr. Hoeft to determine plaintiff's work capabilities and indicate any work restrictions. Two months elapsed, during which time Dr. Hoeft did not provide Willi with the requested report. In a letter dated February 21, 1995, Willi advised plaintiff that it was his responsibility to get his doctor to supply defendant with the necessary information. Willi wrote as follows:

> The City is ready and willing to have you return to work, but we must know whether you are able to perform the duties of your job, or whether the City needs to make some reasonable accommodations so that you can safely perform your job.

In a letter dated February 22, 1995, Dr. Hoeft forwarded the functional capacity

evaluation to Mr. Willi. The evaluation showed that in an eight-hour workday, plaintiff could use his left shoulder/left arm for the following functions and in the following amounts:

1. Plaintiff should never lift or carry in excess of 50 pounds;
2. Plaintiff can occasionally (11% to 30% of day) lift or carry between 21 and 50 pounds;
3. Plaintiff can frequently (31%-70% of day) lift or carry between 11 and 20 pounds;
4. Plaintiff can continuously (71% to 100% of day) lift or carry between 1 and 10 pounds; and
5. Plaintiff can occasionally (11% to 30% of day) shovel.

In addition, the evaluation indicated that during an eight hour work day, plaintiff could use his left shoulder and left arm continuously at one time for two hours and during the entire day for six hours. The evaluation stated that these restrictions were permanent. Dr. Hoeft did not see plaintiff during his evaluation; rather, other non-physician staff evaluated plaintiff and forwarded their reports to Dr. Hoeft. Dr. Hoeft's conclusions were the product of the evaluations by these other individuals.

Dr. Hoeft indicated that the test results showed that plaintiff fell within the medium demand classification. He stated as follows:

> It is notable that there are limitations in lifting from the level of knuckle to shoulder, and shoulder to overhead, not to exceed 27 pounds, and limitations [on] lifting floor to knuckle or 12 inches to knuckle in the vicinity of 55 to 65 pounds. Additionally, there are some limitations in bending or stooping, reaching overhead, and crawling in terms of frequency. The grip and pinch strength are normal. . . . I have discussed the nature of Mr. Peter's [sic] job requirements with him in some detail, and there is some concern that the variable nature of his work might put him in a position to exceed his capacity from time to time and that this may be unforeseeable. It is my

> feeling that he may be expected to work reliably within the limitations noted on the functional capacity evaluation, however, if he were likely to have additional demands placed on him, and in an unpredictable way he might be better served by seeking another occupation.

Plaintiff does not know what Dr. Hoeft meant by "additional demands placed on him, and in an unpredictable way." Plaintiff did not have any concern that the permanent restrictions imposed by Dr. Hoeft would prevent him from performing his job duties; in fact, plaintiff believes that he did not need any accommodation to allow him to perform his job. Plaintiff does not believe that he would have needed to be excused from performing any job duty because of the restrictions.

On February 28, 1995, after receiving Dr. Hoeft's assessment, Willi and Giesendorfer met with plaintiff. Willi's summary of the meeting indicates that plaintiff expressed a desire to return to work if he was capable of performing his job, expressed concern about performing certain work-related functions and indicated that he was unaware of any accommodations that could be made to help him perform his duties.

Willi took Dr. Hoeft's report and information about the meeting with plaintiff to the defendant City's Personnel Committee. The committee directed Willi to meet with plaintiff again and walk through every element of plaintiff's job description in order to determine plaintiff's view as to his own ability to perform various duties, including any accommodations that could be made. On March 13, 1995, Willi and Giesendorfer met with

plaintiff to review the functional capacity evaluation and compare it to plaintiff's job description. Willi proceeded through the job descriptions for operators and laborers; these descriptions contain 14 groupings of tasks and duties. Willi asked plaintiff whether he believed he would have difficulty performing, or be unable to perform, any of the tasks included within the groupings. He further asked plaintiff what, if any, accommodations might allow plaintiff to perform the particular task. Plaintiff's responses were either that he believed he could do the work and saw no problem or that he was uncertain and would only know if he attempted to do the work. The only possible accommodation suggested by plaintiff was that if the lifting became too heavy for him, someone else would have to do it.

