IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. **98-3051 DV**
USCO LOGISTICS SERVICES, INC.,	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court is defendant's, USCO Logistics Services, Inc. (hereinafter "USCO"), motion for partial summary judgment, pursuant to Fed. R. Civ. P. 56, on issues relating to the plaintiff's, Equal Employment Opportunity Commission (hereinafter "EEOC"), damages. EEOC has filed a response in opposition and USCO has replied.

FACTS

The EEOC brought this complaint on behalf of a Mr. Doe (hereinafter "Doe") against USCO, claiming that Mr. Doe was terminated because of his disability of Acquired Immune Deficiency Syndrome (AIDS). USCO claims that he was fired for insubordination.

Doe began working at USCO's Memphis warehouse in 1997 through a temporary employment service. On or about July 21, 1997, he was hired as an employee of USCO. He earned

$7.81 per hour. His supervisor was Chris Cedor (hereinafter "Cedor").

In early June of 1998, various rumors began to circulate about the warehouse that Doe had an infectious disease, to wit: hepatitis, HIV, or AIDS. Cedor was unfamiliar with how to handle this situation and contacted Cynthia Lawson (hereinafter "Lawson"), USCO's Manager of Environmental Health and Safety. Lawson arranged for a Dr. Jackson to speak to the employees at the Memphis facility concerning infectious diseases. Dr. Jackson spoke to the employees on or about June 16, 1998.

Doe was terminated from his employment with USCO on or about July 10, 1998. After his termination, Doe apparently did not seek any other employment prior to his deposition on February 17, 1999. Doe claimed that the reasons he did not do so was because he felt that no one would hire him because of his disease and that he was too sick to work. He stated that he could not get his medication because he had lost his health insurance when he was terminated from USCO. The depositions of Dr. Land and Dr. Acree support Doe's statements.

In February of 1999, Doe applied for employment at Pomerantz Staffing Service. He was offered positions but turned them down because of bus scheduling problems. In the succeeding months, Doe asked friends and relatives about employment without success. Deposition of Doe, September 1999.

In May of 1999, Doe sought employment from Piggly-Wiggly and accepted a position as a janitor on May 16, 1999, paying $6.00 an hour. He was terminated from this position on July 11, 1999, for absenteeism due to illness. Deposition of Doe, September 1999.

On or about August 10, 1999, Doe applied for and was offered a warehouse position at American Work Force. He did not accept it due to a lack of transportation. Deposition of Doe,

September 1999.

On or about September 9, 1999, Doe applied again at Pomerantz Staffing Services and was offered a job at Avery Dennison, paying $8.00 an hour. He accepted that offer. (Deposition of Doe, September 1999).

USCO has filed its motion for partial summary judgment claiming that Doe should be: 1) denied back pay because he has failed to mitigate his damages, 2) denied front pay because Doe could not have been expected to work at USCO for a long period of time, and 3) denied punitive damages because USCO made a good faith effort to comply with the policies of the ADA.

STANDARD OF LAW

Fed. R. Civ. P. 56 -- Summary Judgment

A party may bring a motion for summary judgment under Fed. R. Civ. P. 56.[1] The purposes of a motion for summary judgment are, primarily, the prompt disposition of actions which lack merit, are unfounded, or are specious and the expeditious resolution of claims where there exists no dispute concerning the material facts of the case. 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2712 (West 1990). Thus, summary judgment protects parties from unnecessary costs and delays, expedites justice, and preserves scarce judicial resources.

A motion for summary judgment should be granted where there are no genuine issues of material fact before the court such that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Trustees of B.A.C. Local 32 v. Fantin

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[1] The court may enter an order of summary judgment, sua sponte. However, the court must provide the losing party the opportunity to come forward with all relevant evidence. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); Salehpour v. University of Tennessee, 159 F.3d 199, 204 (6th Cir. 1998).

Enterprises, 163 F.3d 965, 968 (6th Cir. 1998).

Determination of which party has the burden of proof at trial is a preliminary requirement for analysis of a motion for summary judgment. Where the moving party does not bear the burden of proof at trial, summary judgment will be granted if the movant can demonstrate the absence of any genuine issue of material fact in the record and the absence of evidence supporting the non-movant's claim.[2] The movant, in this situation, is not required to negate the opponent's claim. Thus, if the non-moving party has the burden of proof and the movant has carried this initial burden, then the non-moving party must go beyond the pleadings and demonstrate, with evidentiary material, that a genuine issue of material fact exists to defeat the motion for summary judgment. Celotex, 477 U.S. at 323-24; Kalamazoo River Study Group v. Rockwell International, 171 F.3d 1065, 1068 (6th Cir. 1999); Hammon v. DHL Airways, Inc., 165 F.3d 441, 447 (6th Cir. 1999).

However, if the movant bears the burden of proof at trial, then the movant, in addition to showing the lack of any genuine issue of material fact, must also produce sufficient evidentiary material to meet its burden of proof to prevail on a motion for summary judgment. Celotex, 477 U.S. at 323-24. See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Thaddeus-X v. Blatter, 175 F.3d 378, 399 (6th Cir. 1999). Of course, in either situation where the movant does or does not bear the burden of proof at trial, in addition to demonstrating no genuine issue of material fact, the movant must also show legal entitlement to judgment.

When evaluating a motion for summary judgment, the facts are to be construed in a light most favorable to the non-moving party. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,

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2 However, the court may still deny the motion for summary judgment where there is an inadequate factual basis or record to support the ruling. 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2728 (West 1990). See also Askew v. Hargrave, 401 U.S. 476, 479-80 (1971).

475 U.S. 574, 587 (1986); Board of Education v. Pico, 457 U.S. 853, 864 (1982); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Indeed, the evidence of the non-movant is to be believed and justifiable inferences are to be drawn in his favor. Kalamazoo River Study Group v. Rockwell International, 171 F.3d 1065, 1068 (6th Cir. 1998). However, mere conclusory allegations do not establish a genuine issue of material fact. Thaddeus-X v. Blatter, 175 F.3d 378, 399-400 (6th Cir. 1999). Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell International, 171 F.3d 1065, 1068 (6th Cir. 1998).[3]

Genuine issues of material fact are established by evidentiary materials. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986); 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2721 (West 1990). Evidentiary materials, besides affidavits, should be authenticated, unless they are part of the pleadings, depositions, answers to interrogatories, or admissions on file. Authentication can be accomplished through the use of affidavits. 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2722 (West 1990).[4]

The court, in its discretion, may accept oral testimony when considering a motion for summary judgment. Fed. R. Civ. P. 43(e); 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2723 (West 1990). However, this is only allowed infrequently as the motion for summary judgment then almost becomes a trial and defeats the very purpose of the motion.

Thus, there are two primary considerations when evaluating a claimed issue of fact in a

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3 However, the evidentiary materials presented to avoid summary judgment need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999). But, hearsay evidence may not be considered on a motion for summary judgment. Jacklyn v. Schering-Plough Healthcare Products Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999).

4 Unauthenticated material may be considered by the court when evaluating a motion for summary judgment if the opposing party does not object to it. 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2722 (West 1990).

motion for summary judgment: genuineness and materiality. Genuineness refers to whether a reasonable fact finder could enter a judgment for the non-moving party and materiality refers to whether the fact will affect the outcome of the case. Anderson, 477 U.S. at 248; Trustees of B.A.C. Local 32 v. Fantin Enterprises, 163 F.3d 965, 968 (6th Cir. 1998). To contest genuineness, an opponent must "do more than show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Determining materiality is dependent upon the substantive law's identification of which facts are relevant. Anderson, 477 U.S. at 248.

Finally, the court may deny a motion for summary judgment without prejudice to renewal, for various reasons including the completion of discovery. 10A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 3d § 2728 (West 1990). Where the court has any doubt as to the propriety of granting a motion for summary judgment, it lies within the court's discretion to deny it.

ANALYSIS

USCO claims that it is entitled to partial summary judgment concerning damages and that EEOC should be: 1) denied back pay because Doe has failed to mitigate his damages, 2) denied front pay because Doe could not have been expected to work at USCO for a long period of time, and 3) denied punitive damages because USCO made a good faith effort to comply with the policies of the ADA.

First, USCO claims that EEOC should be denied back pay because Doe failed to exercise reasonable diligence to mitigate his damages. USCO claims that Doe should have been more

diligent in trying to find and accept employment. Rasimas v. Michigan Department of Mental Health, 714 F.2d 614, 623-25 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984). In support of its argument, USCO presents expert evidence as to the availability of jobs in the Memphis area during the period 1996-99 and refers to Doe's apparent lackluster attempts to obtain mitigating employment.

Although, it is clear from the record that Doe did not seek another position for approximately seven months and that he refused several job offers subsequent to this seven month period, Doe presents several reasons for these actions which are entirely legitimate: illness, lack of transportation, and differing hours. See McCann Steel Co. v. NLRB, 570 F.2d 652, 655 (6th Cir. 1978)(concerning similar hours); NLRB v. Westin Hotel, 758 F.2d 1126, 1130 (6th Cir. 1985)(concerning travel difficulties). The very case that USCO cites states that whether a claimant has exercised due diligence is a question of fact. Id. at 623.

USCO also claims that Doe contradicted the testimony of his first deposition, taken in February of 1999, by the testimony in his second deposition, taken in September of 1999, and that the second deposition should be disregarded as an improper attempt to create an issue of fact. See Biechele v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984). In the first deposition, Doe stated that he did not immediately seek additional employment because he thought no one would hire him because of his illness. In the second deposition he stated that his illness was the reason that he did not seek additional employment immediately and was not seeking employment as often as he could have been. A review of the depositions shows that these statements by Doe were not necessarily contradictory and could reasonably be construed as supplementary, especially given additional statements by Doe in his first deposition that, taken in a light most favorable to him, indicate that sickness was a concern.

As the standards of summary judgment require that the facts be taken in a light most favorable to the non-movant (in this matter, Doe), this court cannot hold to any degree of certainty as required by the standards of summary judgment that Doe was not reasonably diligent, especially given the reasonable justifications he advances for not accepting or seeking employment. See NLRB v. Westin Hotel, 758 F.2d 1126, 1130 (6th Cir. 1985)(holding that the required degree of diligence for seeking mitigating employment is not the highest -- it need only be reasonable). Thus, summary judgment under this argument is not appropriate as there appear to be genuine issues of material fact.[5]

Second, USCO argues that EEOC is not entitled to front pay because Doe could not have been expected to work for USCO for a long period of time. Both USCO and EEOC presented expert witnesses on the issue of front pay: USCO against the award of front pay and EEOC in support of the award of front pay.

An award of front pay is within the discretion of the court. Suggs v. Servicemaster Education Food Management, 72 F.3d 1228, 1234 (6th Cir. 1996). However, an award of front pay is dependent upon a number of factual elements which include: 1) the employee's future in the position from which he was terminated, 2) his work and life expectancy, 3) his obligation to mitigate damages, 4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment, 5) the discount tables to determine the present value of future damages, and 6) other factors pertinent to the award of prospective damages. Id. Thus, an

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[5] The court is concerned with the fact that the documents in the record which reflect this genuine issue of material fact were apparently available to the movant prior to the filing of its motion for summary judgment. Summary judgment will not be granted where the movant presents in its motion only those facts which support the motion and ignores those facts in the record which would otherwise defeat it. Summary judgment is not a procedural tool which should be filed in every case as a matter of course. Counsel is admonished that summary judgment motions should only be filed when there exist no genuine issues of material fact.

award of front pay is, essentially, a question of fact.[6]

As an award of front pay is essentially a question of fact, all questions of fact should be taken in a light most favorable to the non-movant. With regard to this ground for partial summary judgment raised by USCO, it is obvious there are genuine issues of material fact. First, for example, whether Doe reasonably mitigated his damages is a relevant factor, which this decision has already shown exists as a genuine issue of material fact precluding summary judgment. Second, with regard to the value of the front pay, both parties presented experts and USCO actually argued the merits of the two experts' opinions in its brief. This is not appropriate for summary judgment and is only proper at trial. Thus, summary judgment under this ground for USCO is without merit.

Third, USCO claims that EEOC should be denied punitive damages because USCO made a good faith effort to comply with the policies of the ADA. USCO cites to Kolstad v. American Dental Association, 119 S.Ct. 2118, 2129 (1999), for the position that an employer should not be held liable for the purposes of punitive damages concerning the acts of its managerial agents which are contrary to the employer's good faith efforts to comply with Title VII. In support, USCO refers to its attempts to educate their personnel about AIDS/HIV.

In response, EEOC notes that under Kolstad, if the employer intentionally acts with at least reckless indifference, such that it is aware that it may be acting in violation of federal law, then punitive damages may be warranted. Id. at 2124-25. Thus, the employer's acts must involve at least some perceived risk that the act will violate federal law to be liable for punitive damages.

Given the immense publicity concerning the ADA in recent years and the well known fact

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6 Although front pay is an issue of fact, the court will calculate front pay in the event of a finding of liability.

that it is illegal to fire a person due to a disability, and considering that AIDS/HIV is considered a disability and that Doe suffered from AIDS, which was known before USCO terminated him, under the standards of summary judgment, taking the facts in a light most favorable to Doe, it would be a gross miscarriage of justice for this court to conclude that USCO was not at least aware that there was some risk in firing Doe. Doe's termination, if it was, in fact, because he suffered from AIDS, could reasonably be characterized as reckless indifference on the part of USCO. Further, there appears to be no basis in the record for any argument that Doe's termination was not intentional.

EEOC also argues that USCO's good faith efforts were directed at educating USCO's personnel about AIDS/HIV and not directed toward preventing discrimination involving the hiring/firing of employees. Therefore, EEOC claims that the good faith exception of Kolstad should not apply to USCO. Indeed, USCO does not present any claim that it had taken any good faith efforts to prevent this type of discrimination through training management personnel on the provision of the ADA (i.e., termination based upon a disability). USCO's educational endeavors to minimize concern over the HIV are laudable, but not a substitute for training on the provisions of ADA to prevent discrimination. Thus, it would seem that EEOC's argument is well taken.

Thus, it would appear that punitive damages may very well be appropriate in this matter. Taking the facts in a light most favorable to Doe, summary judgment for USCO is simply not appropriate.

CONCLUSION

Based on the foregoing, the court finds that there are genuine issues of material fact in the record which preclude summary judgment for USCO.

Accordingly, USCO's Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED this 4th day of November 1999.

BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE