IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL S. HAMMEL,

Plaintiff,

v.

EAU GALLE CHEESE FACTORY,

Defendant.

OPINION AND ORDER

02-C-405-C

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Plaintiff Paul Hammel, who is legally blind, was terminated by defendant Eau Galle Cheese Factory after being employed there for approximately three weeks. In this civil action for monetary, injunctive and declaratory relief, plaintiff contends that defendant terminated him because of his disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.395. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1367.

Both parties have filed motions for summary judgment. Defendant's motion will be granted with respect to plaintiff's claim under the state fair employment act because state law requires persons seeking relief under the statute to present their claims to the Department of Workforce Development. Wis. Stat. § 111.39. After the department makes

its decision, a dissatisfied party must appeal to the Labor and Industry Review Commission. Id. Only after the commission has ruled may a party seek judicial review. Wis. Stat § 111.395. The record shows that plaintiff presented his claims initially to the Department of Workforce Development but voluntarily dismissed them before the department made its final decision. As a result, this court does not have subject matter jurisdiction over plaintiff's state fair employment claim. Bourque v. Wausau Hospital Center, 145 Wis. 2d 589, 427 N.W.2d 433 (Ct. App. 1988); Bachand v. Connecticut General Life Insurance Co., 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981); see also Koehn v. Pabst Brewing Co., 763 F.2d 865 (7th Cir. 1985); Mursch v. Van Dorn Co., 627 F. Supp. 1310 (W.D. Wis. 1986), aff'd, 851 F.2d 990 (7th Cir. 1988). Although defendant did not raise this issue, subject matter jurisdiction cannot be waived. Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 381 (7th Cir. 2001). Accordingly, this claim must be dismissed.

With respect to plaintiff's claim under the ADA, the issues are whether plaintiff is a "qualified individual" as defined by the act and whether he posed a "direct threat" to the health or safety of himself or others at the time he was terminated. Because I conclude that there is a genuine issue of material fact with respect to whether plaintiff is a qualified individual, both parties' motions for summary judgment will be denied on that issue. However, I conclude that no reasonable jury could find in favor of defendant on its affirmative defense that plaintiff posed a direct threat at the time he was terminated.

Accordingly, plaintiff's motion for summary judgment will be granted with respect to that issue.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Paul Hammel has been legally blind since at least 1991. He has no vision in his right eye and the field of vision in his left eye is restricted to a 20° corridor. Since 1991, plaintiff has worked as a general laborer for a construction company, a department store and a lumber company. At these jobs he performed tasks such as unloading delivery trucks, stocking shelves and stacking lumber. Plaintiff also worked as a maintenance employee and general aid for the Wabasha County Development Achievement Center and as a courier supervisor for the Ability Building Center. Before 2000, plaintiff had never been denied employment or terminated from employment because of his visual impairment.

Defendant Eau Galle Cheese Factory is a Wisconsin corporation that makes hard Italian cheese. Plaintiff applied for a position with defendant in early 2000. Soon after, plaintiff met with Ron Hemmy, defendant's general business manager, to discuss an available position for a "general laborer" at defendant's plant in Durand, Wisconsin. During the discussion, plaintiff told Hemmy that he was legally blind. Plaintiff explained that he has

no vision in his right eye and that the vision in his left eye is very limited as a result of congenital glaucoma. After speaking with plaintiff, Hemmy met with the plant supervisors and asked them whether they believed that a person with "some vision limitation would have any particular problems in the work environment." One of the supervisors responded, "Well, let's see if it would work for him." However, one supervisor, Dan Simpson, had concerns about plaintiff's ability to perform the job because of his vision impairment.

Hemmy called plaintiff on January 7, 2000, to tell him that he was hired. Plaintiff began work the following day. He worked in both the "make room" and the "brine room." His duties consisted primarily of moving materials from one place to another. In the make room, he would pick up and move cheese materials into forms and then onto racks, flip the cheese, trim it with a knife, place the trimmings in a grinder, move the cheese forms onto a cart and push them into the brine room, where he would stamp the cheese, place it in a brine tank, turn and salt the cheese, take it out of the tank and onto a drying rack and finally onto pallets. Multiple employees worked in both the make room and the brine room.

The morning after plaintiff's first day, one of plaintiff's supervisors, John Anibas, noticed that not all the cheese had been flipped, some cheeses were hanging off the edges of the carts and some of them had been misstamped. Anibas told plaintiff that if he had a problem, he should take his time so that the job was done correctly. On plaintiff's second day, Anibas instructed plaintiff on how to flip the cheese and began pulling plaintiff away

from his duties in the make room. On plaintiff's third or fourth day, Anibas said to plaintiff, "We've got to be careful."

After a few days, Simpson decided to take plaintiff out of the make room and limit his tasks to the brine room, where there is less "commotion and traffic." While plaintiff was working in the brine room, Anibas told Hemmy that plaintiff was having some problems with piling cheese wheels on pallets. Anibas sent plaintiff back to work in the make room when he concluded that plaintiff was not performing successfully in the brine room. When plaintiff returned to the make room, Simpson assigned him the tasks of grinding cheese rinds and greasing the cheese wheels. Simpson does not believe that plaintiff did a good job at greasing the wheels, but he does not remember why. Simpson was concerned about the way plaintiff put rinds into the grinder. Simpson believed that plaintiff pushed his hands too far into the machine, creating a risk he would get his hands stuck. When John Buhlman, defendant's owner, saw the way plaintiff used the grinder, he told Simpson to take plaintiff off that machine.

The factory is not a gentle environment. Plaintiff frequently stumbled, bumped into other employees and carts, bumped his head on carts and tripped over hoses. At least once, plaintiff scraped his knuckles on equipment. Other employees bumped into each other in order to avoid plaintiff. One employee saw plaintiff carrying his trimming knife outward instead of inward and once saw him run a pallet jack into the wall. The employee reported

the incident to his supervisors. Several employees, including Mikey Meixner, Robert Pelke and Steve Seller came to Simpson, telling him that they did not want to work next to plaintiff. Joe Sabelko, another employee, told his supervisors that he was concerned that plaintiff could not do his work safely. Plaintiff never injured one of his co-workers.

No one informed plaintiff that he was doing a poor job or that he would be terminated if his performance did not improve. Neither Hemmy nor Douglas Smith (another supervisor) discussed with plaintiff a concern that plaintiff might hurt himself or other employees. No one at Eau Galle asked plaintiff or someone outside the company whether there were any accommodations that would assist plaintiff in performing his job or in making it safer. Smith believed that other people were talking to plaintiff about these issues. Hemmy, Simpson and Anibas did not speak with plaintiff because they believed that there was no way that they could accommodate plaintiff. Simpson believed that plaintiff could not be accommodated because Simpson could not change plaintiff's working environment. Buhlman never discussed possible accommodations with plaintiff because he could not "make [plaintiff] see" and "that was the problem." None of the supervisors or managers at Eau Galle had experience working with blind people. If any of them had approached plaintiff about his disability interfering with his job, plaintiff could have contacted an agency for the blind that could assist in determining an appropriate accommodation.

On January 25 or 26, 2000, Buhlman, Hemmy, Simpson, Smith and Anibas had a meeting to discuss the concerns they had about plaintiff. During the meeting, they decided to terminate plaintiff. The following day, Hemmy called plaintiff into his office and told him that his supervisors had reported that his vision impairment interfered "to some extent" with his work and that they were concerned for his safety and the safety of other workers. During a later meeting, Hemmy told plaintiff's spouse that plaintiff had been terminated because of safety concerns. In a memo dated, February 3, 2000, Hemmy wrote that plaintiff had been terminated for "non disciplinary reasons."

OPINION

The Americans with Disabilities Act prohibits employers from discriminating against "a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual" is one who both possesses the prerequisites for the position, such as skills and experience, and can perform "the essential functions" of the job, with or without a "reasonable accommodation." 42 U.S.C. § 12111(8); Weiler v. Household Finance Corp., 101 F.3d 519, 524 (7th Cir. 1996) (citing 29 C.F.R. app. § 1630.2(m)). An employer's failure to provide a reasonable accommodation to a qualified individual constitutes discrimination under the act unless the accommodation would cause an undue hardship on the employer. 42 U.S.C. § 12112(b)(5). In addition, an employer

may deny or terminate employment if an individual poses a "direct threat" to health or safety. 42 U.S.C. § 12113(b).

To prevail on his claim under the ADA, plaintiff must demonstrate that 1) he is an "individual with a disability"; 2) defendant was aware of his disability; 3) he could perform the essential functions of the employment position with or without reasonable accommodation; 4) his disability was the reason defendant terminated him. Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999).

A. Individual with a Disability

The parties agree that plaintiff is an individual with a disability within the meaning of the ADA and that defendant was aware of plaintiff's disability. A person meets the definition of an individual with a disability if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2)(A)-(C). It is well-established that "seeing" is a major life activity. See Dvorak v. Mostardi Platt Associates, Inc., 289 F.3d 479, 483 (7th Cir. 2002) (quoting 29 C.F.R. § 1630.2(i)); Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001). Further, defendant does not argue that there are corrective measures that plaintiff could employ to lessen his impairment. See Sutton v. United Airlines, 527 U.S. 471 (1999) (whether impairment is "substantially

limiting" must be determined with corrective measures taken into account). Accordingly, I conclude that plaintiff is an individual with a disability under § 12102(2)(A).

B. Defendant's Reason for Termination

It is not clear whether defendant disputes that it terminated plaintiff "because of" his disability. For the most part, defendant's argument focuses only on whether plaintiff could perform the essential functions of his job in spite of his disability, whether it made reasonable accommodations for him and whether he posed a direct threat to health or safety. However, in its proposed findings of fact, defendant refers to its belief that plaintiff "did not take direction well," had a "bad attitude" and took unauthorized breaks. Dfts.' Prop. Find. of Fact ¶¶ 53-59, dkt. #23, at 8-9. In addition, in its reply brief, defendant appears to argue that the real problem was not plaintiff's vision impairment but rather his obstinance, carelessness and lack of thoroughness.

To the extent that defendant means to argue that it did not terminate plaintiff because of his disability, I conclude that it has failed to show that there is a genuine issue of material fact with respect to this question. Defendant's owner stated that the "problem" with plaintiff's performance was that he could not see. See Dep. of John Buhlman, dkt. #31, Exh. W, at 23-24. This is direct evidence that plaintiff's vision impairment was the reason for his dismissal. See Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir.

2001) (statement of "I fired Judy because she was an old woman" is an example of direct evidence of age discrimination). Although Buhlman's statement does not necessarily demonstrate animus against plaintiff, the ADA prohibits all discrimination against qualified individuals with disabilities, regardless whether the motivation for the decision was prejudice, stereotypes or unfounded fear. Dadian v. Village of Wilmette, 269 F.3d 831, 840 (7th Cir. 2001).

In an ADA case, once the plaintiff has offered direct evidence of discriminatory intent, the defendant has the burden to show that it would have made the same decision without regard to the plaintiff's disability. Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 670 (7th Cir. 2000). Defendant has failed to do this.

Defendant's reply brief includes no citations to its proposed findings of fact or to the record to support its argument that deficiencies unrelated to plaintiff's vision impairment were the real reason plaintiff was fired. Furthermore, most of defendant's proposed facts regarding plaintiff's alleged "bad attitude" and other deficiencies are derived from the affidavits of plaintiff's co-workers, who did not participate in the decision to terminate plaintiff. The opinions that plaintiff's co-workers had about the quality of his work are not relevant to determining defendant's motivation for terminating defendant, unless those employees communicated their concerns to a decision maker. See Biolchini v. General Electric Co., 167 F.3d 1151, 1154 (7th Cir. 1999) (views of other employees not relevant

to defendant's intent unless decision was tainted by employees' opinions). Defendant proposes no facts that they did.

According to defendant's proposed findings of fact, Smith was the only decision maker who believed that plaintiff had a negative attitude and took too many breaks. More important, defendant has pointed to no evidence showing that Smith expressed his concerns to any of the other supervisors or that, if he did, their decision to terminate plaintiff was influenced by those concerns. Rather, all the available evidence demonstrates that defendant believed that it was plaintiff's vision impairment and not some other deficiency that prevented plaintiff from being a successful employee. In addition to Buhlman's statement, it is undisputed that, at the time defendant terminated plaintiff, Hemmy told him that his disability was interfering with his work and creating safety concerns. Hemmy later wrote in a memo that plaintiff had been terminated for nondisciplinary reasons. Because defendant has offered no evidence to contradict these statements by the decision makers, I find it undisputed that plaintiff was terminated "because of" his disability.

C. Qualified Individual

Even though defendant's termination was motivated by plaintiff's disability, plaintiff cannot prevail on his claim unless he shows that he is a "qualified individual" under the act. Defendant does not dispute that plaintiff had the necessary skills and experience in order to

work as a general laborer in a cheese factory. Presumably, defendant would not have hired plaintiff if it did not believe that plaintiff was qualified. However, defendant does dispute that plaintiff was able to perform all the essential functions of his job.

In determining whether a prescribed duty is an essential function, a court should consider the written job description, experience of others who have held the position and evidence of the judgment of the employer. Basith v. Cook County, 241 F.3d 919, 927 (7th Cir. 2001) (citing 29 C.F.R. app. § 1630.2(m)). "'[I]f an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties.'" Winfrey, 259 F.3d at 616 (quoting Miller v. Illinois Dept. of Corrections, 107 F.3d 483, 485 (7th Cir. 1997)). Although neither party proposed facts regarding the job description or experience of other employees, there is no dispute that the following duties were essential functions of plaintiff's job: picking up and moving cheese materials into forms and then onto racks, flipping the cheese, trimming it with a knife, placing the trimmings in a grinder, moving the cheese forms onto a cart and pushing them into the brine room, stamping the cheese, placing it in a brine tank, turning it, salting it, putting the cheese onto a drying rack and finally onto pallets.

"In ADA cases involving actual disabilities, as opposed to perceived disabilities or a

history of a disability, it is usually true that the plaintiff cannot perform the essential functions of the job without some kind of reasonable accommodation." Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir.1998). In this case, however, plaintiff contends that even without an accommodation, he is able to perform the essential functions of the job. He alleges that it is defendant's stereotypical attitude and misunderstanding of his disability rather than an actual inability to perform his job that motivated defendant to fire him. In support, defendant points to his work history as a general laborer, noting that he has never been terminated because of his disability. See Hoffman v. Caterpillar, Inc., 256 F.3d 568, 573 (7th Cir. 2001) (genuine issue of material fact existed with respect to whether plaintiff was qualified individual when there was evidence that she could perform tasks similar to those in dispute). He also points out that no one at Eau Galle told him that his vision impairment was causing problems or that he could be terminated if he did not improve his performance.

Defendant does not dispute plaintiff's successful employment history. It also does not argue that plaintiff's vision impairment is so severe that, as a matter of law, no one with his disability could perform the job duties prescribed to him. See, e.g., Waggoner v. Olin Corp., 169 F.3d 481, 483-85 (7th Cir. 1999) (employee who would miss work "erratically" because of seizures could not be qualified individual); Sieberns v. Walmart Stores, Inc., 125 F.3d 1019, 1022 (7th Cir. 1997) (employee who was completely blind conceded that he

could not perform essential functions of sales clerk position). Further, although defendant notes that plaintiff's supervisors made statements to him such as "we've got to be careful," and "take your time," it points to no evidence that anyone told plaintiff his performance was inadequate or that he was in danger of being terminated if he did not improve. However, defendant is correct that its failure to inform plaintiff that there was a problem does not necessarily mean that he was in fact a qualified individual. Defendant argues that plaintiff's work performance during the three weeks he was employed demonstrated that he could not perform the essential functions of the job.

In its brief and proposed findings of fact, defendant alleges that plaintiff "repeatedly" failed to turn all the cheeses on the cart and in the brine tank, left cheeses hanging off the edges of carts and failed to stamp the cheeses or did so improperly. See Dfts.' Prop. Find. of Fact ¶¶ 15, 17, 18, 21, dkt. #23, at 4. In addition, defendant alleges that plaintiff was "unable" to properly stack cheese onto pallets, causing the stacks to tip over, and that he was "unable" to "properly" trim the cheeses. Id. at ¶¶ 20, 22. The problem with these allegations is that they are not supported by the evidence, at least not to the extent that defendant asserts. In support of its allegation that plaintiff "repeatedly" failed to turn and stamp cheeses properly, defendant cites only the deposition of John Anibas, one of plaintiff's supervisors. However, Anibas testified only that on the morning of plaintiff's second day, he noticed that "there was cheese missed being turned, misstamped, hanging over the edges

on these carts." Dep. of John Anibas, dkt. #23, Exh. E, at 13. Anibas does not indicate how much cheese had not been turned or stamped and he does not say why he believed that it was plaintiff who was responsible for the problems he observed, as plaintiff was not the only employee working in the make room. Further, Anibas also testified that he "pulled [plaintiff] away" from those duties on his second day. Although Anibas stated that *on the second day* he showed plaintiff how to flip the cheeses, there is no testimony that plaintiff continued to perform those duties after the instruction or, if he did continue, that he was still unable to complete them successfully after he received instruction. Evidence that plaintiff may have made mistakes on his first day is not sufficient to show as a matter of law that plaintiff was *unable* to perform his job's essential functions.

With respect to plaintiff's alleged failure to turn the cheeses in the brine tank, defendant cites the deposition of John Buhlman, defendant's owner, who testified that "evidently [plaintiff] missed a lot of them when he turned them." Dep. of John Buhlman, dkt. #23, Exh. G, at 18. However, there is no indication in Bulhman's testimony that he directly observed plaintiff failing to turn the cheese correctly. Rather, Buhlman's use of the word "evidently" suggests that he is relying on information reported to him by another, unnamed source. Generally, "[t]estimony about matters outside [a witness's] personal knowledge is not admissible and if not admissible at trial neither is it admissible in an affidavit used to support or resist the grant of summary judgment." Visser v. Packer

Engineering Associates, 924 F.2d 655, 659 (7th Cir. 1991); see also Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2001) (affidavit of plaintiff referring to conduct of other employees not admissible when it did not explain how she learned about conduct). The personal knowledge requirement applies to depositions and affidavits equally. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

In the context of determining an employer's reasons for terminating an employee, whether the employee *actually* was performing deficiently does not matter so long as the employer *honestly believed* that he was. Helland v. South Bend Community School Corp., 93 F.3d 327, 330 (7th Cir. 1996). For the purpose of determining whether an employee is "qualified" under the ADA, however, the inquiry focuses not on what defendant believed but on plaintiff's actual ability to perform. Thus, defendant cannot rely on hearsay testimony to illustrate that plaintiff is not a qualified individual. Defendant has cited no other evidence to support its contention regarding the brine tank.

With respect to the allegation that plaintiff was "unable to properly trim the cheeses," plaintiff cites an affidavit of another employee. See Aff. of Robert J. Pelke, dkt. #26, at ¶ 6. However, the employee does not explain how he knows that plaintiff did not properly trim cheese or, equally important, what it was about plaintiff's technique that was deficient. Affidavits must be made on personal knowledge and contain "specific facts" to be admissible

under Fed. R. Civ. P 56(e). See Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998). ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.") The employee's affidavit contains no specific facts, only a conclusion. Thus, it is not admissible for the purpose defendant wishes it to be used.

