

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION



Equal Employment Opportunity
Commission,

Case No. 01-72130

Plaintiff,

Honorable Nancy G. Edmunds

v.

Daimler Chrysler Corporation,

Defendant.

FILED

MAY 20 2002

CLERK'S OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Equal Employment Opportunity Commission ("EEOC") filed this lawsuit pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA") on behalf of Thomas Diem ("Diem") who Daimler Chrysler Corporation ("Daimler") extended an employment offer contingent upon a physical examination and then, after Diem "failed" the exam, withdrew the offer. The EEOC claims that Daimler refused to hire Diem on the basis of a disability. Daimler now moves for summary judgment, claiming that Diem is not disabled pursuant to the ADA. The EEOC concedes that Diem is not actually disabled, but argues that Diem is protected by the ADA because he has a record of a disability and Daimler regarded him as disabled. Because the EEOC fails to establish that Diem was disabled under the statute, Daimler's motion for summary judgment is **granted**.

I. Facts

Diem applied for employment at Daimler on February 26, 1999. On his application, Diem specified that he was qualified for the positions of hi-lo repair, truck repair, and management. See Pl.'s Resp. Ex. 1. At the time of application, Diem was working for the Friendly Ford Automobile Dealership as an automobile mechanic. See *id.* Ex. 2 at 50. In that position he routinely had to bend, stoop, squat, and twist. See *id.* Ex. 2 at 24, 38-39. Despite previous hip problems, including hip replacement surgery in April 1982, Diem was able to perform these tasks without any restrictions. See *id.* at 51.

Sometime around July 25, 1996, Daimler notified Diem of a jitney repair mechanic position at its Detroit Axle plant (the "plant").¹ Steven Venglarcek, Daimler's Maintenance Area Manager at the plant, and Gary Pakula, the plant's maintenance supervisor, interviewed Diem for the position on July 25. See *id.* at 33-34, Ex 3, & Ex. 4. On that day, they offered Diem the position, conditional upon his successful completion of a physical examination by the plant's physician, Dr. Asit Ray. See *id.* Ex. 2. Prior to his physical exam, Diem completed a "Self-Administered Medical History" form in which he disclosed the following previous or existing physical problems: (1) hip, knee, or foot trouble; (2) hip, knee, or foot operation; (3) broken or fractured bones; and (4) painful or swollen joints. See *id.* Ex. 13. Dr. Ray received this form prior to examining Diem. See *id.* Ex. 5 at 12. Dr. Ray also received a form entitled

¹A jitney is a hi-low. See Pl.'s Resp. Ex. 2 at 42.

"Replacement Examination Insert," a type-written document that indicated, among other things, that Diem had left hip replacement surgery in 1982 and currently walked with a limp. See *id.* Ex. 14. Dr. Ray, however, cannot recall whether he saw this document prior to the examination. See *id.* Ex. 5 at 14-15 & 18.

Dr. Ray does not remember Diem's examination. See *id.* Ex. at 9. Diem, however, recalls that Dr. Ray checked him for a hernia, listened to his chest, asked him about the scar on his hip, and asked him to twist his body. See *id.* Ex. 2 at 35-36 & 39. Diem does not recall being asked to stoop, lift his knee, or to sit in a chair and bend. See *id.* At his deposition, however, Diem acknowledged that Dr. Ray had asked him to complete some physical tests, such as bending and stooping, but that at the time Diem had not understood Dr. Ray because of the latter's accent. See *id.* at 36. Diem claims that he could have done those physical activities without difficulty.² See *id.* at 39, 40-41.

When his physical examination ended, Diem believed he had passed. See *id.* at 35-36, 39. Dr. Ray, however, completed a "Request for Medical Services" form on which he assigned Diem "PQX" codes of 40 and 60, indicating that Diem was not physically qualified to perform jobs that required climbing (code 40) and that he could only perform minimal stooping, squatting, bending, or twisting of the body (code 60). See *id.* Ex. 6 & Ex. 12. Dr. Ray then forwarded the form to the human resources

²Although Diem's activities were limited before and immediately after his hip replacement surgery in April 1982, Diem claims that by July 11, 1983, he was able to perform all of the duties of his then current job as a repair mechanic at McLouth Steel. See Pl.'s Resp. Ex. 2 at 24, 39. In that position, Diem routinely had to climb, bend, stoop, squat, and twist. See *id.* at 24, 38-39.

department. Christine Soukup, an employment supervisor at the plant, received Diem's paperwork and recalls speaking with Dr. Ray regarding his findings. *See id.* Ex. 7 at 21. According to Ms. Soukup, Dr. Ray told her that Diem was not able to sit in a chair and bend over without risk of physical injury. *See id.* As the jitney mechanic position required working while "standing, leaning, squatting, and reaching around the jitney," Daimler rescinded its offer to Diem. *See id.* Ex. 2 at 43-44, Ex. 4. According to Daimler's records, there were no positions within the plant's Jitney Repair area that Diem could perform as they all required physical abilities of which Dr. Ray found Diem incapable.³ *See id.* Ex. 4.

Based upon these events, Diem filed an EEOC charge against Daimler on August 21, 1996, alleging that Daimler discriminated against him by rescinding its job offer because the company feared that he would "aggravate his disability." *See id.* Ex. 15. Approximately one year later, however, Daimler contacted Diem and offered him a warehouse position at its Warren Truck Depot Facility. *See id.* Ex. 8 at 89. Diem declined to interview for the position because he was scheduled for a second hip replacement in August or September. *See id.* Diem indicated that he would be available for work in December 1997. *See id.* In December, Daimler contacted Diem regarding a jitney repair mechanic position at its Jefferson North Assembly Plant ("JNAP"). *See id.* Ex. 2 at 51-52. Daimler subsequently interviewed Diem for the position and offered him the position conditioned upon his successful completion of a

³According to Daimler's internal documents, the Jitney Repair area at its Detroit Axle Plant did not have any provisions for any type of bench work. *See* Pl.'s Resp. Ex. 4. Additionally, all positions within the Jitney Repair Department at that facility required "standing, leaning, squatting, and reaching around the jitney." *See id.*

physical examination. See *id.* Dr. James Miller, Daimler's physician at JNAP, examined Diem and determined that he was physically qualified. See *id.* Diem began working as a jitney mechanic at JNAP in January 1998, and currently is employed there.⁴ See *id.*

II. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. See *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon

⁴The EEOC therefore only is seeking lost wages and benefits for Diem from the time Daimler rescinded its first offer of employment in July 1996, until he began working there in January 1998. See Pl.'s Resp. at 10 n. 4.

which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. See *Liberty Lobby*, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. See *id.* at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." See *id.*

III. Applicable Law and Analysis

The ADA prohibits covered entities, which includes Daimler, from discriminating against qualified individuals with a disability. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477 (1999). Specifically, it provides that no covered employer "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." *Id.* (quoting 42 U.S.C. § 12112(a)). The ADA defines a "qualified individual with a disability" 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).

The Act 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 impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Thus to be a qualified individual under the ADA, one must have an actual disability, have a record of a disability, or be regarded as having a disability. See *Sutton*, 527 U.S. at 478.

There are two ways in which individuals fall within the “regarded as” provision of §12102(2)(C): “(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 489. 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.”

Id. (quoting 42 U.S.C. § 12101(7)(providing findings and purpose of ADA)); see also 29 C.F.R. pt. 1630, App. § 1630.2(l)(explaining that the purpose of the “regarded as” prong is to cover individuals “rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities”). Thus, “if an employer ascribes to [an] individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job’s duties,” the individual may fall into the definition of one regarded as having a disability. *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001).

The ADA does not define the phrase “substantially limits” or delineate what activities constitute “major life activities.” The EEOC, however, has issued regulations

which define these terms. "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). In an interpretative guidance accompanying the regulations, the EEOC notes that this list is not all-encompassing and emphasized that point by adding sitting, standing, reaching, and lifting to the roster of likely major life activities. See 29 C.F.R. pt. 1630, App. § 1630.2(i). The Supreme Court recently has provided that "major . . . refers to those activities that are of central importance to daily life." *Toyota Motor Manuf., Ky., Inc. v. Williams*, 122 S. Ct. 681, 691 (2002).

According to the regulations, "substantially limits" means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly 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.

See 29 C.F.R. § 1630.2(j)(1). The regulations provide courts with the following factors to consider in determining whether an individual is substantially limited in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630(j)(2). With respect to the major life activity of working, the guidelines provide:

The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630(j)(3). As the Supreme Court explained in *Sutton*:

one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 492. In other words, "[a]n employer does not necessarily regard an employee as disabled 'simply by finding the employee to be incapable of satisfying the singular demands of a particular job.'" *Cotter v. Ajilon Servs., Inc.*, 2002 WL 715038 (6th Cir. April 25, 2002)(quoting *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996)).

The regulations define a "class of jobs" as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). Thus if an employer mistakenly believes that an individual's impairment deems him or her incapable of performing any heavy labor job, the individual would be substantially limited in the major life activity of working. The

guidelines provide that "this would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs." *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001)(citing 29 C.F.R. § 1630, App. at 353-54). As further illustration, the Sixth Circuit has provided the following:

an individual may be disabled by a lifting restriction of 23 pounds, by being substantially impaired in the major life activity of working, if that restriction prevented him from performing "medium to heavy lifting and other forms of manual labor," and those jobs constituted the majority of the jobs from which the plaintiff is suited based on his age, education, and experience.

Id., 247 F.3d at 652 (citing *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 253-54 (6th Cir. 2000)). In *Henderson*, the Sixth Circuit held that the plaintiff raised a genuine issue of material fact as to whether her employer regarded her as disabled under the ADA by showing that her employer perceived her as unable to perform anything but "light duty" work, and that it perceived that medium to heavy manual labor constituted a majority of the jobs available to her based on her age, education, and experience. *Id.*

To state a claim under the ADA, a plaintiff must establish: "(1) that he is an individual with a disability; (2) that he is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and (3) that he suffered an adverse employment action 'because of' his disability." *Holiday v. City of Chattanooga*, 206 F.3d 637, 642 (6th Cir. 2000)(citations omitted). Diem has produced sufficient evidence to survive summary judgment on the second and third elements of this test. Diem's deposition testimony and affidavit and the affidavit of Charles Mullins, his former co-worker at McLouth Steel, indicate that Diem was physically capable of performing

the job requirements of the jitney mechanic position at Daimler's Detroit Axle Plant. See Pl.'s Resp. Ex. 2, Ex. 10 & Ex. 13. There is no dispute that Daimler decided not to hire Diem for that position because of his "disability." This case therefore turns on the first element of this test-- whether Diem is "disabled" within the meaning of the ADA.

To satisfy this element, the EEOC argues that Daimler mistakenly believed that Diem's hip impairment substantially limited his ability to perform the major life activities of bending, climbing, stooping, squatting, and sitting or, in the alternative, the major life activity of working.⁵ See Pl.'s Resp. Ex. 4. These activities alone qualify as major life activities.⁶ Dr. Ray only determined, however, that Diem was not physically qualified to perform a job that required more than minimal bending, stooping, squatting, or twisting of the body or climbing. Thus Daimler assigns "PQX" codes in order to link an applicants' physical impairments to his or her ability to work in particular jobs. The "PQX" system is not a determination of the applicants ability to perform these major life activities in general.

The relevant question, therefore, is whether Daimler *mistakenly* believed that Diem's physical impairment substantially limited his ability to work. The answer to this

⁵The record in fact indicates that Daimler regarded Diem as being capable of only "minimal stooping, squatting, bending, or twisting of the body" and that bending over while sitting in a chair would place him at risk of physical injury. See Pl.'s Resp. Ex. 4 & Ex. 12.

⁶The EEOC regulations and cases identifying major life activities strongly suggest that squatting, stooping, twisting, and bending are major life activities. See 29 C.F.R. §§ 1230.2(i) & (j); see also *Henderson v. Ardcro, Inc.*, 247 F.3d 645, 650 (6th Cir. 2001)(stating that lifting and working are major life activities); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11 (1st Cir. 2002)(holding that lifting is major life activity); *Triebert v. Lindberg Sch. Dist.*, 2002 WL 57065 (E.D. Mo. April 11, 2002)(finding sitting, standing, lifting, reaching, and sexual relations to be major life activities).

question is no. Not because Diem has failed to provide evidence to suggest that Daimler perceived his impairment as rendering him incapable of performing a substantial class of jobs.⁷ But because Daimler did not *mistakenly* believe that Diem's impairment substantially limited his ability to work.

The Sixth Circuit has explained that "[t]he 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.'" *Holiday*, 206 F.3d at 643 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998))(quoting 136 Cong. Rec. S. 7422-03, 7347 (daily ed. June 6, 1990)(statement of Sen. Harkin)). As the *Holiday* Court further observed, "[t]he ADA thus 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.'" *Id.* (quoting *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998)); *see also*, 29 C.F.R. Pt. 1630, App. § 1630.2(l) (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987)). Thus cases in which plaintiffs prove that they are "disabled" pursuant to the "regarded as"

⁷Diem in fact has presented sufficient evidence to raise a factual dispute as to whether Daimler believed that his disability substantially limited his major life activity of working. Daimler claims that while it found Diem physically unfit for the jitney mechanic position at its Detroit Axle Plant, it regarded Diem as capable of working in other positions and/or in other plants. As proof, Daimler points to its subsequent call to Diem in the Summer of 1997 regarding a position at its Warren Truck Depot and employment of Diem shortly thereafter as a jitney mechanic at JNAP. *See* Def.'s Reply at 4-5. Diem, however, presents evidence to indicate that his perceived impairment significantly limits his ability to work in a broad class of jobs. *See* Pl.'s Resp. Ex. 17 at 29-30 and Ex. 18.

theory typically involve employers making adverse employment decisions based on their biases, ignorance, or unfounded fears about the plaintiffs' impairments. For example in *Holiday*, the city of Chattanooga offered the plaintiff a position on its police force, conditioned upon his passage of a physical examination. *Holiday*, 206 F.3d at 640. During the physical examination, the plaintiff informed the city's doctor that he was infected with HIV. *Id.* at 641. The doctor then advised the city that the plaintiff had failed the physical examination because "he was not strong enough to withstand the rigors of police work." *Id.* When the city subsequently revoked its offer, the plaintiff filed suit alleging that it had violated the ADA. The district court granted the city's motion for summary judgment, finding that the plaintiff failed to prove that he was "otherwise qualified" to perform the job for which he had applied. The court of appeals reversed, holding that the doctor's assessment was not based on an individualized inquiry into the applicant's actual physical condition, but rather on unfounded fear, prejudice or ignorance, and that there was evidence indicating that the applicant in fact was physically qualified to perform the duties of a police officer. *Id.* at 644-45.

In this case, the record indicates that Dr. Ray made an individualized evaluation of Diem and determined that he could not bend, squat, twist, or stoop without the risk of physical injury. This evaluation was accurate based on Diem's failure to perform maneuvers Dr. Ray requested (albeit Diem did not respond to the doctor's requests because he did not understand him). It therefore was not an evaluation based on a mistaken belief with respect to Diem's impairment.⁸ Dr. Ray did not base his

⁸It was neither Dr. Ray's nor Diem's fault that Diem did not perform these maneuvers because he did not understand the doctor's requests. Thus the fact that Dr. Ray's

assessment on "biases, ignorance, or unfounded fears about [Diem's] impairments."⁹

The evidence indicates that Daimler, in good faith, relied upon Dr. Ray's assessment of Diem's physical condition in making its decision to revoke its employment offer, rather than on an intent to discriminate. The ADA forbids discrimination based on stereotypes, "but it does not forbid decisions based on the actual attributes of the [disability]." *See Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 443 (6th Cir. 1991).

To prove that Diem was disabled, the EEOC also argues that Diem has a "record of" a disability. The guidelines provide, "[t]his part of the definition is satisfied if a record *relied on by an employer* indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities." 29 C.F.R. Pt. 1630, App. § 1630.2(k)(emphasis added). The guidelines plainly state, and several courts including the Sixth Circuit Court of Appeals have held, that a plaintiff must demonstrate that the covered entity was aware of the plaintiff's record of a disability. *See id.*; *see also Keith v. Ashland, Inc.*, 205 F.3d 1340 (6th Cir. 2000)(Table); *Davidson v. Midelfort Clinic. Ltd.*, 133 F.3d 499, 510 n. 8 (7th Cir. 1998); *Hilburn v. Murata Elec. N.*

evaluation in fact was inaccurate is not relevant since he based it on the abilities Diem actually displayed during the physical examination. This was not a matter of mistaken beliefs, but rather of miscommunication.

⁹As discussed above, the legislature added the "regarded as" prong specifically to address situations where individuals are rejected from jobs because of myths, fears and stereotypes associated with their disabilities, as in *Holiday*. The legislature's intent provides further support to the Court's finding that the present matter does not fall within this prong of the statute.

Am., Inc., 181 F.3d 1220, 1228-29 (11th Cir. 1999); *Taylor v. Nimocks Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 776-77 & nn. 33-34 (E.D. Tex. 1996); *but see Buckley v. Consol. Edison Co. of New York, Inc.*, 127 F.3d 270, (2d Cir. 1997)(holding that establishment of record of past alcohol or drug addiction automatically establishes disability under subsection (B)). Although the EEOC establishes that Diem has a record of a disability, it fails to present evidence to show that Daimler was aware of anything in the record aside from the information contained in Diem's Self-Administered Medical History Form and the Preplacement Examination Insert (which alone do not indicate that Diem was substantially limiting of major life activities). Furthermore, as discussed above, it was not Diem's record that led Daimler to revoke its job offer; but rather Diem's failure to perform the physical maneuvers Dr. Ray asked him to do during the examination.

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

Defendant's motion for summary judgment is **granted**.

Nancy S. Edmunds

Nancy S. Edmunds
U. S. District Judge

Dated: MAY 20 2002

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ON MAY 20 2002

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