

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

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WESTERN DISTRICT OF TN JACKSON

EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
 )  
Plaintiff, )  
 )  
VS. )  
 )  
GENERAL ELECTRIC COMPANY, )  
 )  
Defendant. )

No. 01-1137

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ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Equal Employment Opportunity Commission (“EEOC”) has filed suit on behalf of Oscar S. Graham against Graham’s former employer, General Electric Industrial Systems,<sup>1</sup> for allegedly discriminating against him in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* Defendant has filed a motion for summary judgment. Plaintiff responded to the motion, and Defendant filed a reply to the response. On June 14, 2002, the court entered an order denying Defendant’s motion to strike Plaintiff’s amended answer to interrogatories and the portion of Plaintiff’s response to the motion for summary judgment which relied on that amended answer but finding that Defendant was entitled to conduct discovery on the issue of whether Defendant perceived Graham to be disabled. Defendant’s deadline to conduct discovery was extended, and

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<sup>1</sup> Defendant is incorrectly identified in the complaint as “General Electric Company.”

Defendant was allowed additional time in which to supplement its motion for summary judgment.<sup>2</sup> Plaintiff was allowed additional time to file a supplemental response. The parties have now fully briefed the court. For the reasons set forth below, the motion for summary judgment is DENIED.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the “absence of a genuine issue of material fact as to an essential element of the nonmovant's case.” Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

“If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Anderson, 477 U.S. at 249. Rather, “[t]he inquiry on a summary

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<sup>2</sup> In its supplemental memorandum, Defendant attempts to re-argue the motion to strike. Defendant's Supp. Memo. at pp. 10-11. Defendant has failed to convince the court that its previous ruling was in error.

judgment motion . . . is . . . ‘whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.’” Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The complaint alleges that Graham is a qualified individual with a disability within the meaning of the ADA in that he has severe chronic pain and neurological damage. The complaint further alleges that Defendant refused to allow Graham to return to work in his job as a general factory operator/welder after a medical leave of absence. According to the complaint, Defendant subsequently terminated Graham’s employment because of his disability and because of the mitigating measures required to treat Graham’s disability, i.e., narcotic drugs dispensed with a surgically implanted pump.

In January 1997, Graham began experiencing pain in his back and side and was placed on a medical leave of absence when he was unable to continue working.<sup>3</sup> In November 1997, Graham was diagnosed as having neuropathic pain in the T8/9 dermatome and a post viral syndrome. An intrathecal pump that delivered narcotic pain medication was inserted in Plaintiff in December 1997. He was released to return to work by his physician on January 16, 1998.

Before Graham was allowed to return to work, Defendant required him to undergo an examination by its company physician, Dr. James Smith. Dr. Smith notified Defendant that

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<sup>3</sup> The facts are stated for the purpose of deciding this motion only.

Graham should not be allowed to return to work in any capacity until his condition could be controlled by “non-narcotic and non-sedating medication for a period of time such as two of three months.” Dr. Smith continued to monitor Graham’s medical records and refused to authorize his return to work based on his continued use of narcotics. On October 18, 1998, Graham was notified that his employment had been terminated effective January 18, 1998, because he had been absent from work for more than one year.

Defendant acknowledges that Graham was terminated because he was taking narcotic medication. Defendant’s Supp. at p. 2. However, according to Defendant, Graham was not regarded as having a disability but, instead, as being a consumer of narcotic medication. Id. Defendant has presented the affidavit of Dr. Smith, in which he states that he would not let Graham perform any work for Defendant “except to sit at a desk and do nothing.” Smith Affidavit, Defendant’s Exhibit A. Dr. Smith states that he did not base his opinion on any impairment that Graham had, but, instead, his opinion was based on “the mind-altering effects of narcotic medication [which] can affect an employee’s judgment in a way that they could jeopardize the company’s operation in any way.” Id.

Additionally, Defendant contends that Graham cannot perform the requirements of his job without or without reasonable accommodation. Defendant describes the accommodation needed by Graham as being the waiver of Defendant’s drug-free workplace policy and argues that this accommodation is not reasonable. Defendant also argues that Graham has not shown that he can perform the essential functions of his job without his

narcotic medication. Finally, Defendant asserts that it is entitled to rely on the business necessity defense.

The ADA prohibits an employer from discriminating against a qualified individual with a disability because of that disability. 42 U.S.C. § 12112(a). See McKay v. Toyota Motor Manufacturing, U.S.A., Inc., 110 F.3d 369 (6<sup>th</sup> Cir.1997). A “qualified individual with a disability” is defined as 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. 42 U.S.C. § 12111(8). To establish a claim under the ADA, a plaintiff must prove that (1) he is a disabled person within the meaning of the ADA, (2) that he is qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) that he suffered an adverse employment decision because of his disability. McKay, 110 F.3d at 371. The ADA defines disability as:

- (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.

42 U.S.C. § 12102(2).

An employer may impose as a qualification standard “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,” § 12113(b), with “direct threat” being defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” Albertson's, Inc. v.

Kirkingburg, 527 U.S. 555 (1999) (quoting § 12111(3) and § 12113(b) and citing 29 CFR § 1630.2(r) (1998)). Accordingly, the ADA requires a case-by-case analysis of disabled individuals “to accurately determine what risks, if any, they pose to themselves or the public.” Stillwell v. Kansas City, Mo. Bd. of Police Commissioners, 872 F. Supp. 682, 687 (W.D. Mo. 1995) (holding that an across-the-board exclusion of persons with one hand as armed security guards violates the ADA). See also Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993) (finding that a rule prohibiting persons with insulin-dependent diabetes from employment as police officers is a blanket exclusion violative of the ADA). “An individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices.” Id. at 1219. See also Smith v. Chrysler Corp., 155 F.3d 799, 805 (6<sup>th</sup> Cir.1998) (“The thesis of the [ADA] is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have.” (quoting 136 Cong. Rec. S 7422-03, 7347 (daily ed. June 6, 1990) (statement of Sen. Harkin)); EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1097 (6<sup>th</sup> Cir.1998) (The ADA serves to “prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual's disability rather than on the individual's actual characteristics.”)

On September 7, 2001, the court denied Defendant’s motion to dismiss and stated as follows:

In the present case, it is not possible to conclude at this stage of the proceedings whether the drugs that Graham receives through his surgically implanted pump have such an effect on him as to render him unable to perform his job without creating a significant risk to the safety of others which could not be eliminated by reasonable accommodation. There is no evidence in the record as to how surgically implanted pumps operate, how the drugs affect Graham, and whether any reasonable accommodations were available which would have eliminated any significant risk to others. Because the record does not reflect an individualized assessment of the risk that Graham poses to others in the workplace, the court cannot find that Plaintiff cannot prove any set of facts in support of its claim that would entitle it to relief.

In its motion for summary judgment, Defendant has not presented evidence to show that an individualized assessment was conducted. Instead, Defendant admits that its policy is enforced without regard to the individual. Defendant's Memorandum at pp. 17-18. Because a trier of fact could find that Dr. Smith's medical opinion that Graham could not work was based on "inaccurate stereotypes and prejudices" rather than an assessment of Graham's individual abilities, summary judgment on this ground is not appropriate.

Although Defendant states that it did not regard Graham as having an impairment, there is evidence that Defendant perceived Graham's use of the narcotic pump as being an impairment based on Dr. Smith's statement that he did not believe that Graham could perform any work while using the narcotic pump. Thus, a trier of fact could conclude that Defendant regarded Graham as having an impairment that "substantially limited" him in the "major life activity" of working. See Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1050 (5<sup>th</sup> Cir.1998), citing 29 C.F.R. § 1630.2(i) (Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.")

As to Defendant's contention that Graham could not perform the essential functions of his job with or without reasonable accommodation, Plaintiff has presented evidence that Graham could perform his job in January 1998 when he was released to return to work. Dr. Feler testified in his deposition that Graham could safely perform his work at that time. Plaintiff's Exhibit 3. Dr. Feler released Graham to return to work with no restrictions. Id. Defendant was made aware of Dr. Feler's opinion in January 1998. Id. Although Dr. Feler opined that it was "conceivable that the patient could have a pump malfunction and develop an altered mental state," he also stated that "this is not expected." Id. Consequently, there is a disputed issue of fact as to whether Graham could perform the essential functions of his job in January 1998.

Defendant's reliance on its "drug-free workplace" policy as mandating summary judgment is misplaced. The ADA prohibits the use of standard tests and selection criteria that "screen out or tend to screen out" persons with disabilities. 42 U.S.C. § 12113(a). Such screening mechanisms are permissible only if they are both "job-related" and "consistent with business necessity." Id. The employer has the burden of showing that the selection criteria is a business necessity. See Andrews v. Ohio, 104 F.3d 803, 807-08 (6<sup>th</sup> Cir.1997); EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1283-84 (7<sup>th</sup> Cir.1995). If the employer does so, the employee may still show that a less discriminatory alternative test would serve the employer's interest, and thereby defeat the attempt to invoke the defense. Morton v. United Parcel Service, Inc., 272 F.3d 1249 (9<sup>th</sup> Cir. 2001) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

Defendant's written policy, on its face, refers to unlawful drugs. Defendant's Exhibit 11. A trier of fact could find that Dr. Smith's interpretation that the drug-free policy also applied to prescribed narcotics was merely his personal belief that workers should not be taking narcotics on a continuous basis, this creating a question of fact as to the meaning of the policy which precludes summary judgment.

Furthermore, there are disputed questions of fact as to whether the policy was a business necessity. See Rowles v. Automated Production Sys., Inc., 92 F. Supp. 2d 424 (M.D. Pa. 2000) (Genuine issues of material fact exist as to whether under the ADA an employer's policy of prohibiting all employees from using legally prescribed, controlled substances is job-related and consistent with business necessity). C.f. Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153 (D. Colo. 1996), *aff'd in relevant part and rev'd in part on other grounds*, 124 F.3d 1221 (10<sup>th</sup> Cir.1997) (employer's blanket policy to require disclosure of prescription drugs prior to a drug test is a medical inquiry not job-related or consistent with business necessity and violates the ADA). When an employer attempts to defend a general safety-based qualification standard applicable across-the-board as a business necessity, "the strength of the defense ... turns on whether the employer can justify the safety standard as a general rule." E.E.O.C. v. Exxon Corp., 203 F.3d 871, 874 (5<sup>th</sup> Cir. 2000). The employer must show that "the risks are real and not the product of stereotypical assumptions." Id. at 875.

In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence. The

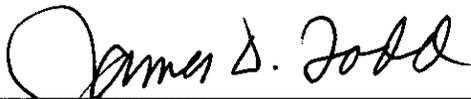
acceptable probability of an incident will vary with the potential hazard posed by the particular position: a probability that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example. In short, the probability of the occurrence is discounted by the magnitude of its consequences.

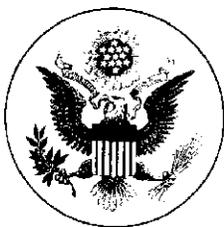
Id. at 875.

Here, Defendant has offered no evidence, other than Dr. Smith's opinion, as to the actual risks associated with allowing employees who use prescription narcotics to continue in their employment. There is no evidence as to the "magnitude of possible harm as well as the probability of occurrence." At this juncture, the court cannot determine if "the risks are real" or if they are "the product of stereotypical assumptions." Therefore, summary judgment on this ground is not appropriate.

Because Defendant has failed to establish that it is entitled to judgment as a matter of law, Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

  
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JAMES D. TODD  
UNITED STATES DISTRICT JUDGE  
  
\_\_\_\_\_  
DATE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 40 in case 1:01-CV-01137 was distributed by fax, mail, or direct printing on October 2, 2002 to the parties listed.

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Honorable James Todd  
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