The only remaining contention is that plaintiff improperly stacked cheeses, causing them to tip over. In support, defendant again cites the deposition of Anibas. Anibas was asked, "Did you ever have a situation where the pallets were stacked improperly, the pallets that Mr. Hammel worked on, that you recall?" Anibas responded equivocally: "Not that he worked on exactly, no. But it was brought to my attention and pointed [out] to me." Dep. of John Anibas, dkt. # 23, Exh. E, at 47. The meaning of Anibas's statement is not immediately clear. In the first sentence, Anibas appears to say, "No, there was no situation in which plaintiff stacked the cheese improperly." However, his second sentence seems to suggest that although he never witnessed plaintiff stacking the cheese improperly, other employees did and told him about it. Assuming that the latter interpretation is the correct one, it does not support defendant's proposed finding of fact. First, Anibas does not appear to have personal knowledge of plaintiff's performance but instead is relying on information of other employees. Even setting aside this problem, Anibas's testimony does not support

defendant's allegation that plaintiff's stacks tipped over; at most, it supports an inference that on at least one occasion, plaintiff made a stack that was somehow "improper." Again, however, such testimony controverts the requirement under Fed. R. Civ. P. 56 that a party set forth "specific facts" supporting its position on summary judgment.

Defendant has put in virtually no admissible evidence showing that defendant was unable to perform his job's essential functions. I conclude that plaintiff has adduced sufficient evidence to create a genuine issue of material fact on this issue. However, I cannot conclude that plaintiff has proven as a matter of law that he can perform the job's essential functions without an accommodation. Thus, I will deny both parties' motions for summary judgment on the issue whether plaintiff is qualified without an accommodation.

D. Reasonable Accommodation

Assuming that the jury rejects plaintiff's claim that he is qualified *without* an accommodation, I must consider whether plaintiff is qualified *with* an accommodation. Unlike Title VII or the ADEA, the ADA requires more than equal treatment for disabled and nondisabled employees. Rather, recognizing that generally applicable practices and policies can have unfairly burdensome effects on individuals with disabilities, Congress included the failure to provide a reasonable accommodation in the ADA's definition of discrimination.

In the context of the work environment a "reasonable accommodation" is a "modificatio[n] or adjustmen[t] to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. app. § 1630.2(o)(ii); see also Vande Zande v. State of Wisconsin Dept. of Administration, 44 F.3d 538, 543 (7th Cir. 1995) ("It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work.") A reasonable accommodation may include a transfer to a vacant position, e.g., Rehling v. City of Chicago, 207 F.3d 1009, 1014 (7th Cir. 2000), additional training, e.g., Schmidt v. Methodist Hospital of Indiana, Inc., 89 F.3d 342, 344-45 (7th Cir. 1996), restructuring the job, Feliberty v. Kemper Corp., 98 F.3d 274 (7th Cir. 1996), or simply "sitting down . . . and talking about the situation," Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996); see also 42 U.S.C. § 12112(9) (providing examples of reasonable accommodations). However, an accommodation is not reasonable if providing it would eliminate an essential function of the job. Ross v. Indiana State Teacher's Association Insurance Trust, 159 F.3d 1001, 1015-16 (7th Cir. 1998) (request of teacher's association director to have all teachers' meetings in his office not reasonable accommodation when essential function of job was to meet with teachers outside his office).

Plaintiff has the initial burden to show that an accommodation is reasonable. Vande Zande, 44 F.3d at 543. The Court of Appeals for the Seventh Circuit has interpreted "reasonable" to mean both "efficacious" and "proportional to costs." Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002) (citing Vande Zande, 44 F.3d at 543). Once plaintiff makes this showing, defendant has the burden to demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

Defendant argues initially that plaintiff cannot meet his burden because it attempted to accommodate him by reassigning him to different tasks, but plaintiff never measured up regardless which job he was placed in. Assuming that plaintiff did need an accommodation, defendant does not immunize itself from liability under the ADA simply by implementing *an* accommodation. Neither the employee nor the employer may unilaterally determine what constitutes a reasonable accommodation under the act. Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 693 (7th Cir. 1998). The court of appeals has held in numerous cases that an employer must engage in an "interactive process" with the employee to determine what an appropriate accommodation would be. Corder v. Lucent Technologies Inc., 162 F.3d 924, 928 (7th Cir. 1998); Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996). The employer has a "duty to consult with the employee to determine the

precise job-related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation." Lenker v. Methodist Hospital, 210 F.3d 792, 797 (7th Cir. 2000).

In many cases, an employee must request an accommodation before the employer's duty is triggered. See, e.g., Sieberns, 125 F.3d at 1023. In this case, however, it would not be reasonable to require plaintiff to request an accommodation when he did not think he needed one and defendant never informed him until his termination that his disability was interfering with his job. When an employer knows that an employee is disabled and believes the disability is preventing him or her from performing the job's essential functions, the employer should put the employee on notice that there is a problem. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, at Question 40 (October 17, 2002). By failing to provide plaintiff with this information, defendant caused a breakdown in the interactive process. Beck, 75 F.3d at 1136.

However, defendant's failure to engage in an interactive process is not sufficient on its own to establish liability. Rehling, 20 F.3d at 1016. Plaintiff must show that had defendant engaged in the process, together they could have identified a reasonable accommodation. Mays v. Principi, 301 F.3d 866, 870 (7th Cir. 2002). Although plaintiff

has not personally identified accommodations that could have been made, he points to the affidavit of Richard Davis, who is the assistant director of Blind, Inc., and a professional consultant on blindness and rehabilitation. It is undisputed that had defendant told plaintiff that there was a problem, he could have contacted Blind, Inc. or a similar agency for assistance. After visiting defendant's facility in Durand, Wisconsin, Davis concluded that there were a number of simple techniques that could be implemented to insure that plaintiff's vision impairment did not prevent him from properly stacking, flipping or stamping cheese. Davis also suggested that plaintiff's work be inspected as he was working so that he could be shown how to hold the stamp if he was doing it incorrectly. Aff. of Richard Davis, dkt. #37, at ¶5.

The only evidence that defendant has submitted to dispute Davis's suggestions is an affidavit of Ron Hemmy, in which he avers that the proposed accommodations would have been "unworkable or ineffectual." Aff. of Ron Hemmy, dkt. #42, at ¶5. Again, defendant's conclusory assertion does satisfy the requirement for "specific facts" under Rule 56.

Defendant argues also that Davis's suggestion to supervise plaintiff while he is stamping is "unreasonable, in that it would take almost as much time to check the stamps as to stamp the cheese in the first place." Dfts.' Reply Br, dkt. # 40, at 6. Defendant does not support this assertion with any citation to the record. Furthermore, plaintiff is not

asking for a full-time babysitter. See Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir. 1996) (request to have full time helper not reasonable accommodation). At most, plaintiff is requesting someone to monitor his technique at first to insure that he is performing the task properly. It makes eminent sense to work with the employee initially, particularly when an employee is visually impaired,. It is surprising that, even on plaintiff's first day, defendant seemed to give plaintiff little if any supervision. A reasonable jury could find that plaintiff's proposed accommodations were both efficacious and proportional to costs. Again, however, I cannot conclude that plaintiff has established this as a matter of law. "Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties." Oconomowoc Residential Programs, 300 F.3d at 784. In this case, this is a determination properly left to the jury.

In addition to challenging Davis's suggestions directly, defendant argues that even if the proposed accommodations would be effective with respect to plaintiff's vision impairment, plaintiff will still not perform adequately because the real problem is his "carelessness." Defendant appears to be confusing the issue whether plaintiff can perform the job's essential functions with whether plaintiff was terminated "because of" his disability. The "qualified individual" analysis focuses on whether plaintiff's disability prevents him from performing his prescribed duties, *not* on whether defendant may have had other reasons for terminating him. Furthermore, as noted above, defendant has not pointed to *any*

evidence that would suggest that plaintiff was fired because he was viewed as careless. Rather, the facts show that defendant fired plaintiff because of his vision impairment. A conclusory assertion in a reply brief does not create a genuine issue of material fact on that question.

E. Direct Threat

Even when an individual with a disability is a qualified individual, an employer may terminate that individual if he or she poses a "direct threat" to health or safety. 42 U.S.C. § 12113(b). The ADA defines "direct threat" as a "a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (emphasis added). However, the Supreme Court has affirmed the EEOC's interpretation of 42 U.S.C. § 12113(a), which permits employers to apply "qualification standards" that are "job-related and consistent with business necessity," to include a defense for employers when the employee is a direct threat to him or herself. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 122 S. Ct. 2045 (2002).

Defendant proposes facts that plaintiff was a direct threat to himself and his co-workers because he dropped cheeses "heavily" on the table, put his hands too far into the cheese grinder, scraped his knuckles on equipment, bumped into other employees, bumped

his head on carts, tripped over hoses, did not use "caution as to where he was waving the knife in relation to the location of his co-workers," once carried a knife outward instead of inward and once ran a pallet jack into the wall. Dfts.' Prop. Find. of Fact ¶¶23-46, dkt. #23, at 5-7.

A preliminary question is whether plaintiff or defendant has the burden of proof on this issue. Defendant suggests that the direct threat analysis should be determined in the context of whether plaintiff is a qualified individual and thus he should have the burden of proof. Dfts.' Br., dkt. #22, at 2. I disagree; the statute expressly places the burden of proof for demonstrating a direct threat on employers. 42 U.S.C. § 12113(b). In the most recent Supreme Court case that addressed the issue of direct threats under the ADA, the Court noted that the existence of a direct threat is an affirmative defense. Chevron, 122 S. Ct. at 2049; see also Bragdon v. Abbott, 524 U.S. 624, 652-53 (1998) (noting that party asserting existence of direct threat had burden of establishing that there was genuine issue of material fact); Dadian v. Village of Wilmette, 269 F.3d 831, 841 (7th Cir. 2001) ("[I]t is the employer's burden to show than an employee posed a direct threat to workplace safety that could not be eliminated by reasonable accommodation.") Nevertheless, relying on a dissenting opinion from the Court of Appeals for the Fifth Circuit, defendant argues that when an employee's essential job functions involve safety, the burden should be on the plaintiff to show that he or she can perform the essential functions of the job without

imposing a direct threat. See Rizzo v. Children's World Learning Centers, Inc., 213 F.3d 209 (5th Cir. 2000) (Jones, J., dissenting).

There may be some instances in which there is an overlap of the question whether an employee can perform the essential functions of a job and the question whether he or she is a direct threat, requiring the court to decide which party has the burden of proof. See Emerson v. Northern States Power Co., 256 F.3d 506, 513 (7th Cir. 2001) (declining to decide whether plaintiff's ability to handle "safety-sensitive" calls is more appropriately addressed under "qualified individual" analysis or "direct threat" analysis); but see Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 569 (1999) (citing 29 C.F.R. § 1630.2(r), which places burden on defendant to prove that employee cannot "safely perform the essential functions of the job"). If there is such a case, this is not one of them. Defendant has not argued that maneuvering a pallet jack or stepping over hoses without tripping are "essential functions" of the job. If the burden of proof is placed on plaintiff in this case, it would be very difficult to imagine any situation in which the employer would have to prove the existence of a direct threat. Such a result would be inconsistent with the plain language of the statute. The burden to prove a direct threat remains with defendant.

An initial problem with defendant's proposed findings of fact regarding the danger that plaintiff allegedly created is that, again, they are not all supported by the record. For

instance, to support its allegation that plaintiff "dropped the cheeses heavily onto the table," defendants cites the depositions of Anibas and Hemmy. The page in Anibas's deposition cited by defendant has no reference to dropping cheese, heavily or otherwise. See Dep. of John Anibas, dkt. #23, Exh. E, at 25. In Hemmy's deposition, he testified only that Smith told him that he was *worried* plaintiff would drop a cheese form on himself or a co-worker, not that he actually had done so or that he dropped forms any more heavily than the other employees. See Dep. of Ron Hemmy, dkt. #23, Exh. D, at 52.

Defendant cites the same sources to support its allegation that plaintiff was not cautious in using the trimming knife. Hemmy's deposition does not refer to any problems regarding the way plaintiff used a knife. Anibas testified only that other employees did not want to work by plaintiff because they observed that "he wasn't watching where everybody was when he would swing with it." Once again, I must remind defendant that testimony is not admissible unless the witness has personal knowledge of the facts. Anibas cannot testify to what other employees saw, only what he observed personally.

Defendant has supported with admissible evidence its remaining proposed findings of fact regarding safety concerns. Plaintiff attempts to dispute these facts, but he does so unsuccessfully. For example, plaintiff states that he "does not recall" bumping into other workers or bumping his head. In this circuit, however, a statement that one does not recall

an event occurring is insufficient to create a genuine dispute. Tinder v. Pinkerton Security, 305 F.3d 728, 736 (7th Cir. 2002); see also Federal Election Commission v. Toledano, 317 F.3d 939, 949-50 (9th Cir. 2002); Dickey v. Baptist Memorial Hospital-North Mississippi, 146 F.3d 262, 266 n.1 (5th Cir. 1998); but see Roth v. G.D. Searle & Co., 27 F.3d 1303 (8th Cir. 1994) ("By arguing that she does not recall being informed of the risk of PID, Ms. Roth placed at issue the caliber of the warnings she received.") A statement of "I don't recall," suggests a "mere possibility" of a dispute, which not does satisfy the requirements of Rule 56. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

In attempting to dispute the remainder of defendant's proposed findings of fact, plaintiff either provides no citation to the record or cites his affidavit, in which he avers that defendant's allegations are "untrue or over-exaggerated." Aff. of Paul Hammel, dkt. #36, at ¶11. However, he does not identify which allegations are false and which are exaggerated. He provides no specific facts at all. General averments are insufficient to show a genuine dispute. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990).

Thus, I view as undisputed the facts that plaintiff frequently stumbled, bumped into other employees and carts, bumped his head on carts and tripped over hoses, that other employees bumped into each other in order to avoid him, that at least once, he scraped his knuckles on equipment, that one employee saw plaintiff carrying his trimming knife outward

instead of inward and once saw him run a pallet jack into the wall and that Simpson and Buhlman believed that plaintiff put his hands too far into the grinder. However, I conclude that these facts are insufficient to show a genuine issue whether plaintiff posed a direct threat to health or safety.

