IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

A. LANCE PETRO,

Plaintiff,

v.

OPINION AND ORDER

05-C-671-C

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, GREG PITTZ, DARRELL BAZZELL, FRANCIS M. FENNESSY, SUSAN J. OSHMAN and PAUL SCOTT HASSETT,

Defendants.

- -

In this civil action for monetary and injunctive relief, plaintiff A. Lance Petro contends that defendants failed to accommodate his disabilities and disciplined and terminated him because of his disabilities, in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In addition, plaintiff contends that defendants' alleged violation of § 504 of the Rehabilitation Act is actionable under 42 U.S.C. § 1983. Initially, plaintiff alleged that defendants retaliated against him for requesting accommodations for his disabilities, but he has abandoned this claim. Subject matter jurisdiction is present. 28 U.S.C. § 1331.

Now before the court is the motion for summary judgement of defendants State of Wisconsin Department of Natural Resources, Gregg Pittz, Darrell Bazzell, Francis M. Fennessy, Susan J. Oshman and Paul Scott Hassett. Because I find that plaintiff is not disabled within the meaning of the Rehabilitation Act, defendants' motion for summary judgment will be granted. Plaintiff has failed to adduce facts from which a reasonable jury could conclude that his mental and physical impairments substantially limited him in one or more major life activities. This is a threshold determination under the Rehabilitation Act; if a plaintiff is not disabled within the meaning of the Act, its protections do not apply. Therefore, I have not considered any further aspects of plaintiff's claims, such as whether defendants discriminated against him.

According to plaintiff, his claim under 42 U.S.C. § 1983 arises from defendants' alleged violation of the Rehabilitation Act. The Court of Appeals for the Seventh Circuit has not held squarely whether a plaintiff can bring a § 1983 claim for an alleged violation of the Rehabilitation Act and other courts have disagreed about whether it is permissible. See, e.g., Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997) (holding that plaintiff may not maintain § 1983 action in addition to Rehabilitation Act cause of action when only alleged deprivation is of rights created by Rehabilitation Act); Lollar v. Baker, 196 F.3d 603 (5th Cir. 1999) (same); Holmes v. City of Chicago, No. 94-C-4083, 1995 U.S. Dist. LEXIS 6111, at *16 (N.D. Ill. May 5, 1995) (finding that Rehabilitation Act's remedial scheme is

sufficiently broad to preclude enforcement through § 1983); but see, e.g., River Forest School District No. 90 v. Illinois State Board of Education, No. 95 C 5353, 1996 U.S. Dist. LEXIS 2253, at *5 (N.D. Ill. Feb. 21, 1996) (finding that party may bring § 1983 action for alleged violations of Rehabilitation Act). However, I need not resolve the question because there has been no violation of the Rehabilitation Act itself. Thus, plaintiff has no grounds for an action under 42 U.S.C. § 1983.

I must note briefly that the parties were instructed by the court that "[a]ll facts necessary to sustain the parties' positions on summary judgment must be explicitly proposed as findings of fact." Procedure to be Followed on Motions for Summary Judgment, Introduction. Further, the parties were warned that the court would not search the record for factual evidence. Procedure, Section I.C.1. In spite of this, rather than citing specific evidence to support statements included in the Proposed Findings of Fact, plaintiff frequently directs the court to "GHC Medical Records" attached to the Porter Affidavit, Dkt. #25. The cited "GHC Medical Records," are nearly thirty pages long and detail medical treatment plaintiff received over a period of ten years. Where I could determine from defendants' response to plaintiff's proposed findings of fact or from a direct quotation and a date contained in the proposed finding referring to the specific entry in the record on which plaintiff was relying, I have considered the evidence; otherwise, I have ignored facts not supported by precise citation to the medical record.

I note also that in the proposed findings, plaintiff proposed numerous "facts" about his back and respiratory ailments and the effects of his bipolar affective disorder that were conclusory in nature or unsupported by citation to relevant portions of the record. For example, plaintiff proposes as fact that "[p]laintiff's back problem is a physical impairment that creates a disabling condition in that it substantially limits one or more of plaintiff's major life activities." Dkt. #21, at 12. This is not an evidentiary fact, it is the ultimate finding of fact that this court must make.

Defendants have disregarded the court's summary judgment requirements and have cited plaintiff's depositions in their reply brief, although they did not make these citations the subject of any proposed findings of fact. I have disregarded references to plaintiff's deposition in defendants' reply brief for defendants' failure to comply with this court's summary judgment procedure.

