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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Timothy Coleman, Plaintiff, v. City of Tucson, a body politic, Defendants.	CV 08-98 TUC DCB **ORDER**

The Court grants in part and denies in part the Defendant's Motion to Dismiss. The Defendant shall file its Answer, and a case management scheduling conference shall be set accordingly.

Introduction

Timothy Coleman ("Plaintiff") was an employee of the City of Tucson ("Defendant") from December 2, 1991 to January 25, 2007. During his employment, Plaintiff was diagnosed with various medical and psychological conditions that resulted in extended absences from work. Plaintiff informed Defendant that he was disabled. As a result of his disability, Plaintiff was incapable of meeting the demands of his position, and he sought reasonable accommodations. Plaintiff asserts that Defendant failed to provide these accommodations and that he suffered adverse employment actions because of his disability, including being forced to take medical retirement.

Plaintiff filed his Complaint on February 5, 2008, alleging discriminatory employment practices. Plaintiff seeks relief under the Americans with Disabilities Act, the Arizona Civil Rights Act, 42 U.S.C. § 1983, and right of privacy provisions under the Health

Insurance Portability and Accountability Act. He also claims that Defendant retaliated against him when he complained that he was being discriminated against based on his disability. Plaintiff seeks money damages, injunctive and other equitable relief.

The Defendant asks the Court to dismiss the case, pursuant to Rule 12(b)(6), because the Complaint fails to state a claim upon which relief may be granted.

Standard of Review

The Supreme Court has explained that to survive a motion to dismiss for failure to state a claim upon which relief can be granted, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations and internal quotations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 1964 (citations and internal quotations omitted). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id*. at 1968 (abrogating a literal reading of *Conley*: "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")

Under Rule 12(b)(6), all factual allegations are taken as true and construed in the light most favorable to the nonmoving party, *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir.1994), and all reasonable inferences are to be drawn in favor of that party as well. *Jacobsen v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir.1997). Dismissal is appropriate if the facts alleged do not state a claim that is "plausible on its own face." *Twombly*, 127 S. Ct. at 1973. Plaintiff must allege facts which plausibly support his claims; it is not enough if the facts are merely consistent with his claims. *Id*. at 1959. The Supreme

Court has found this reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." *Id*.

Discussion

I. Americans with Disabilities Act (ADA) Claim

Plaintiff has set forth sufficient facts to support a prima facie claim of discrimination under the ADA, and the motion to dismiss is denied. To qualify for relief under the ADA, plaintiff must show that: (1) he is a disabled person within the meaning of the statute; (2) he is qualified, with or without reasonable accommodation, to perform essential functions of the job he holds or seeks; and (3) he suffered an adverse employment action because of his disability. 42 U.S.C.A. § 12101 et seq. Defendant does not dispute that the Plaintiff has a disability.

A. Qualified, with or without Reasonable Accommodation

A disabled person is "qualified," for ADA purposes, if the individual can perform the essential functions of an employment position, with or without reasonable accommodation. 42 U.S.C. § 12111(8). "Essential functions" refer to the "fundamental job duties of the employment position the individual with a disability holds or desires." It does not "include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). A job function may be considered "essential" for various reasons. *See id.* § 1630.2(n)(2)(i)-(iii). The statute provides that "consideration shall be given to the employer's judgment as to what functions of the job are essential…" 42 U.S.C. § 12111(8).

Plaintiff bears the burden of proving that he is "qualified." *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 892 (9th Cir.2001). This is a two part inquiry; Plaintiff must show either that he can perform the job's essential functions without reasonable accommodation, or that he can do so with reasonable accommodation. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231 (9th Cir.2003). In the latter instance, the plaintiff must allege the existence of a reasonable accommodation that would permit him to perform

the essential functions of his position. *U.S. Airways v. Barnett*, 535 U.S. 391, 401, 122 S.Ct. 1516 (2002). If the suggested accommodation is reasonable on its face, the burden shifts to the defendant to show that it is unreasonable on the facts presented. *Id.* at 402.

A reasonable accommodation may include job restructuring, part-time or modified work schedules, and reassignment. 42 U.S.C. § 12111(9). The ADA does not require an employer to modify an essential function of an existing position in order to accommodate a disabled employee. *Martin v. Kansas,* 190 F.3d 1120, 1133 (10th Cir.2001) *overruled on other grounds, Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373-74 (2001). While an employer need not create a new position for a disabled employee, the employer must consider the employee for a vacant position for which he is qualified. This mandatory reassignment of disabled employees as a reasonable accommodation only applies under the following limited circumstance: 1) the employee becomes unable to perform the essential function of the job even with reasonable accommodations and 2) there exists, or soon will be, a vacant position which the employee is qualified to perform. *Ransom v. Ariz. Bd. of Regents*, 983 F.Supp. 895, 902 (D.Ariz.1997).

Plaintiff alleged the following facts. Plaintiff's position often required him to work 6 to 7 days per week for as much as 70 hours per week. (Complaint at 5, ¶43). Plaintiff supervised six people. Plaintiff informed Defendant that he was disabled as early as 2003. (Complaint at 4, ¶28). On January 12 and April 2, 2006, the Defendant reclassified his position, increasing his responsibilities, which resulted in "unattainable expectations," causing Plaintiff mental anguish and stress. (Complaint at 6, ¶44-45).

On or about July 28, 2006, Plaintiff met with the Department of Human Resources, and it was recommended and agreed that Plaintiff would apply for and receive from Defendant an ADA Accommodation. (Complaint at 8, ¶70-71). On or about August 5, 2006, Defendant received an ADA Reasonable Accommodation Request Form from Plaintiff in which he attached the Health Care Certification from Dr. Westin. (Complaint at 10, ¶86).

Plaintiff requested that Defendant transfer him to another position to relieve him from working as a supervisor as an accommodation for his disability. (Complaint at 10, ¶85).

Dr. Westin recommended that Plaintiff work no more than 40 hours per week, that his projects be limited to no more than three projects running simultaneously and that he be allowed to vary his work day. (Complaint at 10, ¶88). Dr. Westin also stated that Plaintiff should not be required to supervise others. (Complaint at 10, ¶89). Dr. Westin further opined that Plaintiff was "substantially limited in thinking/concentrating, learning and interacting with others." He had a "low ability to concentrate, remember, or follow through resulting in tasks not being completed or started; Plaintiff's depression and limitations made learning difficult. (Complaint at 9, ¶81-83).

Plaintiff did not want to consider medical retirement. (Complaint at 8, ¶68). Plaintiff was waiting to be placed in a position which accommodated his disability. (Complaint at 11, ¶103). Defendant required Plaintiff to interview for such positions, (Complaint at 11, ¶104), and he was not reassigned to a new position. (Complaint at 12, ¶107).

Defendant submits the Plaintiff admitted he was "totally disabled" when he took disability retirement and, thereby, admitted he was not qualified for employment. Defendant argues that it was not required to provide Plaintiff a new position under the ADA, and it accommodated him by allowing him to apply and interview for a new position.

The disputed material fact of whether or not Plaintiff was "totally disabled" does not warrant dismissal of Plaintiff's Complaint under Rule 12(b)(6) for failing to state a claim. Fed. R. Civ. P. 12(b)(6). To survive the motion to dismiss, the Plaintiff only needs to allege sufficient facts creating a genuine issue as to whether he was qualified for employment, with or without a reasonable accommodation. He has alleged facts to support his claim that he was qualified for employment with an accommodation.

In a case where the employee is unable to perform the essential functions of his current job, but is qualified for an alternative position, reassignment is warranted as a

reasonable accommodation. Plaintiff claimed he was unable to perform his position, requested reassignment, alternative employment assignments were available, but Defendant did not reassign him to such a position. Instead, the Defendant only allowed him to interview for positions of accommodation, which did not result in a reassignment.

The key question is whether Plaintiff was qualified to perform the essential functions of such a reassignment. While Plaintiff fails to provide insight as to the specific duties of the new positions he sought, or specifically allege that the open positions accommodated his disability, the Defendant's challenge also lacks the same specificity.

The Defendant could not work in excess of 40 hours per week, not supervise others, and not have more than three ongoing projects at a time. His ability to learn new things was limited. On its face, a request to accomodate these limitations seems reasonable. It is undisputed that the Defendant was aware of these limitations and allowed him to interview for available positions of employment. This is enough to support his claim that he was qualified for reassignment to open positions of employment. If not, he would not have been interviewed for them. It is undisputed that he was not reassigned to any of the positions. Plaintiff has stated a claim that the Defendant failed to accommodate his disability by not reassigning him to another position.

The Court rejects the Defendant's argument that it accommodated the Plaintiff's disability by allowing him to interview for available positions. This Court will follow *Ransom v. Ariz. Bd. of Regents*, 983 F.Supp. 895 (D.Ariz.1997), where the court held that an employer may be required to assign a disabled employee to a new position under certain circumstances. The court in *Ransom* held that an employer's policy to make reassignments through competitive hiring prevents the reassignment of employees with disabilities to vacant positions for which they are qualified and discriminates against qualified individuals with disabilities. Like the court in *Ransom*, this court believes such an accommodation policy

results in no accommodation at all. *Id.* at 902 (citing *Wood v. County of Alameda*, 1995 WL 705139 *14 ((N.D. Cal. 1995).

Defendant relies on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) to argue that it was not legally required to change its rules or give the Plaintiff a preference over more qualified applicants in order to provide a reasonable accommodation. (Motion at 8-9.) *Barnett* dealt with circumstances where an accommodation conflicts with seniority rules. Ordinarily, this will be an unreasonable accommodation, *Barnett*, 535 U.S. at 403-404, because of the importance of seniority to employee-management relations, *id.* at 401-405. Nevertheless, the Supreme Court held that an employee is still entitled to present evidence of special circumstances that makes the exception to the seniority rule reasonable under particular facts, *id.* at 405-406. The employee might show, for example, that the employer has retained the right to change the system unilaterally, exercised the right fairly frequently, thereby reducing employee expectation that the system would be followed and making the requested accommodation reasonable. *Id.* at 405. Alternatively, the system might contain exceptions that would make one further exception for a disability accommodation reasonable. *Id. Barnett* does not support the Defendant's Motion to Dismiss; there is no evidence the Plaintiff was denied accommodation because of a seniority system.

B. Adverse Employment Action

Under the ADA, Plaintiff must show that he suffered an adverse employment action because of his disability. 42 U.S.C.A. § 12101 *et seq.* Plaintiff alleges that he was "forced" into disability retirement. In support of this assertion, Plaintiff has alleged the following: (1) On July 28, 2006 Plaintiff's doctor provided Defendant with Health Provider Certification stating Plaintiff's impairment as Major Depression that was most likely permanent; (2) around this same time, Defendant was considering reasonable accommodations for Plaintiff; (3) no accommodation was provided; (4) Plaintiff was told his medical leave exceeded

FMLA allowances and he was subject to termination; (5) Plaintiff had no choice but to take medical retirement.

Defendant argues it only informed the Plaintiff he was about to exceed the permitted amount of medical leave. From February 2006 to February 2007, the Plaintiff worked on a part-time basis for approximately one week in May. Defendant argues that it is not prohibited from terminating an employee who has exhausted his leave under the Family Medical Leave Act (FMLA) and that receiving disability retirement benefits is not adverse to the employee's interests.

Here, however, it was adverse. Plaintiff alleges he was on medical leave because he was unable to perform the essential functions of his job, he was awaiting reassignment to another position as a reasonable accommodation for his disability, Defendant's failure to reassign him to an open position had the direct result of forcing him to take additional medical leave. Consequently, the employer's action/inaction caused the FMLA clock to continue running, allowing the employer to then, upon expiration of the FMLA leave, terminate the employee, or use the threat of looming termination as leverage to "encourage" his disability retirement.

Assuming all facts alleged in the Complaint are true, Plaintiff suffered an adverse action as a result of his disability: Defendant's failure to reassign Plaintiff forced him to use his FMLA leave and be subject to termination. The avenue he chose post-termination was disability retirement. The adverse action was his "constructive discharge," not his disability retirement. Plaintiff alleges facts to support a prima facie claim of discrimination under the ADA. The motion to dismiss the ADA claim is denied.

II. Arizona Civil rights Act (ACRA)

ACRA is modeled after and virtually identical to the ADA. *Fallar v. Compuware Corporation*, 202 F. Supp. 2d 1067, 1081 n. 9 (Ariz. 2002). Frequently, courts combine the analysis of the two statutes. *Id.*, *see also, Kyles v. Contractors/Engineers Supply, Inc.*, 190

Ariz. 403, 405 (Ariz. App.1997) (explaining that employment discrimination claims under state law follow Federal Title VII precedent).

It is an unlawful employment practice for any employer to discriminate against any individual because of the individual's disability, if the disabled individual is qualified; it is unlawful to fail or refuse to reasonably accommodate the individual's disability. A.R.S. § 41-1401 et. seq. A "Reasonable accommodation" may include job restructuring, part-time or modified work schedules, or reassignment to a vacant position. *Id.*

An employer may be required to assign a disabled employee to a new position under certain circumstances. *Ransom v. Ariz. Bd. of Regents*, 983 F.Supp. 895 (D.Ariz.1997) (holding Defendants' policy that reassignments must be made through competitive hiring prevents the reassignment of employees with disabilities to vacant positions for which they are qualified and discriminates against qualified individuals with disabilities, in violation of the ACRA.). Because Plaintiff's Complaint survives under the ADA, it survives under ACRA.

III. Retaliation claim

To establish a prima facie case of retaliation under the ADA, an employee must show the following: 1) he engaged in a protected activity; 2) suffered an adverse employment action; and 3) there was a causal link between the two. *Brown v. City of Tucson*, 336 F.3d 1181, 1187 (9th Cir. 2003); *see also Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding the same in respect to Title VII employment law cases). The EEOC has interpreted "adverse employment action" to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Id.* (citing EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998)).

Plaintiff has alleged two acts in support of his claim that Defendant retaliated against him for engaging in a protected activity. He has alleged that his complaints of discrimination

and requests for reasonable accommodation were followed by two "reclassifications" of his position with increased burdens and responsibilities and refusal to reassign him to another position, which forced him to take disability retirement. Defendant argues the reclassifications did not create additional burdens and responsibilities because Plaintiff was already performing these duties. It merely reflected the work he was actually performing.

The Court finds that the Plaintiff engaged in the protected activity of informing the Defendant that he was disabled and that he had disability related limitations that prevented him from performing essential functions of his job. Thereafter, Defendant reclassified his position, which solidified his inability to perform the tasks and responsibilities and made reassignment to a new position his only means of accommodation. Defendant then refused to reassign him to a new position until his medical leave expired under the FMLA, causing him to be subject to termination and forcing him to take disability retirement. Plaintiff alleges a prima facie case of retaliation.[1]

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[1]The Court rejects Defendant's argument that the only actionable events that occurred in the 300 day time frame prior to the filing of Plaintiff's EEOC claim are limited to his one week of part time work in May, 2006 because he was on medical leave the remainder of time. (Reply at 2-3.) As early as 2003, Plaintiff informed Defendant that he was disabled due to depression, and by August and October 2006, his disability diagnosis was changed to Atypical Bipolar Disorder. In January and April of 2006, the Defendant reclassified his position over Plaintiff's objections that the job was too stressful and burdensome. In April, Plaintiff requested three alternative accommodations, including return to his position with fewer hours and responsibilities or reassignment to a new position with fewer hours and responsibilities.

In March, Plaintiff had been placed on medical leave because of back surgery, but he was released to return to work on a part-time basis in April, which he did for one week in May. When Plaintiff was unable to perform his job on a part-time basis, he was again placed on medical leave. On June 7, 2006, he was released from medical leave related to his back surgery to return to work full duty. Thereafter, Plaintiff was on medical leave related to his Atypical Bipolar Disorder because Defendant did not reassign him to a position accommodating his disability. Instead of providing an accommodation, in January, 2007, the Defendant informed him that his FMLA was exhausted and he would be terminated. Plaintiff took disability retirement and filed his EEOC claim. (Complaint at 19-133.)

IV. 42 U.S.C. §1983

Title 42 section 1983 of the United States Code (§1983) provides a cause of action for the deprivation of any rights, privileges secured by the Constitution and laws; it allows the injured party to bring a proceeding for relief from the opposing party. Plaintiff rests this claim on Defendant's alleged ADA violations. Defendant argues that because the ADA provides a comprehensive enforcement mechanism, it precludes any corollary action based on §1983, when it is based on the same facts. (Motion at 15 (citing *Americans with Disabilities Practice and Compliance Manual*, 7:49; *see also: Thompson v. City of Arlington, Tex.*, 838 F. Supp. 1137, 1149 (N.E. Tex., 1993)).

Plaintiff's § 1983 is dismissed, but not for the reason stated by the Defendant. To impose liability under 42 U.S.C. § 1983 upon Defendant City of Tucson, Plaintiff must demonstrate the existence of a particular official city policy or established custom and that the policy or custom caused him to be subjected to a deprivation of a constitutional right. *Oklahoma City v. Tuttle*, 471 U.S. 808, 829-30 (1985) (Justice Brennan, concurring); *See also, Monell v. New York City Department of Social Services*, 436 U.S. 658, 691, 694 (1978); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675 (9th Cir. 1984).

Plaintiff makes no allegations in the Complaint regarding a particular policy or custom of the City of Tucson. The Defendant, however, in its Reply suggests that it followed standard personnel procedures. (Reply at 6.) As alleged in the Complaint, the City of Tucson is not a proper Defendant under § 1983, and count 5 is dismissed without prejudice to it being added should the evidence, upon development, support it.

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The first reclassification of Plaintiff's position was prior to April, but the second reclassification was in April and Defendant's failure to accommodate the Plaintiff extended throughout the 300 days prior to the filing of the EEOC claim. The Complaint states a jurisdictional basis for Plaintiff's claims.

V. Other Claims: HIPAA and Title II

Plaintiff alleges that Defendant invaded his privacy by not properly securing his medical information in violation of Health Insurance Portability and Accountability Act (HIPAA) and the ADA. HIPAA itself provides no private right of action. *Webb v. Smart Document Solutions*, LLC., 499 F.3d 1078, 1081 (Cal.2007). To the extent that Defendant violated ADA regulations, such evidence may be relevant to prove Plaintiff's ADA claim. Dismissal of Plaintiff's HIPAA claim does not reflect this Court's position regarding discovery or admissibility of evidence that Defendant violated ADA regulations related to Plaintiff's right of privacy in his medical records.

Title II of the ADA does not apply to employment discrimination. *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1173 (9th Cr. 1999).

Conclusion

The Court dismisses Plaintiff's claims under Title II of the ADA, 42 U.S.C. § 1983, and HIPAA.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (document 9) is GRANTED in part as to counts 2, 5 and 6 and DENIED in all other parts.

DATED this 4th day of December, 2008.

David C. Bury
United States District Judge