IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS D. EVANS,

OPINION AND 0RDER

Plaintiff,

06-C-0140-C

v.

STOUGHTON AREA
SCHOOL DISTRICT,[1]

Defendant.

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This is a suit brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, that raises the question whether a person is "a qualified individual with a disability" if he cannot show that he could perform the essential functions of his job until some unknown time in the future. Defendant Stoughton Area School District and then-Superintendent Myron Palomba and Becky Fjelstad, defendant's human relations director,

[1] When plaintiff filed this suit, he listed Myron Palomba, individually, and Becky Fjelstad, individually, as additional defendants. I am dismissing them from the case on the court's own motion because a supervisor cannot be held liable in his individual capacity under the Americans with Disabilities Act. Silk v. City of Chicago, 194 F.3d 788, 797 (7th Cir. 1999).

concluded that plaintiff Thomas D. Evans was not qualified to perform his duties as a physical education teacher because he had been on leave for more than a year and was unable to say when he might be able to return. Although defendant did not terminate plaintiff officially until February 25, 2004, Palomba told plaintiff in October 2, 2003 that he was terminated for not reporting to work for the 2003-04 school year after he had been on authorized leaves from February 19, 2002 to June 23, 2003.

Plaintiff contends that the ADA requires employers to make reasonable accommodations for disabled persons and that a reasonable accommodation for him would have been the grant of his request for an additional year of medical leave. Defendants do not agree; they maintain that the issue of a reasonable accommodation never arises because plaintiff cannot bear his burden of showing that he is a qualified individual under the Act.

This case is before the court on defendant's motion for summary judgment, which will be granted. So long as plaintiff was unable to return to work, he cannot show that he was a qualified individual who could perform the duties of his job with or without reasonable accommodation. Not only had plaintiff been away from his teaching position for more than two years before he was terminated officially on February 25, 2004, his doctor was still unwilling or unable to say when plaintiff might be able to return to his teaching duties. Moreover, even if plaintiff were able to show he is qualified, the ADA does not require employers to grant employees indefinite leaves of absence as a form of reasonable

accommodation.

From the findings of fact proposed by the parties, I find that the following material facts are not in dispute. (I have disregarded the findings proposed by plaintiff because they are not supported by citations to the record, as required by this court's Procedures to be Followed on Summary Judgment, I.B.2, and also because in most cases, the proposed facts have no bearing on the issues for decision. Also, I have omitted defendant's proposed facts concerning plaintiff's grievances against defendant and disciplinary actions taken against plaintiff. Defendant does not contend that the discipline meted out to plaintiff shows that he is not qualified to be a physical education teacher; its sole contention is that plaintiff's inability to report for work makes him unqualified to perform the duties of his position, with or without accommodation.)

UNDISPUTED FACTS

Plaintiff Thomas D. Evans started work as a teacher in the Stoughton Area School District in 1990. Before then, he had worked in several other Wisconsin high schools and had worked as an insurance agent for four years from 1982-1986.

Plaintiff taught driver education at Stoughton High School from 1990-1995 and then taught elementary physical education at Kegonsa Elementary in the Stoughton district. In 1999, he was diagnosed with depression by Dr. David Roethe.

On February 19, 2002, plaintiff went on medical leave from his teaching position. From then until the school year ended on June 20, 2002, he asked for and was granted a series of intermittent medical leaves, initially under the provisions of the Family and Medical Leave Act, 42 U.S.C. §§ 2611-2619, and then through the leave provisions of the Master Contract between the Stoughton Education Association and the Stoughton Board of Education.

On August 28, 2002, plaintiff asked for another medical leave of absence, this time for the entire 2002-03 school year. Superintended Myron Palomba approved the request on September 3, 2002, pursuant to the provisions of the Master Contract.

On March 26, 2003, defendant District received a letter from plaintiff indicating his intent to accept a teaching contract for the 2003-04 school year. On June 3, 2003, Becky Fjelstad, defendant's director of human relations, wrote plaintiff to confirm receipt of his letter of intent and instruct him to send her his doctor's verification that he was released from any medical restrictions and would be able to return to his duties as a full-time physical education teacher for the 2003-04 school year.

On June 23, 2003, plaintiff wrote Palomba, asking for an additional one-year leave of absence for the 2003-04 school year for medical reasons. Dr. Roethe wrote defendant District on June 25, 2003, to say that plaintiff did "not appear to be ready to return to employment." He went on to describe plaintiff's slipping back into "debilitating depression,

anxiety and somatic difficulties" each time he participated in activities resembling employment situations. Evans Aug. 25, 2005 dep., exh. #10.

Palomba denied the leave request in a letter to plaintiff written on July 16, 2003, Evans Aug. 25, 2005 dep., exh. #5, in which he explained his beliefs that the best interest of the students, the physical education program and the team of teachers with which plaintiff worked required a consistent team of teachers working on a full-time basis. He noted also that Dr. Roethe was not prepared to say when plaintiff might be able to return to active employment. Id.

Defendant's position description for a regular education teacher includes as essential job functions: "[e]stablishes and maintains an effective learning climate in the classroom" and "[c]omplies with the absence policies of the district." Fjelstad Aff., dkt. #27, exh. J.

On August 26, 2003, Roethe left a voice message for defendant Fjelstad, saying that plaintiff was not medically able to return to work. Plaintiff did not return to work on August 27, 2003, the first working day of the 2003-04 school year. Instead, he called the substitute teacher to say that he would not be reporting for work. At the time, plaintiff did not have more than 15 days of available sick leave and he had not been approved for a continuing leave of absence.

In a letter dated September 3, 2003, Roethe told defendant that he and plaintiff had targeted the fall of 2004 as the time when plaintiff could "attempt to return to work on a

permanent basis," assuming he continued to progress at the rate at which he had been progressing. He held out the possibility that plaintiff could ease back into work as a part-time instructor or substitute teacher in the spring of 2004. Evans Aug. 25, 2005 dep., exh. #6.

On October 2, 2003, Fjelstad wrote plaintiff to inform him that his employment with defendant District would be terminated effective September 30, 2003, because he had been absent without leave from his physical education teaching position since August 27, 2003. She said that plaintiff had failed to communicate in a timely manner with defendant, interfering with defendant's "ability to plan for the education of the students in the physical education classes at Kegonsa School." Evans Aug. 25, 2005 dep., exh. #4. She followed up the October 2 letter a week later with a certified letter informing plaintiff that she had been wrong when she wrote in her October 2 letter that plaintiff's employment had been terminated as of September 30, 2003, because plaintiff could not be terminated except by action of the school board. She advised plaintiff that it was the administration's intent to recommend his termination to the school board. Id.

On November 10, 2003, the Stoughton Educational Association wrote Palomba to advise him that the union intended to file a grievance over plaintiff's recommended termination. On February 18, 2004, the union, plaintiff and Palomba reached an agreement that the school board would meet with the union and plaintiff on February 24, 2004, to

allow Palomba and plaintiff to present information to the school board regarding plaintiff's termination and that the board meeting would not be an evidentiary hearing because the union and plaintiff would be entitled to proceed to arbitration on plaintiff's grievance.

Pursuant to the agreement, the school board held a meeting regarding plaintiff's grievance over the recommendation for his termination and on his appeal of defendant Palomba's denial of his leave request. In a written statement dated February 23, 2004, and read to the board, Roethe reported that plaintiff was continuing to progress and that, "absent significant setback or other hindrance, and subject to his continued commitment toward wellness, [plaintiff's] condition will continue to improve to the point where he is able to return to active employment, should he wish to do so." Evans Aug. 25, 2005 dep., exh. #12. He did not give any estimate as to when plaintiff might be able to return to teaching.

The school board determined that Palomba had not violated the collective bargaining agreement when he denied plaintiff's request for an extended leave of absence. It found that just cause existed for plaintiff's termination and notified plaintiff in a letter dated March 9, 2004 that his employment was terminated effective February 25, 2004.

From the time that plaintiff first went on medical leave until May 2007, he has not held any gainful employment. He engaged in some volunteer activity as an assistant football coach at Madison West high school in August 2002, but gave it up when he realized it was too stressful. He has not participated in any other volunteer activity since then or applied

for any employment positions on a part-time or full-time basis in a teaching capacity or in any other capacity. Dr. Roethe has not authorized plaintiff to return to work and plaintiff has not requested him to do so. As of May 25, 2007, plaintiff was still unable to return to work as a teacher.

Plaintiff has been receiving disability payments continuously since approximately May 20, 2002. The payments have been made to him by Madison National Life Insurance Company on the determination that he is totally disabled.

OPINION

The Americans with Disabilities Act prohibits discrimination by employers against a qualified individual with a disability because of that disability. "Discrimination" is defined in part as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee . . ." 42 U.S.C. § 12112(a)(5)A).

To prevail on a claim of discrimination based on disability, a plaintiff must prove that he is qualified to perform the essential functions of the job he holds or seeks, with or without reasonable accommodation. Bay v. Cassens Transport Co., 212 F.3d 969, 974 (7th Cir. 2000). To determine whether a plaintiff is qualified involves a two-step analysis. Id. (citing Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996)). The first

question is whether "'the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.'" Id. (citing 29 C.F.R. app. § 1630.2(m)). If he does, the court then considers "'whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.'" Id. Whether or not an individual meets the definition of a qualified individual with a disability is to be determined as of the time the employment decision was made. Id.