Willi wrote a memo summarizing the March 13, 1995 meeting. In this memo, he indicated that, following a review of his job duties and responses, the conversation turned to the following:

> When I completed the job duties, [plaintiff] asked, "What are the two-hour and six-hour restrictions you keep talking about?" I told him that these restrictions were placed on his job duties by Dr. Hoeft and showed him the evaluation sheet where these restrictions were listed. He looked at the sheet. I also discussed the restrictions on lifting and shoveling that were placed on his performance by Dr. Hoeft. He stated, "Yeah, but my shoulder will probably get better over time." I then showed him on the evaluation sheet where it stated that the restrictions were permanent. He said, "Oh, I didn't realize it said that."
>
> I then asked him if he understood that the doctor had restricted his lifting over 20 pounds to 11-30 percent of the day. He said "I haven't really lifted anything over 20 to 25 pounds, as I didn't want to do any more damage to my shoulder." I then asked him how the City should accommodate this lifting restriction. He said "Someone else

would probably have to do the lifting for me, if it got too heavy."

Willi reported the results of this meeting to the Common Council on March 14, 1995.

After reviewing the functional capacity evaluation and plaintiff's job duties, the council decided to terminate plaintiff's employment. The council stated in a letter dated March 15, 1995, that it did not see how plaintiff could "safely, reasonably and effectively perform the duties of a public works operator." The council stated that the decision to terminate plaintiff's employment was "based on a careful and lengthy review of the permanent restrictions placed on [plaintiff's] shoulder concerning lifting, carrying, and shoveling, and [on] the limitations placed on the number of hours [plaintiff] can use [his] shoulder on a continuous basis." The council added that "[a] majority of the duties related to the operator's position require lifting, carrying, and extensive use of . . . shoulders, and the Council is convinced that [plaintiff's] restrictions prohibit the safe and efficient performance of these duties."

At the time of plaintiff's termination, there were no vacant positions in the City of Mauston. Because of this, the Common Council did not consider whether plaintiff was able to perform any other position in the city. The Common Council also did not consider whether plaintiff was able to perform any job outside defendant's employment. Defendant did not mention anything about plaintiff's being unable to perform any job other than the

operator job; no one led plaintiff to believe that defendant had decided that plaintiff was unable to perform any job other than the operator job.

It is plaintiff's belief that around the time of his termination, there was nothing he was physically unable to do. He was able to get up, shower, eat, drive, watch television and perform all normal life activities. He was able to work outside the restrictions imposed by Dr. Hoeft. Despite the fact that the functional capacity evaluation listed plaintiff's restrictions as "permanent," on February 13, 1996, less than one year after termination, Dr. Hoeft released plaintiff to work without restrictions.

After his termination, plaintiff went to work for a local contractor, Leo Fronk. While working for Fronk, plaintiff engaged in frequent lifting and carrying and used his shoulders extensively. Plaintiff was able to perform his job duties. After plaintiff left Mr. Fronk's employment he had many jobs, including over-the-road truck driving and other construction work that required a great deal of manual labor. Plaintiff did not have any problem performing any of this work. After plaintiff was terminated by defendant, he applied for only one job that he did not get for the reason that another applicant lived closer to the job than plaintiff did.

After being terminated, plaintiff filed a grievance concerning his termination. On March 7, 2000, arbitrator William C. Houlihan determined that defendant lacked "just cause" to terminate plaintiff's employment under its collective bargaining agreement.

Arbitrator Houlihan awarded plaintiff his job back, but did not award back pay. In deciding not to award back pay, arbitrator Houlihan stated that Dr. Hoeft was plaintiff's doctor and that the limitations imposed by Dr. Hoeft were wrong. Arbitrator Houlihan indicated that defendant had relied heavily on Dr. Hoeft's diagnosis when it decided to terminate plaintiff.

Sometime after plaintiff's 1992 surgery and before his surgery in 1994, plaintiff was told by Jerry Grey, a foreman in the Public Works Department, that Joan Boyer, a city engineer, had told Grey either that "if someone gets hurt down there, they [sic] are out of a job," or "if someone gets hurt down there, they [sic] could be out of a job." Neither Boyer nor Grey was on the Common Council or involved in the decision to terminate plaintiff's employment.

