

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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GAIL KING,

Petitioner,

v.

CITY OF MADISON,

Respondent.  
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OPINION and ORDER

07-C-295-C

In this proposed civil action for monetary relief, petitioner Gail King contends that respondent City of Madison violated her rights under the Americans with Disabilities Act, 42 U.S.C. § 12131, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, by failing to provide her with a reasonable accommodation when she became disabled from uncontrolled diabetes and severe headaches and dizziness. Jurisdiction is present under 42 U.S.C. § 1331.

Petitioner has requested leave to proceed in forma pauperis. From her affidavit of indigency I conclude that she lacks the means to prepay the filing fee in this case. The next step is determining whether her proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is

immune from such relief. 28 U.S.C. § 1915(e)(2). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). Petitioner has alleged that respondent terminated her employment permanently when she became disabled rather than allowing her to transfer to another job for which she was qualified (a practice respondent allegedly sanctioned for non-disabled employees). Because petitioner's allegations, if true, suggest that respondent may have failed to provide her with a reasonable accommodation as required by the ADA, her request to proceed in forma pauperis will be granted.

In her complaint, petitioner alleges the following facts.

#### FACTUAL ALLEGATIONS

From August 5, 2002 to February 25, 2003, petitioner Gail King was employed by respondent City of Madison, Wisconsin, as a transit operator. At the time she was hired, petitioner was taking medication that controlled her severe headaches and bouts of dizziness. At some point before February 2003, petitioner became pregnant.

During her pregnancy, petitioner suffered from uncontrolled diabetes (it is not clear whether her diabetes was pre-existing or gestational). On February 25, 2003, petitioner took a medical leave of absence from work. While on leave, she experienced a return of severe headaches and sporadic dizzy spells. On September 12, 2003, petitioner's six-month leave

of approved absence expired and she was “placed on layoff status.”

On August 10, 2004, petitioner’s doctor permanently restricted her from driving a bus. On August 19, 2004, petitioner filed a request with respondent asking for a reasonable accommodation in the form of a transfer to a different job for which she was qualified. At the time she made her request, the city had open positions for typists and receptionists. Petitioner met the minimum requirements for both positions. Nevertheless, respondent refused to transfer her into an open position, citing its policy regarding disability layoff.

## DISCUSSION

### A. ADA and Rehabilitation Act Claims

The ADA prohibits certain employers from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). In enacting the Americans with Disabilities Act, Congress intended to level the playing field for disabled persons. Siefkin v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995). Although the Act provides disabled persons with a wide latitude of protection against discrimination, it “does not erect an impenetrable barrier around the disabled employee, preventing the employer from taking any employment actions vis-à-vis

the employee.” Id.

The Rehabilitation Act of 1973 also prohibits discrimination against qualified employees because of disability by any program receiving federal financial assistance. 29 U.S.C. § 794a(a)(1). In the employment context, courts look to the standards applied under the Americans with Disabilities Act to determine whether a violation of the Rehabilitation Act has occurred. Peters v. City of Mauston, 311 F.3d 835, 842 (7th Cir. 2002); Silk v. City of Chicago, 194 F. 3d 788, 798 n.7 (7th Cir. 1999); see also 29 U.S.C. § 794(d) (“The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990.”). Accordingly, I will address these claims together under the standards governing the ADA.

To qualify as an individual with a disability within the meaning of the ADA or Rehabilitation Act, a plaintiff must ultimately show that she is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires.” 42 U.S.C. § 12111(8). Petitioner alleges that after she was hired by respondent as a transit operator, she became disabled by uncontrolled diabetes, and later by severe headaches and dizzy spells that rendered her incapable of operating a bus safely. Although it is not clear from her allegations that she is a “qualifying person with a disability” within the meaning of either Act, at this

stage of the proceedings I will assume that she is.

Petitioner concedes that her disability prevented her from performing her job as a transit operator. Nevertheless, she contends that respondent could have reasonably accommodated her disability by transferring her to another open job for which she was qualified, an option respondent allegedly refused to consider. When an employee is unable to continue performing the job she performed prior to her disability, the ADA requires the employer to consider reassigning the employee to a vacant position for which the employee is otherwise qualified. 42 U.S.C. § 12111(9)(b). As the court of appeals has explained:

The reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory. That is not the same thing as requiring the employer to give him the job even if another worker would be twice as good at it, provided only that this could be done without undue hardship to the employer.

Equal Employment Opportunity Commission v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027-1028 (7th Cir. 2000).

In her complaint, petitioner alleges that although she was unable to drive a bus because of her disability, she was qualified to serve as a typist or receptionist, that positions for both jobs were open at the time she requested an accommodation but that respondent refused to consider transferring her into one of those jobs at the time her “disability lay off”

was set to expire. Although many of the details surrounding petitioner's termination remain unclear, she has done enough to put respondent on notice of her claims against it and to state a claim under the ADA and the Rehabilitation Act. Consequently, her request for leave to proceed in forma pauperis will be granted.

B. Motion for Appointment of Counsel

On June 19, 2007, petitioner filed a supplement to her affidavit of indigency. Included in that supplement is a paragraph in which she asks the court to appoint a lawyer for her because she cannot afford to retain one herself. I construe her request as a motion for appointment of counsel, which I must deny as premature.

The Court of Appeals for the Seventh Circuit has held that before a district court can consider a motion for appointment of counsel made by an indigent plaintiff in a civil action, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that she has made reasonable efforts to find a lawyer, a petitioner is required to submit the names and addresses of at least three lawyers that she asked to represent her and who turned her down. Petitioner has not complied with this preliminary step. Consequently, I must deny her motion. Petitioner remains free to renew her motion after she has sought representation from at least three lawyers without

success.

## ORDER

IT IS ORDERED that

1. Petitioner Gail King's request for leave to proceed in forma pauperis is GRANTED with respect to her claim that respondent City of Madison violated her rights under the Americans with Disabilities Act and the Rehabilitation Act by refusing to transfer her to a vacant position for which she was qualified when her disability rendered her unable to perform her prior job.

2. Petitioner's motion for appointment of counsel is DENIED without prejudice.

3. Petitioner's complaint will be forwarded to the marshal's office for service on respondent.

4. Petitioner should be aware of the requirement that she send each respondent a copy of every paper or document that she files with the court. Once respondent's attorney is known, petitioner should send one copy of all documents to the lawyers rather than to respondent directly. Petitioner should retain a copy of all documents for her own files. If petitioner does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to

each respondent or to respondent's attorney, once he or she is known.

Entered this 11th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge