

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOELLEN BLEY : CIVIL ACTION
 :
 vs. :
 : NO. 05-CV-0029
 BRISTOL TOWNSHIP SCHOOL :
 DISTRICT :

MEMORANDUM AND ORDER

JOYNER, J.

January 25, 2006

This discrimination action has been brought before the Court on motion of the defendant for summary judgment. For the reasons which follow, the motion shall be denied.

History of the Case

Plaintiff, Joellen Bley has worked for the defendant Bristol Township School District ("District") as a substitute custodian¹ since October, 1999. In 1985, at the age of 6 years old, Ms. Bley was diagnosed with epilepsy and she has required medication to control her seizures since that time. Presently, she takes

¹ The District has several different categories of custodians: permanent full-time, permanent part-time and substitute custodians. (Exhibit "A" to Plaintiff's Response to Defendant's Motion for Summary Judgment, at pp. 5-7) Unlike the permanent custodians, the substitute custodians do not receive any benefits and work on an as-needed, per diem basis. (Exhibit "C" to Plaintiff's Response to Defendant's Motion for Summary Judgment, at pp. 12, 21; Exhibit "E" to Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 13).

four different anti-seizure medications, Tegretol, Lamictal, Phenobarbital, and Keppra twice daily. Despite this regimen, Ms. Bley continues to suffer grand mal seizures 3-4 times per year. During these grand mal seizures, which generally last between 3 and 5 minutes, Ms. Bley's body shakes uncontrollably and she sometimes falls and loses consciousness. Although Plaintiff loses the ability to control her own motor functions, think, speak, and walk and needs to rest after a seizure, she suffers no other bodily impairments as a result of her epilepsy. She is, however, permanently restricted from driving a motor vehicle.

Given that Plaintiff herself was a graduate of the Bristol Township School system and that her mother, also a school district employee, told the then-supervisor of custodians about her condition at the time Plaintiff began working, it is clear that the District had knowledge of Plaintiff's epilepsy.² Although Plaintiff has worked on a regular basis for the District since her initial hire in October, 1999, she has never been offered a permanent position, despite having applied for nearly 30 permanent part-time custodial positions between 1999 and May,

² Plaintiff testified that she graduated from both elementary and high school in the Bristol Township School District. (Exhibit "D," to Plaintiff's Response to Defendant's Motion for Summary Judgment, at p.25) Additionally, as the deposition testimony of Katherine Bachman, John Kopean and James Lundquist illustrate, most, if not all of the permanent custodians with whom Plaintiff worked were aware that Plaintiff suffered from epilepsy. (Exhibits "A," "B," and "E" to Plaintiff's Response to Defendant's Motion for Summary Judgment).

2005. (Exhibit "H" to Plaintiff's Response to Defendant's Motion for Summary Judgment, at pp. 4-6). After filing claims with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission and receiving a right to sue letter on October 14, 2004, Plaintiff instituted this action alleging that the District has denied her a permanent position because of her disability, record of disability and its perception that she is disabled in violation of the Americans with Disabilities Act, 42 U.S.C. §12101, *et. seq.* ("ADA") and the Pennsylvania Human Relations Act, 43 P.S. §951, *et. seq.* ("PHRA"). Defendant now moves for the entry of summary judgment in its favor on both counts of the plaintiff's complaint.

Summary Judgment Standards

Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Jones v. School District of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999). Indeed, the standards to be applied by district courts in ruling on motions for summary judgment are clearly set forth in Fed.R.Civ.P. 56(c), which states, in pertinent part:

"...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Under this rule, a court is compelled to look beyond the bare allegations of the pleadings to determine if they have sufficient factual support to warrant their consideration at trial. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C.Cir. 1988), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988); Aries Realty, Inc. v. AGS Columbia Associates, 751 F.Supp. 444 (S.D.N.Y. 1990). In considering a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party and all reasonable inferences from the facts must be drawn in favor of that party as well. Troy Chemical Corp. v. Teamsters Union Local No. 408, 37 F.3d 123, 126 (3rd Cir. 1994); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3rd Cir. 1989); U.S. v. Kensington Hospital, 760 F.Supp. 1120 (E.D.Pa. 1991).

"Material" facts are those facts that might affect the outcome of the suit under the substantive law governing the claims made. An issue of fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" in light of the burdens of proof required by substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252, 106 S.Ct. 2505, 2510, 2512, 91 L.Ed.2d 202 (1986); The

Philadelphia Musical Society, Local 77 v. American Federation of Musicians of the United States and Canada, 812 F.Supp. 509, 514 (E.D.Pa. 1992). Thus, a non-moving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial. Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 138 (3d Cir. 2001).

Discussion

The Supreme Court recently observed that the purpose of the ADA is "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace." US Airways, Inc. v. Barnett, 535 U.S. 391, 399, 122 S.Ct. 1516, 1522, 152 L.Ed.2d 589 (2002). Plaintiff's complaint in this case avers that her rights under both the federal ADA and the state PHRA were violated by the defendant's failure/refusal to hire her for a permanent position on the basis of her epilepsy. Under the ADA, 42 U.S.C. §12112(a),

No covered entity shall discriminate 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.

A "covered entity" "means an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. §12111(2). A "qualified individual with a disability"

means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. §12111(8).

The Pennsylvania Human Relations Act likewise recognizes the problems discrimination poses to the citizenry of the Commonwealth and provides, in pertinent part:

The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodations, advantages, facilities and privileges of any public accommodation and of any housing accommodation and commercial property without discrimination because of...handicap or disability,... the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.

43 P.S. §953.

Under §955(a) of the PHRA,

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(a) For any employer because of the ...non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual or independent contractor to refuse to hire or employ or contract with, or to bar or

to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required...Notwithstanding any provision of this clause, it shall not be an unlawful employment practice for a religious corporation or association to hire or employ on the basis of sex in those certain instances where sex is a bona fide occupational qualification because of the religious beliefs, practices, or observances of the corporation, or association.

In light of the similarities between the two laws, the PHRA has been held to be basically the same as the ADA in relevant respects and Pennsylvania courts therefore generally interpret the PHRA in accord with its federal counterparts. Rinehimer v. Cencolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002), citing Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996).

In order to make out a prima facie case of disability discrimination under the ADA and PHRA, a plaintiff must establish that s/he (1) has a "disability," (2) is otherwise qualified to perform the essential functions of the job, and (3) has suffered an adverse employment action because of his/her disability. Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 568 (3d Cir. 2002); Buskirk v. Apollo Metals, 307 F.3d 160, 166 (3d Cir. 2002). To establish that a plaintiff is "qualified" under the ADA, the employee must show that he/she "satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or

desires." Conneen v. MBNA America Bank, N.A., 334 F.3d 318, 326 (3d Cir. 2003), quoting Skerski v. Time Warner Cable Co., 257 F.3d 273, 278 (3d Cir. 2001).

We thus consider first whether the Plaintiff is a "disabled person" within the meaning of the ADA/PHRA. Under 42 U.S.C. §12102(2), "[t]he term 'disability' means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

While it makes a distinction between a "handicap or disability" and a "non-job related handicap or disability,"³ the PHRA's general definition of "handicap" or "disability" with respect to a person is strikingly similar to that of the ADA:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) a record of having such an impairment; or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance, as defined in section 102 of the

³ Specifically, a "non-job related handicap or disability" is defined as "any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related." 43 P.S. §954(p).

Controlled Substances Act (Public Law 91-513, 21 U.S.C. §802).

43 P.S. §954(p.1)

Despite the fact that no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA and that the Supreme Court has yet to rule on what deference these regulations deserve, most courts at least consider them in determining whether the three elements necessary to make out a "disability" have been met. See, e.g., Toyota Motor Manufacturing Co. v. Williams, 534 U.S. 184, 194, 122 S.Ct. 681, 689, 151 L.Ed.2d 615 (2002); Sutton v. United Air Lines, 527 U.S. 471, 480, 119 S.Ct. 2139, 2145, 144 L.Ed.2d 450, 460 (1999). Under the regulations, a "physical or mental impairment" includes "(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(h)(1), (2). "Major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(I).

"Substantially limits" means "(I) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §1630.2 (j).

Thus, merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity. Toyota Motors, 534 U.S. at 195, 122 S.Ct. at 690. The determination of whether one is or is not disabled within the meaning of the ADA is an individualized one to be made on a case-by case basis with reference to measures that mitigate the individual's impairment, such as medications and devices, and "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." Sutton, 527 U.S. at 475, 483, 119 S.Ct. at 2143, 2147, quoting Bragdon v. Abbott, 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S.Ct. 2162, 2169, 144 L.Ed.2d 518 (1999). Stated otherwise, in defining when an impaired person is substantially limited, the standard to be used is whether the

impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Caracciolo v. Bell Atlantic-Pennsylvania, Inc., No. 03-4472, 135 Fed. Appx. 503, 504 (3d Cir. March 4, 2005), quoting Toyota Motors, 534 U.S. at 198. Consequently, the Courts have held that health conditions that cause moderate limitations on major life activities do not constitute disabilities under the ADA, as to hold otherwise could expand the ADA to recognize almost every working American as disabled to some degree. Collins v. Prudential Investment and Retirement Services, No. 03-2356, 119 Fed. Appx. 371, 376 (3d Cir. Jan 4, 2005).

In application of the preceding principles to the case at hand, we first find that the plaintiff was sufficiently qualified for the job in question--custodian, as she had been consistently performing the job on a substitute basis since 1999. As she had not been offered a permanent position despite having applied some thirty times, she obviously suffered an adverse employment action within the meaning of both the state and federal acts.

We further find that Plaintiff clearly suffers from a physical or mental impairment within the meaning of the ADA and the PHRA. To be sure, epilepsy is defined as "a group of nervous system disorders that feature repeated episodes of convulsive seizures, abnormal behaviors and blackouts. All types of epilepsy have an uncontrolled electrical discharge from brain

nerve cells." SIGNET/MOSBY MEDICAL ENCYCLOPEDIA, 211 (1985).
See Also, Merriam-Webster Medline Plus, at <http://www2merriam-webster.com>; Sutton, 527 U.S. at 488, 119 S.Ct. at 2149
(identifying epilepsy as the type of impairment that may or may not be disabling with the use of medication); Landry v. United Scaffolding, Inc., 337 F.Supp.2d 808 (M.D.La. 2004)(same); Galle v. Department of General Services, Civ. A. No. 02-4622, 2003 U.S. Dist. LEXIS 4548 at * (E.D.Pa. March 18, 2003)(epilepsy conceded by Defendant to be impairment).

As to whether or not this impairment substantially limits the plaintiff in one or more major life activities, we find that a jury question exists such that to grant summary judgment at this juncture would be ill-advised. Indeed, the record here reflects that the plaintiff is twenty-six years old and has suffered from epilepsy since she was six years old. Thus, her impairment is clearly permanent, given that she has suffered from it for more than twenty years and it clearly severely restricts her from several major life activities (walking, talking, thinking) while she is experiencing and shortly after a seizure. Although she currently takes four different anti-epileptic medications twice daily, her epilepsy remains unpredictable and difficult to manage and she continues to suffer from grand mal seizures some 3-4 times per year. Plaintiff is permanently restricted from driving because of the epilepsy and the

medications that she takes to control her condition. (Exhibit "D" to Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 8-12, 14-20; Exhibit "I" to Plaintiff's Response to Defendant's Motion for Summary Judgment). While it is true that unless she is having a seizure, Plaintiff's life is unaffected by her epilepsy and that while the frequency of her seizures are somewhat controlled by medication, she is not able to control when her seizures occur or their severity and thus we find that her impairment is not altogether remedied by these measures. (Exhibit "D" at pp. 22-23). See, e.g., 29 C.F.R. §1630.2(j)(2). In the several years that Plaintiff has worked for the School District, she has suffered at least one seizure at work. (Exhibit "C," 13; Exhibit "D", 68-69). For these reasons, we deny the defendant's motion for summary judgment on the issue of plaintiff's actual impairment.

Defendant also moves for summary judgment on Plaintiff's claim that she was unlawfully discriminated against because Defendant regarded her as having a disability. Claims that an employee was the object of discrimination because he was "regarded as" having a disability are evaluated under the McDonnell Douglas burden shifting paradigm. Speer v. Norfolk Southern Railway Corporation, No. 04-1323, 121 Fed. Appx. 475, 476 (Feb. 10, 2005), citing McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The McDonnell

Douglas analysis proceeds in three stages: first, the plaintiff must establish a prima facie case of discrimination. Id. If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Finally, should the defendant carry this burden, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id., also citing Jones v. School District of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999).

There are two apparent ways in which individuals may fall within the statutory definition of being "regarded as" having a disability: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. Sutton, 527 U.S. at 466, 119 S.Ct. at 2149-2150; Speer, 121 Fed. Appx. at 477. In both cases, it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions

often "result from stereotypic assumptions not truly indicative of individual ability." Sutton, 527 U.S. at 466-467, 119 S.Ct. at 2150, citing 42 U.S.C. §12101(7) and School Board of Nassau County v. Arline, 480 U.S. 273, 284, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). The regarded as analysis focuses not on the plaintiff and his actual disabilities but rather on the reactions and perceptions of the persons interacting or working with him. Buskirk, 307 F.3d at 167, quoting Kelly v. Drexel, 92 F.3d at 108-109. Thus, "even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability." Id., quoting Deane v. Pocono Medical Center, 142 F.3d 138, 144 (3d Cir. 1998).

We likewise find in the case at bar, that sufficient evidence exists that the defendant School Board regarded Plaintiff as disabled to withstand the pending motion for summary judgment. According to the deposition testimony of Kathy Bachman, John Kopean and Mary Ellen Bley, in response to a question regarding hiring the plaintiff as a permanent custodian at a head custodians' meeting, James Lundquist, the School District's Head Custodial Supervisor, stated that he believed she was a liability because of her seizures. (Exhibit "A", 13-15; Exhibit "B," 6-7, 11-12; Exhibit "C," 8-9). Although the School

Board makes the final hiring decisions, Mr. Lundquist is the individual responsible for making recommendations to the Board for the hiring of permanent custodians and it appears from his deposition testimony that the Board relies upon his recommendations in making its decisions. Although Mr. Lundquist testified that he did not recommend Plaintiff for a permanent position because he did not think her work was good enough, we believe the issue of whether the District has articulated a legitimate, non-discriminatory reason and that this articulated reason was the true reason Plaintiff was not given a permanent position is properly left to a jury given that Ms. Bley has been working on a regular basis in the very position for which she seeks permanent status for nearly six years. We shall therefore deny the defendant's motion for summary judgment on the plaintiff's "regarded as" claim as well.

An order follows.

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 BRISTOL TOWNSHIP SCHOOL :
 DISTRICT :

ORDER

AND NOW, this 25th day of January, 2006, upon consideration of the Motion of Defendant Bristol Township School District for Summary Judgment and Plaintiff's Response thereto, it is hereby ORDERED that the Motion is DENIED for the reasons articulated in the preceding Memorandum Opinion.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.