STATE OF VERMONT
RUTLAND COUNTY

ANTHONY CADY,	)	**Rutland Superior Court**
	)	**Docket No. 218-3-08 Rdcv**
Plaintiff,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant	)	

DECISION ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED APRIL 24, 2009, and PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED JUNE 2, 2009

This matter came on before the Court on defendant General Electric Company's Motion for Partial Summary Judgment, pursuant to V.R.C.P. 56, filed April 24, 2009. Plaintiff Anthony Cady filed an Opposition and a Cross-Motion for Partial Summary Judgment on June 2, 2009. Defendant filed an Reply to plaintiff's Opposition and an Opposition to plaintiff's Cross-Motion for Summary Judgment on June 24, 2009.

Plaintiff Anthony Cady is represented by Erin Gallivan, Esq. Defendant General Electric Company is represented by Andrew H. Maass, Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "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 any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue

of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs*, *Inc.,* 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.,* 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

Anthony Cady began working at General Electric ("GE") some time around 2001. He has had back pain "on and off" throughout his life. Mr. Cady has been diagnosed with spondylolisthesis – slippage of the vertebrae.

Mr. Cady previously missed time from work because of his back condition. In March 2005, he experienced a flare-up of his back problems and took approved medical leave from GE. Mr. Cady went on short-term disability. He was paid less than his normal wages while on disability.

In April 2005, Mr. Cady's doctor, Dr. Weinstein, cleared him to return to work with the restrictions that Mr. Cady work four hours per day, changing jobs every 1 to 2 hours, for two weeks, and then after this two week period, eight hours per day, changing jobs every 2 hours. GE could not accommodate Mr. Cady's restrictions at that time. In May 2005, Dr. Weinstein changed his opinion to no workplace restrictions for Mr. Cady.

In May 2005, GE's doctor, Dr. Ryder, placed restrictions upon Mr. Cady which included no lifting over 20 lbs occasionally and 10 lbs. frequently, no combined forward bending and rotation, and no jobs in large engine broach and large engine cast. Dr. Ryder placed these restrictions upon Mr. Cady as it was his opinion that heavy lifting could cause more slippage and make his back condition worse.

In August 2005, Mr. Cady's doctor, Dr. McClellan, cleared Mr. Cady to return to work. On September 1, 2005, Dr. Ryder reviewed the information sent by Dr. McClellan and continued to recommend the prior noted restrictions from May 2005. Around September 2005, Mr. Cady's short-term disability benefits ran out.

In October 2005, Dr. Ryder consulted with Dr. Kenosh, head of the Rutland Regional Medical Center Rehabilitation Department. Following this consultation, Dr. Ryder changed Mr. Cady's restrictions to no lifting over 40 lbs. occasionally and 20 lbs. frequently, no lifts with extended arms or forward flexion, and no jobs in large engine broach and large engine cast. At this time GE was still unable to accommodate Mr. Cady with the new restrictions.

In early February 2006, a position became available that met Mr. Cady's restrictions ("small engine bench/cast"). Mr. Cady returned to work on February 13, 2006. Since returning to work he has performed work as a cast operator, performed end trimming work and worked on squealer tips, run a mill multiple times, and run a robo drill. Mr. Cady perceives himself as a "multitasker." He has stated "I can do many various jobs. I have many job skills." As such, he gets moved around to a lot of different jobs and functions at GE.

The restrictions set forth by Dr. Ryder in October 2005 are still in effect. Mr.

Cady is unaware of what jobs actually require lifting over 40 lbs. occasionally and 20 lbs. frequently, but he asserts that there are many jobs that GE treats as requiring such lifting. Since returning to work in February 2006, plaintiff has not been allowed to work in large engine broach, large engine cast, or any job that requires lifting more than 40 lbs. occasionally and 20 lbs. frequently and any job that requires lifting with extended arms or forward flexion.