As noted above, the outcome of this motion for summary judgment turns exclusively on a threshold determination whether plaintiff suffers from a disability within the meaning of the Rehabilitation Act. The parties dispute numerous facts regarding specific accommodations that defendants may or may not have provided to plaintiff and whether defendants were aware of Dr. Sheldon's letter of May 2002. However, facts regarding plaintiff's work history and any accommodations he desired or that were provided to him are immaterial to the resolution of defendants' motion. I have provided a brief summary of

plaintiff's work history for context only.

From the parties' properly proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff A. Lance Petro is an adult who resides at 210 Oak Street in Blanchardville, Wisconsin.

Defendant Wisconsin Department of Resources is a Wisconsin executive branch state agency. It employs approximately 2,900 people, whose duties range from managing state parks, forests, wildlife, and fish to controlling and preventing air, water and toxic pollution. The DNR receives federal funding for at least some of these programs.

Defendant Greg Pittz became the Yellowstone Lake State Park Property Supervisor in mid-1995. He was plaintiff's supervisor until plaintiff was terminated in 2002.

Defendant Darrell Bazzell was Deputy Secretary of the DNR from February 8, 2000 to January 5, 2003.

Defendant Francis M. Fennessy was employed by the DNR from April 1993 to January 2003. Initially, he served as Administrator of the Division of Management Services,

then as Executive Assistant to the Secretary, and in March 2001 was appointed Deputy Secretary of the DNR.

Defendant Susan J. Oshman was employed by the DNR for twenty years. From 1997 to 2004, her position was Regional Land Leader. She oversaw the DNR land programs in the south central region of Wisconsin, including Yellowstone State Park. Oshman supervised Carl Batha, the Regional Supervisor responsible for Yellowstone, who supervised Pittz.

Since January 6, 2003, defendant Paul Scott Hassett has been Secretary of the DNR.

B. Plaintiff's Work History

For approximately fifteen years, plaintiff was employed as a Facilities Repair Worker 3 for the DNR at Yellowstone Lake State Park. In 1988, plaintiff was hired by the DNR under its "Handicapped Expanded Certification Program." (The parties have provided no details about the nature of this program.) However, plaintiff did not identify himself as having a disability on surveys circulated by the DNR in 1990 and 1994. From 1988 to June 2000, plaintiff was employed at Yellowstone on a nine-month seasonal basis. In June 2000, his position became full-time, year-round. Plaintiff's job duties included maintaining and repairing equipment, facilities, buildings and plumbing, and performing electrical work and janitorial services.

Plaintiff's disciplinary problems began in 1997, when he started to refuse to follow directions, complete assigned tasks or answer questions when asked. He made derogatory remarks and called people names. The incidents that provoked specific disciplinary actions occurred between May 1999 and September 2002. In May of 1999, defendant Pittz instructed plaintiff to install cabinets and shelving in a break room. When the task was not completed by the next day, defendant Pittz ordered plaintiff to complete it. Plaintiff responded by calling defendant Pittz a "dink" to the other employees and told another employee, Steve Thomas, that Thomas should complete the job with his "butt buddy," defendant Pittz. Also in May 1999, plaintiff told employees of the Yellowstone concession stand that he was allowed to have free ice cream and soda, which was untrue. In a meeting with defendant Pittz in late July 1999, plaintiff told defendant Pittz that he would no longer give him yes or no answers. In addition, he said that he wouldn't cut thistles anymore, because it bothered the tendonitis in his arm. Defendant Pittz said that he would not direct plaintiff to do work that caused problems if plaintiff provided additional information and a doctor's excuse. Plaintiff said the union told him that he did not need a doctor's excuse and that he just wasn't going to do the work if it bothered him.

In 2000, more incidents took place for which plaintiff received disciplinary action. They included plaintiff's failure to clean bathrooms as directed, to pick up debris that fell from his truck, to respond to questioning and to follow directions about mailing water

samples. Plaintiff refused to follow defendant Pittz's directions to clean bathrooms and turn on a drinking fountain and became disrespectful and argumentative in front of other employees and park visitors.

