1999 WL 495480
United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
HINSDALE HOSPITAL, Defendant.

No. 98 C 3482. | June 30, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.

***1** Plaintiff United States Equal Employment Opportunity Commission ("EEOC") brought this action against Defendant Hinsdale Hospital under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.,* to correct allegedly unlawful employment practices on the basis of a disability and to make whole Patricia Chapman ("Ms.Chapman"). Specifically, the EEOC charges that Defendant discriminated on the basis of a disability by maintaining an insurance benefits plan (the "Plan") that denies coverage for prosthesis-related treatment and that such discrimination resulted in Chapman's constructive discharge. Defendant now moves for summary judgment on the grounds that the Plan does not contain a disability-based distinction and that it is exempt under Section 501(c)(3) of the ADA, 29 U.S.C. § 12201(c)(3). For the following reasons, the court grants summary judgment in favor of Defendant.

FACTUAL BACKGROUND

As a result of an infection and injury to her left arm, Patricia Chapman had her left arm amputated above the elbow in December 1981. (Chapman Aff., Ex. 1 to Plaintiff EEOC's Appendix in Response to its Opposition to Defendant's Motion for Summary Judgment (hereinafter "Pl.App.") ¶ 2.) In February 1982, she was fitted with a cable-driven body operated prosthesis. (*Id.* ¶ 3.) The prosthesis was controlled by a harness that wrapped around the opposite shoulder and attached to cables; additional straps across her back and chest allowed her to manually control the prosthesis. (*Id.*)

Ms. Chapman was hired by Defendant Hinsdale as a Pharmacy Technician in December 1992. (EEOC's Rule 12(N) Statement of Additional Uncontested Facts (hereinafter "Pl. 12(N)") ¶ 38.) With the use of her prosthesis, Ms. Chapman was able to perform her duties at Hinsdale without difficulty for several years. In mid–1994, however, Ms. Chapman began experiencing pain in her back, neck, and shoulders. (Chapman Aff. ¶¶ 4–5.) Recognizing that the pain became less intense when she removed her prosthesis, she concluded that the pain was related to her prosthesis. (*Id.* ¶ 6.) In November 1994, she sought medical treatment from Dr. Gail Hopkins, who recommended that she obtain a light-weight myoelectric prosthesis, which operates without a harness and is not cable-driven, thereby eliminating the strain on her neck and shoulders. (*Id.* ¶ 7; Hopkins Notes, Group Ex. 1 to Pl.App.)

Ms. Chapman subsequently sought pre-approval from Hinsdale's Plan for the cost of the necessary replacement prosthesis in November 1994. (Defendant's Statement of Uncontested Material Facts (hereinafter "Def. 12(M)") ¶ 24.) Hinsdale, a nonprofit corporation affiliated with the Seventh–Day Adventist Church, offers its employees a Plan that includes coverage for prosthesis devices only under the following conditions:

> The original prosthesis necessary to replace a body member lost while covered under this Plan, and replacement prostheses necessary due to physiological changes in supporting structure.

***2** (Employee Benefit Plan, at 16, Ex. 1 to Defendant's Appendix in Support of Motion for Summary Judgment (hereinafter

"Def.App.").) Hinsdale characterizes the clause as "simply a lawful pre-existing condition exclusion." (Hinsdale Hospital's Reply Memorandum in Support of Motion for Summary Judgment (hereinafter "Def. Reply"), at 1.)[1]

On January 3, 1995, Hinsdale denied Ms. Chapman's claim. The letter sent from Harrington Benefit Services ("HBS"), the entity hired by Hinsdale to assist in administering the Plan, stated the basis for the denial as follows:

> In accordance with the Hinsdale Hospital Medical Plan, no benefit is available for the myoelectric left above elbow prosthesis. The plan provides benefit only for replacement prosthesis necessary due to physiological changes in supporting structure, providing the original prosthesis was obtained to replace a natural body part lost while the member is covered under the Medical Plan.
>
> Since Patricia underwent a left elbow amputation in December 1981 and her medical coverage through Hinsdale Hospital became effective February 1, 1993, there will be no benefit available for the prosthesis.

(HBS Denial Letter 1, Ex. 2 to Def.App.) In other words, Hinsdale grounded its denial for the replacement prosthesis on the language of the Plan.[2]

Ms. Chapman appealed the denial on January 17, 1995, which was affirmed by another representative of HBS on January 25, 1995. The basis for the denial was again based on the wording of the Plan, namely:

> Our interpretation of this wording, is that initial and replacement prostheses are eligible under the Hinsdale Hospital Employee Benefit Plan only when the body member was lost while the individual was covered by the Plan. The intent/spirit of this benefit is to provide coverage for eligible individuals whose loss occurs while covered under the Plan.
>
> Our records indicate that the above patient underwent a left elbow amputation in December, 1991[sic]; given her effective date of February 1, 1993, there are no benefits eligible for this replacement prosthesis.

(HBS Denial Letter 2, Ex. 3 to Def.App.)

On January 31, 1995, Ms. Chapman again appealed the denial of her claim to Douglas Lafferty, the acting Administrator of the Plan who had discretion to make final decisions regarding claims for benefits. (Def.12(M) ¶ 31.) Mr. Lafferty also denied her appeal. In his March 17, 1995 letter, Mr. Lafferty made no mention of the fact that Ms. Chapman's need for a replacement pre-dated her employment with the Hospital. Instead, he cited:

> a lack of evidence supporting medical necessity "due to physiological changes in supporting structure" as stated in the Plan. Also, it is not evident that the myoelectric prosthesis is the appropriate replacement.

(Lafferty Denial Letter, Ex. 5 to Def.App.)

Ms. Chapman claims that the pain in her neck, shoulders, and back became increasingly intolerable as a result of her heavy, cable-driven prosthesis. (Chapman Aff. ¶ 12.) In her words, she was "forced to ask" for leave under the Family and Medical Leave Act, 29 U.S.C. § 2611 *et seq.* ("FMLA") to prevent her termination because of repeated absences from work. (*Id.* ¶ 12.) On June 2, 1995, her leave request was approved. (*Id.;* Leave Approval Letter, Group Ex. 2 to Pl.App.) Still finding her attempts at approval for the prosthetic benefit futile, Ms. Chapman filed her first charge of discrimination with the EEOC on July 21, 1995. (Chapman Aff. ¶ 13.) In May 1996, unable to obtain more FMLA leave and believing she was no longer capable of performing her duties without significant pain, Ms. Chapman resigned from Hinsdale. (*Id.* ¶ 15.) On June 6, 1996, she filed a second charge of discrimination with the EEOC, alleging she was constructively discharged. (*Id.* ¶ 16.) In January 1998, Ms. Chapman finally received a light-weight myoelectric prosthetic through Medicare coverage. (*Id.* ¶ 17.) She is now able to use a prosthesis comfortably. (*Id.*)

***3** Defendant moves for summary judgment on two grounds: (1) the Plan provision on which Plaintiff relies is not a form of disability-based discrimination prohibited by the ADA, and (2) the Plan falls within the safe-harbor provision of section 501(c)(3) of the ADA, 42 U.S.C. § 12201(c)(3). Because the court finds the first of these arguments dispositive, it will not reach the safe-harbor argument.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper where "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 the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322–34 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

II. The Prosthetics Clause as Disability–Based Discrimination

Hinsdale submits that the "only issue" is whether Hinsdale's Plan falls within the safe-harbor provision of section 501(c)(3) of the ADA. The court, however, considers a more fundamental question as the threshold, and possibly dispositive, matter.[3] That dispositive question is whether a clause that distinguishes based on the timing of the event causing the need for a prosthesis violates Title I of the ADA. If the ADA does not prohibit this type of clause, the court need not reach the issue of whether the safe-harbor provision of the ADA should apply. To the limited extent the parties discuss the issue, Hinsdale argues that this is not a disability-based discrimination clause, while the EEOC contends that the clause violates the ADA because it treats the disabled differently from the non-disabled.

The EEOC has brought this action under Title I of the ADA. Title I of the ADA proscribes discrimination in the terms and conditions of employment and mandates in relevant part:

> (a) General rule
>
> No covered entity 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.
>
> (b) Construction
>
> As used in subsection (a) of this section, the term "discriminate" includes ... (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with ... an organization providing fringe benefits to an employee of the covered entity[]]....

***4** 42 U.S.C. § 12113(a)-(b). Defendant's employee benefits plan is a fringe benefit of employment at Hinsdale. *See EEOC v. CNA Ins. Cos .,* 96 F.3d 1039, 1044 (7th Cir.1996).

The EEOC claims that Hinsdale violated Title I of the ADA because under the language of the prosthesis clause, the decision to provide or deny prosthesis benefits depends on whether the employee does or does not have a particular disability at the time of hire. Under Hinsdale's Plan, the EEOC contends, a person hired with a prosthesis (like Ms. Chapman) will *never* be eligible for benefits related to that prosthesis. But any person hired without a disability requiring the use of a prosthesis (i.e., a non-disabled person) *is* eligible for prosthetic benefits in the future. Moreover, the group of employees that will always be excluded from coverage (those hired by Hinsdale with a prosthesis) are necessarily disabled. The EEOC thus insists that the Plan treats the disabled differently than the non-disabled.

Hinsdale agrees that the clause differentiates between two groups of people, but identifies those groups differently. According to Hinsdale, the clause is a pre-existing condition exclusion that distinguishes only based on the timing of the event that caused the need for the prosthesis. All covered employees are eligible for prosthesis benefits if the event causing the need occurs while they are employed by Hinsdale and covered by the Plan. Likewise, all employees who lost a limb before being employed by Hinsdale and who suffer a second loss are covered by the Plan and are entitled to prosthesis benefits relating to the second loss. The clause therefore applies equally to all employees, irrespective of disability.

The issue presented is a difficult one to resolve, and the case law on this particular issue is sparse. That said, the court concludes, with some dismay, that the ADA does not proscribe the plan provisions at issue here. Based on the case law in this and other circuits, the court cannot conclude as a matter of law that distinguishing based on the timing of a disability, as pre-existing condition clauses do, constitutes discrimination prohibited by the ADA.

The EEOC cites only one case, *Ford v. Schering–Plough Corp.,* 145 F.3d 601 (3d Cir.1998), *cert. denied,* 119 S.Ct. 850 (1999), to support its proposition that a benefit plan violates the ADA if it makes distinctions in coverage based on the time that the employee became disabled. In *Ford,* the Third Circuit considered whether a disparity between disability benefits for mental and physical disabilities violates Title I the ADA. It was undisputed that the insurance plan differentiated between different types of disabilities, but the court found no ADA violation, observing that "this is a far cry from a specific disabled employee facing differential treatment due to her disability." 145 F.3d at 608. Rather, every employee had the opportunity to join the same plan with the same schedule of coverage-every employee received equal treatment. *Id.* The court then went on with language the EEOC believes is significant here: "So long as every employee is offered the same plan *regardless of that employee's contemporary or future disability status,* then no discrimination has occurred even if the plan offers different coverage for different disabilities." *Id* (emphasis added).

***5** Hinsdale does not respond specifically to Plaintiff's suggestion that under *Ford,* a plan may not, consistent with the ADA, distinguish between employees on the basis of their contemporary *or* future disability status. Rather, Hinsdale simply emphasizes that Hinsdale's Plan and its pre-existing condition exclusion applies with equal force to all covered employees and makes permissible distinctions between persons based upon the timing of their disabilities, not between disabled persons and non-disabled persons.

The court does not condone the wisdom or grace in Hinsdale's refusal to pay for a replacement prosthesis for an individual whose need for the prosthesis predates her employment. However unappealing Hinsdale's position, the court nevertheless concludes it does not violate the law. The single sentence in *Ford* is not enough to persuade the court otherwise, either, as it was merely *dicta* in that case, which ultimately found no violation of the ADA by an insurance plan differentiating between different disabilities. The EEOC has not cited to any additional authority, nor has the court been able to locate any favorable to employees in Ms. Chapman's situation.

Notably, the Seventh Circuit discussed whether the ADA required equality of treatment among disabilities in benefit plans in *EEOC v. CNA Ins. Cos.,* 96 F.3d 1039 (7th Cir.1996). In *CNA,* the court held that a totally disabled former employee lacked standing to challenge a disability plan that distinguished coverage for physical versus mental disabilities as a violation of the ADA. 96 F.3d at 1045. The charging party in *CNA* suffered from a long-term mental disability and challenged her former employer's disability policy, which provided benefits to persons having mental and nervous disorders only for two years, whereas persons with physical disabilities received coverage until the employee reached age 65. *Id.* at 1041. The court noted that there was no claim that CNA discriminated on the basis of disability in offering its pension plan to anyone because it did not, for example, charge higher prices to disabled people on the theory they might require more in benefits; nor did the terms of the plan vary depending on whether or not the employee was disabled. *Id.* at 1044. Rather, all employees-"the perfectly healthy, the physically disabled, and the mentally disabled"-had a plan that promised them the exact same benefits. *Id.* While the court indicated this may not be "an enlightened way to do things, [ ] it was not discriminatory in the usual sense of the term." *Id.*

The prosthesis clause in Hinsdale's Plan is similarly offered to every employee whether disabled or not. Every incoming employee receives the same benefit: an original prosthesis to replace the lost limb and replacement prosthesis if medically necessary. The EEOC is technically correct in arguing that an employee who comes in disabled does not receive the same value from the Plan as would an employee who comes in nondisabled and later becomes disabled. That the clause is not as valuable to the disabled as it is to the nondisabled, however, is not remediable under Title I of the ADA. *Cf. Doe v. Mutual of Omaha Ins. Co.,* __ F.3d __, No. 98–4112, 1999 WL 353014, at *6 (7th Cir. June 2, 1999) (holding that Title III of the ADA "does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled, even if the product is insurance").

***6** In effect, in this lawsuit, the EEOC asks this court to invalidate all pre-existing condition clauses for any pre-existing condition that happens to be a disability under the ADA. In that situation, the EEOC suggests, the court ought to find that distinctions based on timing of a disability-the distinction established by a pre-existing condition clause-constitutes discrimination under the ADA. However appealing the EEOC may find such a holding as a matter of public policy, the court does not find it is a matter of law as set forth in either the case law or the regulations promulgated by the EEOC. For example, the regulations specifically note that Title I is "intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. *This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers."* 29 C .F.R. Pt. 1630 (emphasis added).

Finally, the court observes that dismissal of Ms. Chapman's ADA claim may not necessarily leave her without any remedy. The letter denying Ms. Chapman's claim noted that she did not obtain the original prosthesis to replace a natural body part

lost while she was a member of the Plan. The language of the Plan provision, quoted *supra* p. 3, does not require the conclusion that this fact precludes coverage, however. That language may fairly be read as providing benefits for a replacement prosthesis, regardless of when the need for the original arose, so long as the replacement is "necessary due to physiological changes in the supporting structure ." If the only condition that the Plan places on a replacement prosthesis is that it be "necessary due to physiological changes" Ms. Chapman may well have claims under both contract law or the ERISA statute.

CONCLUSION

For the reasons discussed above, the court grants summary judgment in favor of Defendant and dismisses the case.

Parallel Citations

16 NDLR P 35

Footnotes

[1] The Plan language also sets forth a general exclusion for pre-existing conditions that states:

> If a covered individual has a pre-existing condition at the time coverage becomes effective under the Plan, expenses incurred for that condition will be excluded until the earlier of:
> — one hundred eighty day period has lapsed during which no treatment is received for that condition.
> — the individual has been continuously covered under the Plan for a period of twelve (12) months.

(Employee Benefits Plan, at 6–7.) Whether or how this provision affects the prosthesis clause, however, are questions not now before the court.

[2] Plaintiff notes that Defendant later asserted another basis for the denial: that a myoelectric prosthesis was not medically necessary for Chapman. (Plaintiff EEOC's Memorandum in Opposition to Defendant's Motion for Summary Judgment (hereinafter "Pl. Resp."), at 3 n. 2; *see* McDermott, Will & Emery Letter, Ex. 7 to Def.App.) Whether the myoelectric prosthesis was medically necessary is not an issue for the court on this motion.

[3] Under the recent decision in *Sutton v. United Air Lines, Inc.,* the Supreme Court held that the determination of whether an individual is disabled under the ADA should be made in reference to measures that mitigate the individual's impairment. __ S.Ct. __, No. 97–1943, 1999 WL 407488, at *3 (June 22, 1999). Whether this holding encompasses disabled persons who use prosthetic limbs is not entirely clear. Justice O'Connor, writing for the majority, indicated that such individuals are not necessarily excluded from the ADA's protection because

> [t]he use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs ... may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.

Id. at *11. However, in a forceful dissent, Justice Stevens suggests that the majority's holding will effectively exclude from the ADA disabled persons who use prosthetic devices. *See id.* at *17.

In this case, the court does not address the issue further as neither party discussed the issue. Indeed, Hinsdale's arguments assume, at least for purposes of this motion, that Ms. Chapman is disabled within the meaning of the ADA.