OPINION

A. Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Summary judgment may be awarded against the non-moving party only if the

court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994). If the nonmovant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

B. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 7(20) [of this title], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." In determining whether this section has been violated in an employment discrimination action, the courts are required to follow the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101-12213). 29 U.S.C. § 794(d). Section 505(a)(2) of the Act, 29 U.S.C. § 794a(a)(2), provides an enforcement mechanism that the Supreme Court has interpreted as granting an implied private cause of action. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 72-73 (1992).

To establish a prima facie case of discrimination on the basis of disability, a plaintiff

must establish that (1) he has a disability within the meaning of the Rehabilitation Act of 1973; (2) he is otherwise qualified for the position sought; and (3) he has been subjected to discrimination solely because of his disability. Byrne v. Board of Education, School of West Allis, 979 F.2d 560, 563 (7th Cir. 1992). Defendant does not contend that plaintiff was not "otherwise qualified" for the position. Therefore, it is necessary to determine only whether plaintiff was "disabled" within the meaning of the Act, and, if so, whether defendant discriminated against him by failing to provide reasonable accommodations for his needs.

1. Disability

The Rehabilitation Act defines an "individual with a disability" as any person who (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such an impairment. 29 C.F.R. § 1614.203(a)(1). Major life activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1614.203(3). Under the ADA, a major life activity is substantially limited when an individual is

> (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 [he] can perform a 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). The determination whether a person has a disability must be made on a case-by-case basis. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

Plaintiff does not argue that he had an actual disability that substantially limited any major life activity. Therefore, I will consider whether plaintiff has a record of a disability that substantially limited a major life activity or is regarded as having such an impairment. To prevail on his claim that he had a record of being substantially limited in his ability to lift and work, plaintiff must prove that he had a history of, or was classified (or misclassified) as having an impairment that substantially limited a major life activity. 29 C.F.R. § 1614.203(a)(4). To prevail on his claim that he was regarded as being substantially limited in the ability to lift and work, plaintiff must show that although he did not have such an impairment, he was treated by his employer as though he was so impaired. 29 C.F.R. § 1614.203(a)(5).

A number of courts, including the Court of Appeals for the Seventh Circuit, have found that general lifting restrictions are not enough to constitute a substantial impairment of the ability to lift and work. Contreras, 237 F.3d at 763 (citing Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996)(twenty-five pound lifting restriction not a significant restriction on one's ability to lift, work or perform any other major life activity); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir.

1996)(twenty-five pound lifting restriction alone does not substantially limit major life activities); Ray v. Glidden Co., 85 F.3d 227, 228-29 (5th Cir. 1996)(plaintiff's inability to continuously lift items weighing approximately 44-56 pounds does not substantially impair major life activities of lifting or working); Wooten v. Farmland Foods, 58 F.3d 382, 384, 386 (8th Cir. 1995)(plaintiff's restriction to light duty and no work in cold environment or lifting items in excess of twenty pounds did not substantially limit his ability to work)).

In Contreras, 237 F.3d at 763, the court of appeals found that the plaintiff was not substantially impaired even though he was unable to lift in excess of 45 pounds for a long period of time, unable to engage in strenuous work, and unable to drive a forklift for more than four hours a day. The court noted that other circuits also have found that such limitations do not constitute a substantial limitation on the ability to work. Id. The court distinguished other cases in which lifting restrictions had been found to substantially limit the ability to work, finding that in those cases, the court emphasized the breadth of the restrictions and doctors' recommendations concerning how the employees' injuries would affect their ability to obtain other employment. Id. at 763 n.5 (distinguishing DePaoli v. Abbott Laboratories, Inc., 140 F.3d 668 (7th Cir. 1998); Cochrum v. Old Ben Coal Co., 102 F.3d 908(7th Cir. 1996)).

Plaintiff argues that he had a record of being substantially impaired in his ability to work. Such a claim requires that plaintiff show that he had a record of being"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." 29 C.F.R. § 1630.2(j)(3). Plaintiff must present evidence of the number and type of jobs within the geographic area from which he is disqualified. Sutton v. United Airlines, Inc., 527 U.S. 471, 492 (1999); EEOC v. Rockwell International Corp., 243 F.3d 1012, 1017 (7th Cir. 2001). Generally, this requires evidence of the demographics of the relevant labor market. Rockwell International Corp., 243 F.3d at 1017-18. Here, however, there is no such evidence in the record. The evidence in the record suggests only that plaintiff had certain restrictions placed on his ability to lift, not that he was substantially impaired in his ability to work. Although plaintiff was foreclosed from the position of an operator, inability to perform a particular job is insufficient to support a finding that plaintiff had a record of being substantially impaired in his ability to work or was regarded as so impaired. 29 C.F.R. § 1630.2(j)(i).

Plaintiff also argues that he was regarded as substantially impaired in his ability to work because defendant accepted Dr. Hoeft's restrictions on his work. For a "regarded as" claim, plaintiff need not be actually substantially impaired in a major life activity; rather, plaintiff must show that, although he did not have an impairment that substantially limited major life activities, he was treated by his employer as having such an impairment. 29 C.F.R. § 1614.203(a)(5). Plaintiff must show not only that the employer knew of plaintiff's

impairment, but also that the employer believed that his impairment substantially limited a major life activity. Amadio v. Ford Motor Co., 238 F.3d 919, 925 (7th Cir. 2001). Accepting plaintiff's factual assertions as true and drawing all reasonable inferences in his favor, I conclude that plaintiff's supervisor may have known of plaintiff's condition and may have believed that it affected his ability to work in general. Solely for the purpose of deciding this motion, I will assume that plaintiff was regarded as having an impairment that substantially limited his ability to work and I will treat him as an individual with a disability within the meaning of the Rehabilitation Act.

2. Discrimination

In order to survive defendant's motion for summary judgment, plaintiff must provide evidence that defendant discriminated against him solely because of his disability. On the issue of discrimination, plaintiff argues that defendant failed to provide him with a reasonable accommodation prior to terminating his employment. Plaintiff also contends that defendant discriminated against him by terminating him. On this latter point, however, plaintiff advances no supporting argument in his brief. Therefore, I need not address this claim. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181

F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim"); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

When a disabled person is not able to perform job duties, it is necessary to determine whether any reasonable accommodation by the employer would enable the employee to perform those duties. Cochrum, 102 F.3d at 912 (citing School Board of Nassau County, FL v. Arline, 480 U.S. 273, 288 (1987)). The facts reveal that plaintiff believed he did not need any accommodation to perform his job and that he would not have needed to be excused from performing any job duty because of Dr. Hoeft's restrictions. Although plaintiff suggested that others could perform heavy lifting for him as needed, defendant is not required to provide such an accommodation.

As evidenced by the job description for an operator, plaintiff's position required that he be able to perform the duties of a manual laborer. The Common Council noted in its letter of termination to plaintiff that the majority of the duties of an operator require

"lifting, carrying, and extensive use of . . . shoulders." Plaintiff's suggestion that others lift heavy objects for him would eliminate this essential function of the job and for this reason was not reasonable. Id.; Laurin v. Providence Hosp., 150 F.3d 52, 56 (1st Cir. 1998)(employer not required to accommodate disability by forgoing an essential function of the job); Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995)(employer not required to reallocate job duties to change essential function of job).

In Cochrum, the Court of Appeals for the Seventh Circuit held that it was not a reasonable accommodation for a miner whose job involved drilling bolts into the mine ceiling to have a helper for overhead work. Cochrum, 102 F.3d at 912 ("We cannot agree that [plaintiff] would be performing the essential functions of his job with a helper."). The court cited Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir. 1991), in which the plaintiff sued his employer, the Postmaster General of the United States Postal Service, under the Rehabilitation Act of 1973, contending that he was discriminated against because of his handicapping kidney disease. The plaintiff suggested as a reasonable accommodation that lifting and handling requirements be waived for him or that other postal employees working with him be assigned to lift mail bags for him. The court held that because lifting and handling requirements were essential functions of the job and that waiving the requirements or assigning them to other workers was an effort to eliminate an essential function of the job, the plaintiff's suggestions were not reasonable. Id.

Defendant was not required to accommodate plaintiff's limitations by reassigning his heavy lifting work or by providing a helper to lift items for him as needed. Therefore, plaintiff has not established that defendant discriminated against him by failing to reasonably accommodate his needs under the Rehabilitation Act of 1973. I will grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that defendant City of Mauston's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 20th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge