UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

DAIMLER CHRYSLER CORP.,

Defendant.
_____/

Case No. 01-72130

Honorable Nancy G. Edmunds

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

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. Daimler filed a motion for summary judgment on March 15, 2002, arguing that Diem is not "disabled" as defined under the ADA. In its Response, the EEOC conceded that Diem is not actually disabled but argued that Diem is protected by the ADA because he has a record of a disability and Daimler regarded him as disabled. The Court disagreed and issued an Order on May 20, 2002, granting Daimler's motion for summary judgment. On June 4, 2002, the EEOC filed a motion for reconsideration.

In its motion, the EEOC argues that the Court erred in finding that Daimler did not mistakenly believe that Diem's impairment substantially limited his ability to work and

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thus was not "disabled" under the ADA.[1] The EEOC argues that it is irrelevant that Dr. Ray inaccurately assessed Diem's physical capabilities as a result of Diem's failure to understand the doctor's requests to perform certain maneuvers. The EEOC relies primarily on two Third Circuit decisions in which the court stated that an employer violates the ADA whenever it regards an individual as having a disability which in fact the individual does not have, regardless of whether the misperception was based on ignorance, fear, myth, stereotype, miscommunication or even an error in reading the individual's medical records. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d. Cir. 1998); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 182 (3d. Cir. 1999).

Neither of these cases, however, support the factual scenario presented here. In *Deane*, the plaintiff, on leave of absence for a work related injury, telephoned her employer's benefits coordinator to inform her that she intended to return to work with certain restrictions. From that conversation alone, the employer determined that the plaintiff was unable to perform a laundry list of activities which went far beyond the restrictions the plaintiff had described to the benefits coordinator.[2] *Id.* at 141. The

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[1]The EEOC asks the Court to reconsider two additional issues. First, citing the Sixth Circuit Court's decision in *Holiday v. City of Chattanooga*, 206 F.3d 637 (2000), the EEOC argues that Daimler is liable because its mistaken assessment of Diem's condition was caused by its failure to conduct an individualized assessment. The EEOC also argues that the Court erred in determining that it had not established that Diem had a "record of" a disability. The Court addressed both issues in its initial order and the EEOC presents no new arguments or evidence to lead the Court to believe that its decision was incorrect.

[2]The plaintiff informed the benefits coordinator that she was unable to lift more than 15-20 pounds or perform repetitive manual tasks such as typing. *Deane*, 142 F.3d at 141. According to the plaintiff, the employer believed that she therefore was unable to lift more than 10 pounds, push or pull anything, assist patients in emergency situations, move or assist patients in the activities of daily living, perform any patient care job at any hospital, perform CPR, use the rest of her body to assist patients, work with psychiatric patients, or

Third Circuit held that the plaintiff's claim was actionable under the ADA even if her employer's perception of her impairment was not motivated by "myth, fear or stereotype." The court noted "that even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability." *Id.* (citing 29 C.F.R. pt. 1630, app. § 1630.2(*l*)).

The *Deane* Court noted that the single telephone call between the plaintiff and the employer "was [the employer's] only meaningful interaction with [the plaintiff] during which it could have assessed the severity of or possible accommodation for her injuries." *Deane*, 142 F.3d at 141. In fact, the Court found that when the plaintiff attempted to contact her employer, she was treated rudely and told not to call again. *Id.* In comparison, Dr. Ray physically examined Diem and determined his physical restrictions based on his actual performance. The EEOC presents no evidence to suggest that Dr. Ray's assessment was an incorrect evaluation given the physical limitations Diem exhibited. And unlike the plaintiff in *Deane*, it cannot be said that Diem did not contribute to any misunderstanding about his physical condition.

Taylor also is factually distinguishable from the present matter. Relying on *Deane*, the *Taylor* Court held that an employer's inaccurate reading of a plaintiff's medical records may establish a "regarded as" claim. In *Taylor*, the plaintiff's doctor provided the employer with a physical capacity evaluation of the plaintiff on which he indicated that the plaintiff's restrictions were "temporary." *Id.* at 188. For some unknown reason,

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use medical equipment. *Id.* 141-42.

the employer misinterpreted the doctor's evaluation and recorded the plaintiff's restrictions as "permanent." This misinterpretation was exacerbated by a communication "glitch" between the employer's corporate headquarters and the plaintiff's manager. *Taylor*, 177 F.3d at 183. Apparently after receiving the doctor's evaluation, the employer's administrative offices received documentation which clearly indicated that the plaintiff's restrictions were temporary and that he could return to work full-time. *Id.* Headquarters, however, never forwarded the documentation to the plaintiff's manager. Thus when the plaintiff contacted his manager about returning to work, the manager told him no.

The court concluded that the plaintiff could make out a "regarded as" claim, even though there was no information to indicate that the employer's mistake was a result of negligence or malice, because "one of the points of 'regarded as' protection is that employers cannot misinterpret information about an employee's limitations to conclude that the employee is incapable of performing a wide range of jobs." *Id.* at 190. Thus the court concluded that "an employer's innocent mistake (which may be a function of "goofs" or miscommunications) is sufficient to subject it to liability under the ADA . . ." *Id.* at 182.

The EEOC provides no evidence to suggest that Daimler misinterpreted information provided by Diem. Rather, the evidence indicates that Dr. Ray's assessment was a correct interpretation of Diem's condition based on his performance during the examination. And while Diem may have failed to perform certain maneuvers Dr. Ray requested as a result of a miscommunication, the *Taylor* Court's reference to "miscommunications" more likely refers to miscommunications for which the employer

alone is responsible, such as that which occurred within the employer's infrastructure, not miscommunications between the plaintiff and the employer. The latter scenario neither fits within the legislature's rationale for the "regarded as" part of the definition of disability nor the examples of a "regarded as" disabled employee provided in the EEOC's Regulations and Interpretative Guidance. *See* 29 C.F.R. pt. 1630, App. 1630.2(*l*).

In fact, the rationale behind the "regarded as" part of the definition led the *Taylor* Court to recognize a limited defense for mistakes made by the employer which are not infected with stereotypes or prejudice against the disabled. The court summarized this limited exception to liability as follows:

> If an employer regards a plaintiff as disabled based on a mistake in an individualized determination of the employee's actual condition rather than on a belief about the effects of the kind of impairment the employer regarded the employee as having, then the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation.

Id. at 193. The court determined that such a limited defense "best serves the aims of the ADA." *Id.*[3]

The *Taylor* Court thus distinguished between situations where an employer extrapolates from information provided by an employee based on stereotypes or fears about the disabled and situations where the employer makes a mistake about the

[3]The *Taylor* Court also concluded that such a defense called for based on the general logic of the ADA, "which requires an interactive relationship between employer and employee, and concomitantly requires an individualized evaluation of employees' impairments." *Id.* at 192 (citations omitted).

extent of a particular employee's impairment in the course of an individualized determination.[4] *Id.* at 193 The latter scenario, the court noted, is further from the core of the ADA's concern; whereas the ADA has as a major purpose the protection of individuals from the first scenario. Because Dr. Ray's assessment of Diem followed an individualized examination and there is no evidence that Dr. Ray's determination was infected with stereotypes or prejudice, Daimler's assessment of Diem should be excepted from liability under the ADA.

But even if the Court were to conclude that the EEOC established that Daimler mistakenly regarded Diem as having a physical impairment and that *Taylor's* limited defense does not apply, the Court now finds that summary judgment was appropriate because the EEOC failed to establish that Daimler treated Diem's restrictions as substantially limiting in the major life activity of working. The Court erred in its initial analysis of this issue because it looked at whether the EEOC provided sufficient evidence to show that Diem's perceived impairment significantly restricted him in the life activity of working when in fact the regulations and case law require the EEOC to demonstrate that *Daimler treated* Diem's impairment as constituting such a limitation. *See* 29 C.F.R. § 1630.2(*l*); *see also Henderson v. Ardco, Inc.*, 247 F.3d 645, 650-51 (6th Cir. 2001)(focusing on employer's belief as to whether impairment is substantially limiting); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001)(stating that "when [an] individual seeks to proceed under a 'regarded as' theory, we must look to the *state of mind* of the employer against whom he makes a claim.")

[4]The court provided as examples of the first scenario: an employer's belief that anyone with bipolar disorder or HIV infection is substantially limited in a major life activity. *Id.*

The only evidence the EEOC provided on this issue was the testimony of John Kelley and the affidavit of Sherry Browning. *See* Pl.'s Resp. Ex. 17 and Ex. 18. But neither Mr. Kelley nor Ms. Browning were involved in Daimler's hiring decision with respect to Diem. Their statements do not indicate whether *Daimler* regarded Diem as significantly restricted in the ability to perform either a class of jobs or a broad range of jobs. In fact the evidence indicates that Daimler only believed that Diem was incapable of performing a particular job at a particular plant.

Ms. Christine Soukup, Daimler's employment supervisor at its Detroit Axle Plant, testified that she determined based on Diem's PQX designations and her discussion with Dr. Ray after Diem's examination, that Diem was not able to perform jitney repair work that required bending into the jitneys, but that he was able to do bench work. *See* Resp. Ex. A at 24-25; *see also* Pl.'s Resp. to Def.'s Mot. for Summary Judgment Ex. 4. And as Daimler points out, less than a year after it denied Diem a position at its Detroit Axle Plant, it contacted Diem about a jitney mechanic position at its Warren Truck Depot Facility. *See* Pl's Mot. for Reconsideration Ex. 2 at 88-89. Because he was scheduled for a second hip replacement in August or September, however, Diem declined to interview for the position but indicated that he would be available for work in December 1997. *Id.* In December, Daimler contacted Diem about the jitney repair mechanic position at its Jefferson North Assembly Plant where he currently is employed. *Id.* at 68-69.

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

Plaintiff's motion for reconsideration is **denied.**

Nancy Edmunds
Nancy G. Edmunds
U. S. District Judge

Dated: 12 SEP 2002.

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