Whether the employer alleges that the employee is a direct threat to himself or to others, the employer must demonstrate that both the risk of danger and the potential harm are "significant." Chevron U.SA., Inc., 122 S. Ct. at 2050 n. 3; Bragdon, 524 U.S. at 649 ("Because few, if any, activities in life are risk free . . . the ADA do[es] not ask whether a risk exists, but whether it is significant."); see also Emerson, 256 F.3d at 514 (direct threat determined by (1) duration of risk, (2) nature and severity of potential harm, (3) likelihood of harm and (4) imminence of harm). In addition, the assessment must be "'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." Chevron U.S.A., Inc., 122 S. Ct. at 2053 (quoting 29 C.F.R. § 1630.2(r) (2001)). A good faith belief unsupported by objective evidence is insufficient. Bragdon, 524 U.S. at 649.

With regard to the stumbling, bumping and tripping, I conclude that these do not constitute a direct threat under the ADA. Defendant has not submitted any evidence that plaintiff or any of his co-workers have been hurt by these events or that there was a risk they

would be. Particularly in light of the undisputed fact that defendant's factory is not a "gentle environment," a brush on the shoulder cannot be considered a significant harm. At most, these are minor inconveniences, not direct threats. Similarly, scraping a knuckle and running a pallet jack into the wall are not direct threats. Furthermore, plaintiff suggests that difficulties with the pallet jack could be addressed by allowing him to use a manual pallet jack, at least at first, to reduce any risk of danger. In the alternative, because defendant does not identify running a pallet jack as an essential function, any risk that using the pallet jack creates could be eliminated by reassigning that job duty to someone else. See U.S. EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1284 (7th Cir. 1995) (reasonable accommodations include eliminating non-essential job functions that pose direct threat).

The remaining concerns are the way plaintiff carries his knife and uses the cheese grinder. It cannot be disputed that a knife wound or the loss of a finger are significant harms. The question is whether defendant has shown, through objective evidence, that there was also a significant risk that one of these events would occur. Plaintiff argues that it has not, emphasizing that he has never hurt himself or another employee while using knives or the grinder. Although this is certainly relevant in determining whether plaintiff posed a direct threat, it is not dispositive. An employer does not have to wait until there has been a serious accident before it takes corrective action. See, e.g., Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 671-72 (7th Cir. 2000) (doctor suspected of drinking on the job was

direct threat even though he had not yet injured anyone). However, I cannot conclude that because one employee observed plaintiff carrying a knife pointed outward *on one occasion* that he posed a significant safety risk. The problem with the cheese grinder may be a closer call as it appears that plaintiff was observed on several occasions by different people pushing his hands "too far" into the grinder, at least in their view. It is arguable that Simpson's and Buhlman's opinion that plaintiff was endangering himself does not satisfy the requirement for "objective evidence." See Bragdon, 524 U.S. at 649-50 (concluding that dentist's own opinion that patient with HIV would pose direct threat was not objective evidence). Assuming that it does, however, plaintiff has suggested that the safety risk could be eliminated by providing plaintiff with a wooden pestle to push the cheese into the grinder so that he would not have to gauge the distance by sight. Defendant presents no evidence that this accommodation would be unreasonable, other than to argue again that plaintiff is "uncooperative."

Defendant's only remaining evidence is that some of the employees felt uncomfortable working with plaintiff because they thought he was a danger. However, as discussed throughout this opinion, there appears to be little objective evidence to support their fear. The court of appeals has recognized that "a non-disabled person's instincts about the capabilities of a disabled person are often likely to be incorrect." Hoffman, 256 F.3d at 573. This unfamiliarity with disabled individuals may cause co-workers to be uncomfortable

or even afraid. Although perhaps understandable, this generalized anxiety about working with a disabled person is not a sufficient reason to terminate an employee under the ADA. A determination that an employee is a direct threat must be based on objective evidence, not unfounded fear. See Washington v. Indiana High School Athletic Association, Inc. 181 F.3d 840, 851 (7th Cir. 1999) (quoting 28 C.F.R. Pt.35, App.A) (" The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.")

Therefore, with respect to the issue whether plaintiff posed a direct threat to health or safety at the time defendant terminated him, defendant's motion for summary judgment will be denied and plaintiff's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendant Eau Galle Cheese Factory is GRANTED with respect to plaintiff's claim under the Wisconsin Fair Employment Act. That claim is DISMISSED for lack of subject matter jurisdiction. Defendant's motion is DENIED in all other respects.

2. The motion for summary judgment filed by plaintiff Paul Hammel is GRANTED

with respect to the issue whether plaintiff posed a direct threat to the health or safety of himself or others at the time defendant terminated him. Plaintiff's motion is DENIED in all other respects.

Entered this 15th day of April, 2003.

BY THE COURT:
BARBARA B. CRABB
District Judge