In April 2001, plaintiff refused to perform work as directed or maintain contact with his supervisor. He became argumentative and used profane language in a discussion with defendant Pittz. In May 2002, plaintiff refused to follow directions regarding cleaning and maintenance of the bathrooms and on one occasion he used profane language in response to these directions. In July 2002, plaintiff and defendant Pittz had an altercation when plaintiff demanded that defendant Pittz show him a ranger's evaluation of plaintiff's work at another state park. The precise details are disputed, but the altercation escalated when plaintiff took a piece of paper from defendant Pittz's desk, walked out of the office, got on a tractor as defendant Pittz was following him and then threw the piece of paper at defendant Pittz while driving away abruptly. Defendant Pittz feared being run over by the tractor. Plaintiff filed a report with the Lafayette County Sheriff's Department, claiming that defendant Pittz had injured plaintiff's arm during the incident; the county chose not to press charges against either party. Plaintiff's final altercation at work took place in September 2002, when he became engaged in a heated verbal exchange with Financial Specialist Darlene Reeson, leading her to call defendant Pittz at home. Defendant Pittz consulted with defendant Oshman, and they decided to place plaintiff on administrative

leave immediately.

Defendants took the following disciplinary action against plaintiff for his insubordination, disobedience, failure to follow instructions, neglect of job duties and inappropriate behavior. On May 3, 1999, plaintiff received a letter of reprimand. On August 24, 1999, defendant Pittz issued plaintiff a memo that advised him how to correct behavior that was having a negative effect on his work performance. On October 20, 1999, following a pre-disciplinary hearing, plaintiff was suspended for a day. On September 14, 2000, following another pre-disciplinary hearing, plaintiff was suspended for three days. On March 8, 2001, defendant Pittz wrote plaintiff a letter of counsel, advising him of problems with his performance and specifying his job priorities. On August 21, 2001, after a pre-disciplinary hearing, plaintiff was suspended for five days. Plaintiff had three more pre-disciplinary hearings between July 2002 and September 2002. Plaintiff was placed on administrative leave on September 22, 2002. He was notified by letter on December 3, 2002, that his job would be terminated on December 27, 2002.

C. Plaintiff's Medical History

Plaintiff suffers from several medical conditions, including manic-depressive bipolar disorder, chronic asthma, allergies, nasal polyps, chronic sinusitis, throat and back problems, including herniated discs.

1. Bipolar affective disorder

Plaintiff first sought relationship and psychiatric counseling in 1992. In November 1992, Dr. Fred Koenecke, plaintiff's psychiatrist, reported that plaintiff experienced "irritability, indecisiveness, guilt feelings, difficulty concentrating and some fatigue." Koenecke's records indicate also that although plaintiff was not physically abusive, he was verbally abusive and had temper outbursts directed at his wife Kathy and her daughter. However, Koenecke noted that "[plaintiff] has not had these types of angry outbursts at work at all. In fact, at work they view him as a good humored person who keeps people's spirits up." Koenecke's records indicate that he initially diagnosed plaintiff with cyclothymic disorder, with temper outbursts; the records refer to a need to "rule out intermittent explosive disorder." Koenecke concluded also that "it is likely that plaintiff has primary affective disorder." Koenecke prescribed lithium carbonate to plaintiff in November 1992, and increased the dose in December 1992.

According to Koenecke's records and those of plaintiff's subsequent psychiatrist, Dr. Edwin Sheldon, the lithium controlled plaintiff's temper and improved his mood between the beginning of 1993 and November or December of 1995. In his records from February 1996, Sheldon wrote that plaintiff reported becoming "verbally abusive" and stated that his anger was "out of control." In addition, Sheldon reported that plaintiff's

> mood became more cycling in nature with him having more

> periods of being out of control . . . . These are episodes where he becomes very irritable, restless, hyper, his mood is more negative and down, he becomes verbally abusive and often has difficulty remembering what he says during these episodes as he lets it all out. These episodes can last anywhere from one to several hours. He then settles down, and is good for several days.

The report goes on to state that "[h]istorically, this cycling is much more marked in the winter time. It should be noted that this is a period of time when the patient is out of work and he is at home." Sheldon's August 1996 records indicate that plaintiff "lost it" with his stepdaughter in May of 1996 and shoved her after reaching "the absolute limit in terms of frustration" in dealing with her.

Plaintiff's medical records indicate that plaintiff did not see Sheldon or anyone at GHC for mental health treatment between October 1996 and January 1998. Between October 1996 and January 2001, plaintiff's medical records include only one substantive report regarding his mental health. When Sheldon evaluated plaintiff at an appointment in January 1998, he reported that plaintiff "has actually been quite stable with his mood disorder being well controlled on [medications]." However, Sheldon noted also that "[t]his time of year is always difficult for [plaintiff] with him being laid off from work. His mood tends to go down a little more. He gets a little anxious and a little more irritable."

Sheldon's record of a January 2001 appointment with plaintiff suggests that plaintiff's mood and energy level had been poor for several weeks. Sheldon reported, "There have been

a number of job changes, and he has been having increasing disagreements and conflicts with his boss which has left him more irritable and reactive as well." Sheldon's records also show that Kathy Petro had sent him a note in which she observed that plaintiff seemed "more down, retreating to bed, more irritable and insistent he is right." She also reported to Sheldon that plaintiff was "having more trouble listening."

Sheldon's next account of plaintiff's mental health did not occur until May 7, 2002. On this date, Sheldon's records indicate that the plaintiff reported that

> [H]e is doing okay, but he continues to have periods several times per week where his mood escalates. He becomes very anxious, agitated, and his thoughts start flowing faster than he can handle them. He talks nonstop even in situations where he is to be quiet like a cub scout presentation for their son. He continues to get very angry at the drop of a hat and explode. He remains impulsive in these episodes, using poor judgment, particularly when talking to superiors. This has put his job in jeopardy as he has gotten several warnings in his work at the State Parks for the DNR. It is clear from information presented that his superiors and coworkers know how to push his buttons, and he continues to give them reason to discipline him, etc. The pattern to his mood is that he is cycling two to three times per week with these moods.

Sheldon went on to note that "a statement regarding his mood disorder needs to be made." On the same day, May 7, 2002 Sheldon wrote a letter by hand on GHC stationary. The text of the letter was as follows:

> To Whom It May Concern:

> Mr. Alex Petro has been under my psychiatric care for a major mood disorder, manic-depression, since January 2, 1998. He has suffered from this condition for many years. His mood cycles through periods of depression with low energy, irritability, & emotional reactivity.
>
> When his mood is on the up swing, manic phase, his thoughts race faster than he can organize them, he talks nonstop, his judgment is impaired, he is more confrontive [sic], and grandiose.
>
> His medications help to decrease the mood swings, and decrease his symptoms, but under stress they can brake [sic] through the control of medication. I recommend that the necessary accommodations in the work place be implemented.
>
> Sincerely,
> Edwin O. Sheldon, M.D.

Sheldon examined plaintiff again on July 30, 2002. His notes from that meeting state that plaintiff continued to struggle with "overproductive speech," that his thoughts skipped around and that he continued to get irritated and explosive with anger. Plaintiff outlined his problems at work. Sheldon's records indicate that he concluded that "the lithium, while at therapeutic levels, still is not quite holding him." Sheldon examined plaintiff again on January 23, 2003, after plaintiff's termination was final. He noted that plaintiff's "mood disorder was causing a number of problems with losing [sic] irritability, losing temper, using poor judgment in the work force." He went on to note that plaintiff was struggling at home with his stepdaughter and grandson and that his mood continued

to be up and down.

2. Back and respiratory problems

On October 29, 1999, plaintiff provided defendant Pittz with a statement from his physician, Dr. Bush, recommending that plaintiff "avoid exposure to fumes, smoke, etc." Defendant Pittz sought clarification from Bush about whether plaintiff could work around welding fumes and whether he could use a respirator. At defendants' request, plaintiff visited Dr. Wilmeth for an assessment regarding his use of a respirator. Wilmeth determined that plaintiff should avoid exposure to welding fumes or other irritating materials and concluded that he was probably not a respirator candidate. She observed also that "[plaintiff's] health problems are managed by his personal physician with reasonable results on his current medication regimen."

Plaintiff has suffered from back problems, including herniated discs. On January 24, 2001, plaintiff filed a Disability Accommodation Request Form with defendants regarding his back problem and requested that he not be required to do heavy lifting without the assistance of a tractor. He also requested accommodations for his respiratory impairments and asked that his work areas be properly ventilated when he was using chemicals or working in dusty environments and that he be allowed to avoid smoke.

Defendant Pittz wrote a memo to plaintiff on April 20, 2001 that summarized a

discussion with plaintiff in which they agreed on a lifting weight limit of 40 pounds. On April 29, 2002, defendant Pittz wrote to plaintiff's physician, Dr. Scheibel, stating that plaintiff had requested accommodation for "back surgeries" and upper respiratory problems, including asthma. Defendant Pittz requested assistance in determining how to address plaintiff's accommodation request. In a letter dated May 9, 2002, Dr. Anderson referred to plaintiff as "disabled" by his asthma, because it substantially limited his breathing. Anderson further stated that, based on her review of materials provided by defendant Pittz, plaintiff was to avoid exposure to sawdust or other significant amounts of dust particles in the air at work," as well as welding fumes. Her letter did not include a reference to plaintiff's back problems. The parties do not identify why Anderson and not Scheibel responded to defendant Pittz's note.

OPINION

A. Summary Judgment Standard

The standards for summary judgment are well known. Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-movant 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. The Rehabilitation Act Framework

The Rehabilitation Act applies to any program receiving federal assistance. 29 U.S.C. § 794(a). It protects qualified individuals with disabilities from being subject to discrimination solely because of their disabilities. Id. A plaintiff bringing a claim under the Rehabilitation Act must establish that "he suffers from a disability as defined under the Act; that he was otherwise qualified for the job; that he was involved in programs receiving federal financial assistance; and that he was 'excluded from participation, denied benefits, or otherwise discriminated against solely because of' his disability." Silk v. City of Chicago, 194 F.3d 788, 798 n.6 (7th Cir. 1999)(internal citations omitted). The parties do not dispute defendant DNR's receipt of federal financial assistance. Because of the substantial similarities between the Rehabilitation Act and the Americans with Disabilities Act, courts construe and apply them consistently. Radaszewski ex rel Radaszewski v. Maram, 383 F.3d 599, 607 (7th Cir. 2004). Therefore, I will refer to both ADA and Rehabilitation cases and guidance in the discussion below.

When evaluating a Rehabilitation Act claim, a court must first make the threshold determination whether the plaintiff is disabled within the meaning of the Act. Cassimy v. Board of Education, No. 05-2839, 2006 U.S. App. LEXIS 22566, at *7 (7th Cir. Sept. 5, 2006). If this threshold is not met, then claims of discrimination or failure to accommodate may not proceed. Id. The Rehabilitation Act defines an individual with a disability as "any person who (i) has a mental or physical impairment which 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 U.S.C. § 705(20)(B). Plaintiff asserts that the Rehabilitation Act applies to him because he has mental and physical impairments, not because he had a record of impairments or because defendants regarded him as disabled.

Plaintiff alleges that he suffers from numerous cognizable disabilities, including serious respiratory ailments, back problems, and a mental impairment that he refers to as "bipolar affective" and "manic depressive disorder." Plaintiff's medical records refer to his condition at different times as cyclothymic disorder, bipolar affective disorder and manic-depression. It is the effect, and not the particular name of an impairment that is determinative under the Rehabilitation Act. Sutton v. United Air Lines, 527 U.S. 471, 483 (1999) (citing 29 C.F.R. Pt. 1630, App § 1630.2(j)). For the sake of consistency, I will refer to plaintiff's condition as bipolar affective disorder throughout this opinion.

Plaintiff asserts that defendants failed to accommodate his disabilities and that

defendants discriminated against him as a result of them. In order to establish whether the Rehabilitation Act's protections apply to the plaintiff, I must consider each of his health conditions individually and determine whether they are "disabilities" within the meaning of the Act.

1. Mental impairments

a. Bipolar affective disorder

Under Equal Employment Opportunity Commission ADA enforcement standards, a "mental impairment" includes "[a]ny mental or psychological disorder, such as . . . emotional or mental illness." EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Notice 915.002 at 2-3 (March 25, 1997). The parties agree that plaintiff was diagnosed and treated for a mental or psychological disorder and that bipolar affective disorder qualifies as a "mental impairment" under the Rehabilitation Act. However, not every medical impairment places a "substantial limitation" on a major life activity and therefore amounts to a disability under the Act. Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 505-06 (7th Cir. 1998). Whether a particular person is "substantially limited" is an individualized determination; not all individuals who suffer from a particular impairment are necessarily disabled for the purposes of the Rehabilitation Act. Sutton, 527 U.S. at 483-84.

Even if a plaintiff can demonstrate that he suffers from a mental or physical impairment that substantially limits a major life activity, a court must consider whether the plaintiff's condition is mitigated by treatment and whether it is only an intermittent or episodic impairment. Under Sutton, "mitigating factors," such as medication, must be considered when determining whether an impairment substantially affects a major life activity. Id. If an impairment is corrected by medication, it is not a disability under the ADA or the Rehabilitation Act. Id. Moreover, "intermittent, episodic impairments" are not disabilities within the meaning of the Act. Ogborn v. United Food and Commercial Workers Union, Local Number 881, 305 F.3d 763, 767 (7th Cir. 2002) (finding that worker who suffered from severe depression and could not work for eight weeks was not disabled within meaning of ADA because he had not demonstrated that depression was more than episodic impairment).

An impairment "substantially limits" a "major life activity" when the impairment makes "the individual unable to perform a major life activity that the average person in the general population can perform." Branham v. Snow, 392 F.3d 896, 902 (7th Cir. 2004) (internal citations omitted). The United States Supreme Court has found that "major life activities" include those activities that "are of central importance to daily life," such as "walking, seeing, and hearing." Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002). Although this is not an exhaustive list of "major life activities,"

it does provide guidance about the scope of relevant activities.

Plaintiff suggests numerous "major" life activities that his bipolar condition impairs, including the ability to control his mood, his response to stressful situations, his ability to communicate and interact with others and his ability to enjoy life and maintain a positive attitude. Most of the activities proposed by plaintiff do not rise to the level of major life activities because they are too specific and specialized. Even the most comprehensive activity proposed by the plaintiff, "interacting with others," has been recognized as a major life activity by only a limited number of courts. See, e.g., McAlindin v. County of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999); Jacques v. DiMarzio, Inc., 386 F.3d 192, 203 (2d Cir. 2004).

The Court of Appeals for the Seventh Circuit has not explicitly acknowledged "interacting with others" as a major life activity. However, I find persuasive the Court of Appeals for the Ninth Circuit's characterization of "interacting with others" as "an essential, regular function" that "easily falls within the definition of 'major life activity.'" McAlindin, 192 F.3d at 1234. Interacting with others meets the Supreme Court's requirements for a "major life activity" because it is of "central importance to daily life" for the average person. Toyota Motor Manufacturing, Kentucky, Inc., 534 U.S. at 197. Therefore, for purposes of this determination, I will assume that "interacting with others" is a major life activity within the meaning of the Rehabilitation Act.

However, as noted above, it is not enough for a plaintiff to demonstrate that he suffers from an impairment that affects a major life activity. Instead, he must demonstrate that his impairment "substantially limits" that "major life activity." Knapp v. Northwestern University, 101 F.3d 473, 483. A "substantial limitation" does not have a precise or universal definition; it is determined on a case-by-case basis. Id. at 481 (finding that "'substantially limits' means whether the particular impairment constitutes for the particular person a significant barrier to [a major life activity]"). The United States Supreme Court has interpreted "substantial limitation" to mean a limitation that is "considerable" or "specified to a large degree." Toyota Motor Manufacturing, Kentucky, Inc., 534 U.S. at 196, see also Sutton, 527 U.S. at 491 (1999) (using dictionary to define substantial as meaning "considerable" or "specified to a large degree"); 29 C.F.R. § 1630.2(j)(1) ("substantially limits" means "unable to perform" or "significantly restricted" in performing major life activity compared to"average person in the general population"). For example, in the context of the major life activity of working, the barrier set by "substantial limitation" is high. Sutton, 527 U.S. at 491. It is not enough that a plaintiff can show that he was limited in his ability to do one particular job. Id. Instead, he must demonstrate that he is disqualified by his impairment from a wide range of jobs. Id.

Because few courts have ruled on whether "interacting with others" constitutes a major life activity, there is limited guidance in the case law about what constitutes an

impairment that substantially limits this activity. In McAlindin, 192 F.3d at 1230, the plaintiff suffered from anxiety, panic and somatoform disorders that he could demonstrate had a considerable impact on his day to day experiences. Even when medicated, his disorders caused him to experience severe symptoms at least once a month. Id. As evidence of the effects of his impairments, he provided the court with numerous medical evaluations that found him to be "anxious all the time" and "barely functional," and that found that anxiety had a "paralyzing effect on him." Id. The court held that these evaluations were sufficient to create a question of fact about whether he was disabled. Id. at 1230. However, the court cautioned that recognizing interacting with others as a major life activity does not mean that any cantankerous person should be deemed substantially limited in a major life activity. Id. at 1235. In comparison, in Hoeller v. Eaton Corp., 149 F.3d 621 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit found that a plaintiff's bipolar affective disorder did not substantially limit his ability to work, communicate with others or carry on interpersonal relationships and thus affirmed the district court's grant of summary judgment to the defendant employer. Like plaintiff, Hoeller was diagnosed with bipolar affective disorder and provided a letter from his physician to his employers that identified his condition as a disability and requested accommodations. Id. at 623. The physician wrote that Hoeller was at a "stalemate" with his supervisor, making it difficult for him to control his disorder. Id. Hoeller's employers

did not make the requested accommodations and terminated him a month and a half later. Id. The court of appeals rejected Hoeller's discrimination claim and concluded that although "his bipolar affective disorder was undoubtably a difficult condition for him to live with, Hoeller has not proved that it limited him substantially in any major life activity." Id. at 625.

Like Hoeller, plaintiff has offered no evidence that suggests he experienced the kind of "significant restriction" on his overall ability to interact with others that is required for the court to determine that he experienced a substantial limitation. Plaintiff relies on his medical records to support his claim that his bipolar affective disorder substantially limited his ability to interact with others. These records reflect that his condition was controlled for almost three years after he was diagnosed and began taking medication. In 1995, his medical records state that he experienced more serious symptoms and had become physically violent with his stepdaughter. However, during this time there were no reports of problems or discipline at work. For five years, from 1996 to 2001, plaintiff's only substantive medical record indicates that he reported "really doing quite well" although he was a little down in the winter when he was *not* working. Plaintiff argues that the court should consider all of his negative and offensive behavior at work as symptoms of an out-of-control mental impairment, but provides no grounds on which the court could reach such a conclusion. Many of the incidents at work took place when his bipolar affective disorder

was controlled by medication, as his medical records show.

Plaintiff refers to only three medical records from 2001 and 2002, the period leading up to his termination. At best, these records reflect that he experienced a few, relatively brief periods when his medication did not control his symptoms completely. For example, the records from January 2001 state that "his mood was down over a period of weeks." The May 7, 2002 letter from Dr. Sheldon that plaintiff claims to have given defendants did state that he suffered from manic-depressive disorder and requested accommodations; however, it went on to note that his symptoms were decreased by medication, but could break through when he was under stress. Finally, in notes from a session in late July of 2002, well after many of the incidents leading up to plaintiff's dismissal had already taken place, Sheldon's notes reflect that "the lithium . . . is not quite holding [plaintiff]" and that plaintiff struggled with overproductive speech and became easily irritated and explosive with anger.

Although these sporadic reports suggest that plaintiff's condition was occasionally "a difficult condition for him to live with," Hoeller, 149 F.3d at 625, plaintiff has provided no admissible evidence of a generalized, consistent or substantial limit on his ability to interact with others. Rather, the only evidence that the plaintiff has offered reflects, at most, intermittent "inappropriate, ineffective or unsuccessful" efforts to communicate with a limited number of people and occasional problems controlling his thoughts and anger.

In conclusion, even if "interacting with others" may be considered a "major life activity," under the Rehabilitation Act, plaintiff has not adduced facts from which a reasonable jury could conclude that his ability to interact with others was "substantially limited" by his bipolar affective disorder, and constituted a disability within the meaning of the Rehabilitation Act.

2. Physical impairments

Like mental impairments, physical impairments are considered disabilities under the Rehabilitation Act when they substantially limit an individual's ability to engage in one or more major life activities. 29 U.S.C. § 705(20)(B). Again, intermittent impairments or those that are corrected by treatment are not disabilities. See, e.g., Ogborn, 305 F.3d at 767. Plaintiff asserts that defendants failed to accommodate him and discriminated against him because of his back problems and because of his respiratory ailments, including asthma.

a. Back problems

Plaintiff asserts that his back problems substantially limit his major life activities of "lift[ing] objects weighing more than forty pounds, to stand and to walk" and are thus a disability within the meaning of the Rehabilitation Act. Certainly standing and walking constitute "major life activities" within the parameters established by the United States

Supreme Court, as they are of "central importance to daily life" for an average person. Toyota Motor Manufacturing, Kentucky, Inc., 534 U.S. at 197. However, "lifting more than 40 pounds" does not constitute a major life activity. Even in the narrower context of working, this type of limitation has not been considered a disability. See, e.g., Contreras v. Suncast Corp., 237 F.3d 756 (7th Cir. 2001) (rejecting plaintiff's claim that inability to lift more than 45 pounds constituted limitation on plaintiff's ability to work because he was not precluded from broad class of jobs) (citing Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (25 pound lifting restriction not 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) (by itself, 25 pound lifting restriction 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 did 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)).

Plaintiff has offered some evidence that he has back problems for which he sought accommodation from defendants. The parties dispute how much accommodation he actually received. However, plaintiff has offered no facts in support of his contention that

his back problems affected his ability to stand or walk generally, much less substantially limited that ability. Although plaintiff could have offered admissible evidence about the regular effects of his back problems on his ability to stand and walk, he has not. Plaintiff's opinion that his back problems constitute a legally cognizable disability is not a fact. A reasonable jury could not find from the undisputed facts that plaintiff's back problems constitute a disability within the meaning of the Rehabilitation Act.