"Posting" is the GE term for internally applying or bidding for an open position. Mr. Cady has posted for one job, an auditor position, since his return to work in February 2006. Mr. Cady admits that the restrictions placed upon him did not prevent him from getting that position. He asserts that there were many job openings that were not posted that he wanted and inquired about, but that his restrictions kept him from being considered for. Mr. Cady states that applying for the positions would have been futile as his superiors verbally told him that he would not be considered for the positions due to his lifting restrictions.

Mr. Cady's job classification is L18. When he left work in March 2005 he was L18 and when he returned in February 2006 he was L18. Since his return to work, he has not lost any pay or benefits because GE is restricting him from performing certain jobs. Mr. Cady agrees that all L18 positions receive the same money and benefits. He agrees that regardless of what job function one performs at L18, the pay and benefits do not change from one job to another. Furthermore, the open positions that Mr. Cady inquired about to his superiors were L18 as well. Mr. Cady has only applied for one L20 job; that was in 2002.

Mr. Cady believes that his job is unstable and in jeopardy, and that he may not be

needed in the future. He has provided no evidence beyond his own opinion to support this conclusion. Mr. Cady has not missed any work due to his back problems since returning to work at GE in February 2006.

It is the opinion of Greg LeRoy, a vocational expert, that the restrictions placed upon Mr. Cady would substantially limit his ability to work. The restriction prohibiting lifting more than 40 lbs. occasionally and 20 lbs. frequently or lifting with extended arms or forward flexion, would prohibit Mr. Cady from working the "very heavy" and "heavy" category of jobs, as well as many of the jobs in the "medium" capacity category. This restriction would preclude Mr. Cady from at least four different job categories comprising over 230 individual occupations. It is important to note that Mr. LeRoy did not offer an opinion as to jobs at GE.

Mr. Cady filed a Complaint against GE on March 17, 2008. Mr. Cady alleges four counts: (1) disability discrimination based on a history of physical impairment; (2) disability discrimination based on "regarded as" having a physical impairment; (3) violation of the Vermont Parental and Family Leave Act; and (4) violation of the implied covenant of good faith and fair dealing.

On April 24, 2009, defendant GE filed a Motion for Partial Summary Judgment seeking judgment as a matter of law as to Counts (1) and (2). GE argues that plaintiff cannot meet his burden of proof because he cannot establish sufficient evidence to meet the elements of his prima facie case under Vermont's Fair Employment Practices Act, 21 V.S.A. § 495(a).

Plaintiff filed a Cross-Motion for Summary Judgment on June 2, 2009. Plaintiff argues that based on undisputed evidence, he has established the elements of his prima

facie case and has direct evidence of discrimination. Plaintiff further argues that defendant cannot show that it would have made its decision even when not considering plaintiff's back condition.

Discussion

The Vermont Fair Employment Practices Act (VFEPA) sets forth that "[i]t shall be unlawful employment practice…for any employer…to discriminate against…a qualified individual with a disability." 21 V.S.A. § 495(a)(1). The handicapped discrimination provisions under VFEPA are patterned after § 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. *State v. G.S. Blodgett Company*, 163 Vt. 175, 180 (1995). Therefore, Vermont looks to federal case law to guide our interpretation, the allocations of burdens and standards of proof. *Id.* To establish a claim under VFEPA, plaintiff must show that he is a qualified handicapped individual and discriminated against because of his handicap. *Id.*

To withstand summary judgment, plaintiff must present a prima facie case of discrimination. *Gallipo v. City of Rutland*, 163 Vt. 83, 89 (1994). If plaintiff presents evidence that an impermissible factor played a motivating part in the employment decision, then the burden shifts to, and remains with, the employer, who must show that it would have made the same decision even if it had not considered the impermissible factor. *Id.* Unless the Court finds that the plaintiff's evidence is insufficient to make this preliminary showing as a matter of law, under Vermont law, the issue must go to a jury. *Id.*

Recently, the United States Court of Appeals for the Second Circuit recognized the following elements for establishing a prima facie case under the Americans with

Disabilities Act (ADA). A plaintiff must show (1) that his employer is subject to the ADA; (2) that he is disabled within the meaning of the ADA or perceived to be so by his employer; (3) that he was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (4) that he suffered an adverse employment action because of his disability. *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 134 (2d Cir. 2008).

Defendant argues that plaintiff has not proffered evidence as to elements (2), (3) and (4), and, therefore, fails to establish a prima facie case as to both Counts (1) and (2). The Court need only address element (2), that plaintiff is disabled within the meaning of VFEPA, as it is dispositive of both counts.

VFEPA prohibits discrimination in employment against "a qualified handicapped individual." *G.S. Blodgett Company*, 163 Vt. at 180 (citing 21 V.S.A. § 495(a)(1)). A "qualified individual with a disability" means "an individual with a disability who is capable of performing the essential functions of the job or jobs for which the individual is being considered with reasonable accommodation to the disability." 21 V.S.A. § 495d(6)(A).

An "individual with a disability" means "any natural person who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a history or record of such an impairment; or (c) is regarded as having such an impairment." 21 V.S.A. § 495d(5).

"Substantially limits" means "the degree that the impairment affects an individual's employability. An individual with a disability who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered

substantially limited." 21 V.S.A. § 495d(8).

"Major life activities" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and receiving education or vocational training." 21 V.S.A. § 495(9).

I. History or Record of Impairment

Count (1) of plaintiff's Complaint alleges that defendant discriminated against him based on a history of physical impairment. A "history" or "record" of impairment means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one more life activities. 21 V.S.A. § 495(10).

According to the undisputed facts, Mr. Cady previously missed time from work at GE because of his back condition. In March 2005, he experienced a flare-up of his back problems and took approved medical leave from GE. Mr. Cady went on short-term disability. He returned to work at GE in February 2006 and has not missed any work since due to his back. Although plaintiff has not been allowed to work in large engine broach, large engine cast, or any job that requires lifting more than 40 lbs. occasionally and 20 lbs., he is considered a "multitasker" at GE and performs numerous jobs at the L18 level.

Plaintiff argues that he is substantially limited in the major life activity of "working" due to his back condition. He cites his lifting restrictions as evidence that he is substantially limited in "working." However, plaintiff has proffered no evidence that he is likely to experience difficulty in securing, retaining, or advancing in employment. See 21 V.S.A. § 495d(8).

Plaintiff has proffered no evidence beyond his own opinion that his job is not secure and that he will not be able to retain his current L18 position. Likewise, plaintiff has proffered no evidence that he will have difficulty advancing. Plaintiff has formally applied for one job since returning to work in February 2006. This job did not require him to able to lift above his restrictions. Plaintiff did not receive this job, and does not contend that it was due to his back condition.

Furthermore, plaintiff alleges that it would be futile to apply to positions requiring him to lift weight above his restrictions, and his superiors have made this clear to him. Even if the Court were to assume that this fact was true, plaintiff has still not offered any evidence as to how he has experienced difficulty in securing or retaining his employment due to the back condition. See 21 V.S.A. § 495d(8). Nor has he proffered any evidence as to how he has experienced difficulty in advancing in employment, as every job which was "futile" to apply for was also L18. He has not proffered any evidence that these jobs bring with them a higher degree of job security or a higher chance of promotion than his current L18 job.

Finally, it is undisputed that since returning to GE in February 2006, plaintiff has been able to perform all functions of his job despite the lifting restrictions. Since returning to work he has performed work as a cast operator, performed end trimming work and worked on squealer tips, run a mill multiple times, and run a robo drill. Mr. Cady perceives himself as a "multitasker." He has stated "I can do many various job. I have many job skills." As such, he gets moved around to a lot of different jobs and functions at GE.

Plaintiff has not proffered any evidence he has "history" or "record" of

impairment. There is no evidence that he has a physical impairment that substantially limits one more life activities. See 21 V.S.A. § 495d(8). To the contrary, plaintiff agrees that he is able to work his current job at GE, which includes many skills, and he asserts that he is physically able to work jobs at GE for which his lifting restrictions would otherwise bar him from working. As such, there is no genuine issue of material fact that plaintiff has a "history" or "record" of impairment as defined by 21 V.S.A. § 495d(10).

II. Regarded as Having such an Impairment

Count (2) of plaintiff's Complaint alleges that plaintiff is an "individual with a disability" because GE "regards" plaintiff as having such an impairment. See 21 V.S.A. § 495d(5)(C). Plaintiff asserts that he has presented evidence that defendant regards him as having an impairment which substantially limits one or more major life activities due to the lifting restrictions imposed upon him. The Court does not agree.

"'Is regarded as having an impairment' means that the individual (a) has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer as constituting such a limitation; (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of other towards such impairment; or (c) has none of the impairments defined in (7)(A) of this section, but is treated by an employer as having such an impairment." 21 V.S.A. § 495d(11).

Plaintiff has not proffered any evidence beyond the lifting restrictions imposed upon him by defendant which demonstrate that he is "regarded as having an impairment." A lifting restriction, without more, is not a disability. *Wenzel v. Missouri-American Water Company*, 404 F.3d 1038, 1041 (8th Cir. 2005); *Brunko v. Mercy Hosp.*, 260 F.3d

939, 941-42 (8th Cir. 2001). Courts have consistently held that lifting restrictions alone cannot establish that an employer regards an employee as disabled. See *Wenzel*, 404 F.3d at 1041-42 (35 lb. restriction); see also *Brunko*, 260 F.3d at 941 (40 lb. restriction); *Delgado v. Certified Grocers Midwest, Inc.*, 282 Fed.Appx. 457, 462 (7th Cir. 2008) (evidence of 50 lbs. frequently and 25 lbs. occasionally lifting restriction was not sufficient to create genuine issue of material fact as to "regards" prong); *Gayer v. Continental Airlines, Inc.*, 21 Fed.Appx. 347, 350-51 (6th Cir. 2001) (evidence of 40 lbs. lifting restriction insufficient to make out *prima facie* case).

"The provision addressing perceived disabilities is intended to combat the effects of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Brunko*, 260 F.3d at 942 (addressing ADA "regarded as" provision). Here, as in *Brunko*, defendant's perception was not based on any myths or archaic attitudes about the disabled, but rather its perception was based on Dr. Ryder's recommendation that plaintiff could not work in certain positions which would require him to lift more than 40 lbs. frequently and 20 lbs. occasionally. See *Id.*

"The major life activity of working does not mean working at a particular job of that person's choice. An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Id.* The undisputed facts show that defendant did not perceive plaintiff's lifting restriction as substantially limiting the major life activity of working as evidenced by the fact that plaintiff currently works at GE performing a variety of jobs that require different skills.

Furthermore, plaintiff's affidavit and summary from his vocational expert, Mr. LeRoy, focuses on the job market in general and focuses solely on whether plaintiff is in

fact substantially limited in the major life activity of working, not whether defendant GE regards plaintiff as having an impairment.

As such, plaintiff has failed to proffer evidence to create a genuine issue of material fact as to whether defendant GE "regarded" plaintiff as having an impairment. Plaintiff has failed to make out a *prima facie* case, therefore, summary judgment is appropriate.

ORDER

Defendants' Motion for Partial Summary Judgment as to Counts (1) and (2), filed April 24, 2009, is GRANTED.

Plaintiff's Cross-Motion for Partial Summary Judgment, filed June 2, 2009, is DENIED.

Dated at Rutland, Vermont this _____ day of _____, 2009.

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Hon. William Cohen
Superior Court Judge