Although it might seem that plaintiff's receipt of disability insurance benefits as a totally disabled person would foreclose his suit, the United States Supreme Court has held that the effect of the receipt of similar benefits from the Social Security Administration is one that must be determined by the court on a case by case basis. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 805 (1999). The standards that the Social Security Administration and private insurance carriers use for defining disability are not necessarily the same. Id. at 803-05. See also Weigel v. Target Stores, 122 F.3d 461, 466 (7th Cir. 1997) (terms "totally disabled" and "qualified individual with a disability" are terms of art that must be understood within their respective statutory contexts). Rather, a plaintiff receiving Social Security who is suing under the ADA must explain to the court's satisfaction why he is disabled for the purpose of social security but still a "qualified individual" under the ADA. Cleveland, 526 U.S. at 806.

Plaintiff's failure to make any showing why his receipt of disability insurance benefits does not demonstrate his inability to return to work would be sufficient reason to grant defendant's motion for summary judgment, had defendant raised it as a reason. Since it did not, I will take up the contention it did raise, which is that plaintiff is unable to perform the essential functions of the position.

In determining whether the individual can perform the "essential functions of the position," a court considers the employer's determination of what the essential functions are for the job in question, provided that the determination is based on standards that are "job related and consistent with business necessity." 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1). Bay, 212 F.3d at 974 (truck and driver could not perform essential functions of his job because of his inability to obtain certification of physical qualifications required for license); see also Emerson v. Northern States Power Co., 256 F.3d 506, 513 (7th Cir. 2001) (employee subject to panic attacks not qualified to perform duties of job, which included handling safety-sensitive calls); Webb v. Clyde L. Choate Mental Health and Development Center, 230 F.3d 993, 999 (7th Cir. 2000) (psychologist who did not have physical stamina to work with center's violent or infectious patients not qualified to perform work at center); Nowak v. St. Rita High School, 142 F. 3d 999, 1003 (7th Cir. 1998) (teacher who could not demonstrate that he was able and willing to come to work on regular basis was not "qualified individual").

Defendants have defined the essential functions of plaintiff's former job as maintaining a consistent physical presence at the school. Such a requirement seems so obvious as to need no discussion. Establishing and implementing a year's curriculum, learning the personalities and needs of students and working with classroom teachers and staff are not tasks that even the best substitute teachers can carry out as effectively as a regular teacher. See also Nowak, 142 F.3d at 1003. ("Obviously, an employee who does not come to work cannot perform the essential functions of his job."). (The court of appeals noted an exception to this statement in E.E.O.C. v. Yellow Freight System, Inc., 253 F. 3d 943, 948 (7th Cir. 2001), in which it held that "[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not report to work cannot perform any of his job functions, essential or otherwise'") (quoting Tyndall v. National Education Centers, Inc. of California, 31 F.2d 209, 214 (4th Cir. 1994))); Weiler v. Household Finance Corp., 101 F. 3d 519, 525 (7th Cir. 1996) (employee whose psychotherapist advised employer that she was not able to return to work in any position is not "qualified individual").

As of February 24, 2004, when plaintiff was terminated, he was not ready to come back to work for the full school year. Therefore, he was not qualified to take on a job whose essential functions included his physical presence at the school on a full-time basis for the entire school year.

Because plaintiff has failed to meet his burden of proof on the initial question whether he is a "qualified individual," it is not necessary to decide whether defendants had a duty to offer him a reasonable accommodation in the form of another full year's leave of absence. However, the Court of Appeals for the Seventh Circuit has held in dicta that employers are not required to hold positions open indefinitely for disabled employees who are unable to return to work. Weiler, 101 F.3d at 526 (ADA does not require employer to hold job open for employee who refuses to return to work); Nowak, 142 F.3d at 1004 (ADA does not require employer to allow indefinite leave of absence in order to accommodate employee who suffers prolonged illness).

In opposing defendant's motion, plaintiff relies on Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000). In that case, the plaintiff asked for a transfer to a day shift after she returned from maternity leave and found herself experiencing depression and anxiety disorder. Her therapist attributed her mental problems to her having to work a night shift. The employer mishandled Gile's request and made no effort to help her to transfer. At trial, the jury found that Gile had proven that she would have been capable of performing the essential functions of her position had the employer made the reasonable accommodation of transferring her to a day shift. In this case, by contrast, plaintiff has not shown that at any time he would be able to perform the essential functions of his job, whatever accommodations defendant made.

This will be a disappointing outcome for plaintiff, but it is the only one the law allows. As difficult as plaintiff's situation is, it is not one that defendant has a legal obligation to accommodate. Defendant's obligations under the ADA extend only to qualified individuals with disabilities who can perform the essential functions of their jobs with or without accommodation. Unfortunately for plaintiff, his disability is so severe and long-lasting that he cannot prove he is such a qualified person and thereby claim the protections of the Act.

ORDER

IT IS ORDERED that the case is DISMISSED against defendants Myron Palomba and Becky Fjelstad on the court's own motion on the ground that they are not subject to suit under the Americans with Disabilities Act. FURTHER, IT IS ORDERED that the motion for summary judgment filed by defendant Stoughton Area School District is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 20th day of August, 2007.

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