b. Respiratory problems

Plaintiff's final claim is that defendants failed to accommodate him and discriminated against him because of his respiratory problems, including asthma, nasal polyps, chronic sinusitis, allergies and throat problems. He asserts that his respiratory problems are disabilities within the meaning of the Rehabilitation Act, because they are physical impairments that substantially limit two major life activities, namely the ability to breathe and to function without headache pain. Of the two, only "breathing" fits within the parameters of "major life activities" discussed above. Toyota Motor Manufacturing, Kentucky, Inc., 534 U.S. at 197. Thus, in order to determine whether plaintiff's respiratory problems constitute a disability under the Rehabilitation Act, I must consider whether he has adduced sufficient evidence that his respiratory ailments substantially limit his ability to breathe in a general sense. In Knapp, 101 F.3d 473, the Court of Appeals for the

Seventh Circuit noted in its discussion of substantially limiting conditions that asthma was not a disability when it limited a plaintiff's ability to breathe only in a particular room of a building. Id. at 481 (citing Heilweil v. Mt. Sinai Hospital, 32 F.3d 718 (2d Cir. 1994)). In Heilweil, the plaintiff was the administrator of a hospital blood bank. Several types of fumes in the blood bank exacerbated her asthma, and her physician advised her to avoid exposure to the fumes. However, the court of appeals found that plaintiff had not demonstrated that her ability to breathe was otherwise significantly impaired by her asthma. Because the court of appeals found that plaintiff's asthma did not substantially limit her major life activity of breathing and thus that plaintiff was not disabled within the meaning of the Rehabilitation Act, it affirmed the district court's grant of summary judgment for the defendant employer. Id. at 719. In contrast, in Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242, 1250-51, the Court of Appeals for the Tenth Circuit found that a plaintiff had provided sufficient evidence that her asthma created a substantial limitation on her ability to breathe when she demonstrated that it required her to avoid a wide variety of everyday situations, including crowds, night-time or outdoor activities, cold air and stress. In Albert the plaintiff offered medical testimony that, even when she was medicated and not having an asthma attack, she experienced chest tightness, wheezing, coughing and shortness of breath. Id.

Plaintiff's medical history makes clear that he did have a number of respiratory

ailments, including asthma, that qualify as physical impairments under the Rehabilitation Act. Between 1999 and 2002, plaintiff was seen and treated by a number of doctors, who all recommended that he avoid dust, fumes, other irritants and welding at work because of his respiratory ailments. However, other than these well-documented specific activity limitations, plaintiff offers no evidence that his ability to breathe was substantially limited in a general sense. Dr. Wilmeth determined that plaintiff should avoid exposure to certain irritants and was not a candidate for respirator use, but offered the assessment that plaintiff's "health problems are managed . . . with reasonable results on his current medication regimen." As discussed above, under Sutton, 527 U.S. at 483, a plaintiff is not disabled within the meaning of the Rehabilitation Act if his impairments are controlled by treatment or mitigating factors. Dr. Anderson state in her letter to defendant Pittz in May 2002 that plaintiff's asthma "substantially limits his breathing" and that plaintiff was therefore disabled. However, the accommodations that she advised were to "avoid exposure to sawdust or other significant amounts of dust particles in the air at work" as well as welding fumes. Plaintiff's job included numerous strenuous, physical activities, nearly all of which Anderson and plaintiff's other physicians found him able to engage in without risk of exacerbating his asthma. Unlike the plaintiff in Albert, plaintiff has not adduced any evidence that his asthma creates an impediment to his everyday activities beyond a narrow range of activities specific to his job at DNR. He has also adduced no evidence regarding

physical symptoms and how they affect him.

The only facts plaintiff has proposed show that his respiratory impairments were generally controlled by his medication, but that exposure to a limited number of irritants in his work environment caused him distress. This evidence falls far short of the type of demonstration of a substantial limitation on a major life activity that is required to establish a disability within the context of the Rehabilitation Act. No reasonable jury could determine that plaintiff's respiratory problems constitute a cognizable disability within the meaning of the Rehabilitation Act.

In conclusion, because plaintiff has not adduced facts sufficient to support a finding that any of his physical or mental impairments "substantially limited" any "major life activity," no reasonable jury could find that he was disabled within the meaning of the Rehabilitation Act. Plaintiff's § 1983 claim fails as well because it is tied to the alleged violation of the Rehabilitation Act. Because plaintiff's claims cannot meet the threshold requirement of a showing that he is disabled within the meaning of the Rehabilitation Act, defendants' motion for summary judgment will be GRANTED.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants State of Wisconsin Department of Natural Resources, Pittz, Bazzell, Fennessy, Oshman and Hassett

is GRANTED. The clerk of court is directed to enter judgment in favor of all defendants and close the case.

Entered this 19th day of September, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge