

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

SCOTT E. SCHEERER,

Plaintiff,

v.

MEMORANDUM AND ORDER

JOHN E. POTTER,

04-C-611-S

Defendant.

Plaintiff Scott E. Scheerer commenced this civil action under the Rehabilitation Act alleging that John Potter, the Postmaster General of the United States Postal Service, failed to reasonably accommodate his disability.

On January 31, 2005 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

evidence, and shall show affirmatively that the affined is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Scott E. Scheerer is an adult resident of Union Center, Wisconsin. Defendant John E. Potter is the Postmaster General of the United States Postal Service (USPS), a federal agency. The USPS has an office located in the City of Wonewoc. Plaintiff has held the postmaster position at the Wonewoc Post Office since 1993.

In December 2000 Dr. Peter Finch at the Tomah Veterans Affairs Medical Center became plaintiff's primary care physician and

treated him for his obesity related adult onset Type II diabetes. Plaintiff was taking pills for diabetes two or three times a day and testing his blood sugars two or three times a week. Dr. Finch also advised him to watch his diet and lose weight.

In April 2001 Dr. Finch saw plaintiff and encouraged him to eat better and exercise more. Plaintiff did not complain of any health related complications from his diabetes. In August 2001 Dr. Finch noted: "He does have symptoms suggesting that the refractive index of the lenses in his eye is unstable and changed and some suggestion of developing peripheral neuropathy."

On April 15, 2002 plaintiff was treated for a diabetic ulcer on the bottom of his left big toe. He was treated for this ulcer by Dr. Finch through August 2002. By September 24, 2002 his toe ulcer was healed.

On December 9, 2002 plaintiff advised his immediate supervisor Janet Bieschke that he was a diabetic, that his health was getting poorer and he needed additional help in the Wonewoc Post Office.

On December 23, 2002 plaintiff was seen by Dr. Finch who prescribed twice daily insulin injections for him. Dr. Finch also noted that plaintiff had the beginning of neuropathy in his feet. Scheerer has never experienced hypoglycemia, a seizure, a blood sugar fluctuation that caused him to stop working nor lost consciousness because of his diabetes. His doctor was concerned

that if plaintiff did not eat better and exercise more that his diabetes could some day cause significant health problems for him.

In the fall of 2002 plaintiff saw Dr. Jeffrey Durbin for "adjustment disorder with mixed emotional features". Plaintiff advised Dr. Durbin that he was not sleeping well and had lost his sex drive. For some time prior to December 2002 plaintiff had no sexual desire and was unable to sustain an erection. He gave himself injections to solve this problem.

On January 13, 2003 plaintiff first contacted the USPS Equal Employment Opportunity Office to complain that he had been denied a reasonable accommodation for his disability. He filed a formal complaint on April 21, 2003.

In February 2003 plaintiff developed ulcers on the bottom of his feet. In the spring of 2003 the ulcers improved. During the summer of 2003 plaintiff's condition worsened and his left foot was amputated.

Dr. Richard Wilson provided plaintiff with a medical restriction dated March 21, 2003 to work only four hours a day. On April 5, 2003 Diane Kelly was transferred to the Wonewoc office where she currently works 15 and one-half hours a week. Plaintiff is currently employed as the Postmaster at the Wonewoc Office.

MEMORANDUM

Plaintiff claims that the defendant failed to reasonably accommodate his disability under the Rehabilitation Act. The

standards applied under the Americans with Disabilities Act (ADA) are used to determine whether a violation of the Rehabilitation Act has occurred in the employment context. The ADA requires employers to reasonably accommodate a qualified individual with a disability. 42 U.S.C. §12112(a), and prohibits discrimination on the basis of a disability.

A disability is defined as a physical or mental impairment which substantially limits one or more of a person's major life activities. 42 U.S.C. §12102(2). These activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. §1630.2(j).

In Roth v. Lutheran General Hospital, 57 F. 3d 1446, 1454, (7th Cir. 1995), the Court held that plaintiff must meet the threshold burden to establish that he or she is disabled within the meaning of the Act. The Court stated:

An individual is "disabled" if he (or she) has (1) a physical or mental impairment which substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) if he (or she) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B); 29 C.F.R. § 1613.702(a); 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

"Substantially limits" means that the employee is either unable or significantly restricted in the ability to perform a major life activity that the average person in the general population can perform. 29 C.F.R. § 1630.2(j)(1). Toyota Motor Mfg., KY, Inc. v. Williams, 534 U.S. 184 (2002).

It is undisputed that plaintiff had Type II diabetes. It is his burden to prove that the diabetes substantially limited a major life activity. Defendant argues that the relevant time period for this determination ends on January 13, 2003, the date plaintiff contacted the Equal Employment Office. Plaintiff contends that the time period should extend to the date he filed his formal complaint which is April 21, 2003. Since plaintiff complained on January 13, 2003 to the Equal Employment officer that he had been denied a reasonable accommodation for his disability he has to show that he was disabled under the Act prior to January 13, 2003.

In his brief in opposition to defendant's motion for summary judgment plaintiff claims that he was substantially limited in the major life activities of walking, sleeping, eating and engaging in sexual activity. The medical evidence indicates that plaintiff had an ulcer on his big left toe which was treated from April to September 2002. There is no indication in the medical record that plaintiff was unable to bear weight on his foot or that he had trouble walking.

Plaintiff also contends that his neuropathy in his feet substantially limited his ability to walk. In December 2002 Dr. Finch noted that plaintiff had the beginnings of neuropathy in his feet. Although the neuropathy required him to be more careful walking, it did not prevent him from walking. Plaintiff has not

demonstrated that he was substantially limited his major life activity of walking. See Moore v. J.B. Hunt Transport, Inc., 221 F. 3d 944 (7th Cir. 2000).

Plaintiff argues that his diabetes substantially limits the major life activity of eating. Dr. Finch advised plaintiff to watch his diet, eat better and exercise more. There is no evidence in the record that plaintiff was subjected to any dietary restrictions which were more severe than those undertaken by people who diet to control their weight. See EEOC v. Northwest Airlines, Inc., 246 F. Supp. 2d 916, 923 (W.D. Tenn. 2002). Plaintiff has not shown he was substantially limited in the daily life activity of eating.

Plaintiff contends that his diabetes together with his adjustment disorder caused him trouble sleeping in December 2002. There is nothing in the record to suggest that plaintiff had more than periodic sleeping problems. He has not shown that his conditions substantially limited the major life activity of sleeping. See Pack v. K-Mart Corp., 166 F. 3d 1300, 1306 (10th Cir. 1999).

Plaintiff asserts he is substantially limited in the major life activity of sexual activity (reproduction). The Court held in Contreras v. Suncoast Corp., 237 F.3d 756, 764 (7th Cir. 2001) that general assertions regarding sexual difficulties were insufficient to establish that plaintiff had a disability. Plaintiff has

presented no medical evidence that he had erectile dysfunction and has failed to show that he was substantially limited in the major life activity of sexual activity.

Since plaintiff has not shown that his Type II diabetes substantially limited any major life activity, he is not disabled under the Act. Accordingly, defendant is entitled to judgment in his favor as a matter of law and his motion for summary judgment will be granted.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 4th day of March, 2005.

BY THE COURT:

JOHN C. SHABAZ
District Judge