2006 WL 2594479
United States District Court,
S.D. Ohio, Eastern Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
OVERNITE TRANSPORTATION COMPANY, Defendant.

No. 2:02CV591. | July 5, 2006.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

WATSON, J.

***1** This matter is before the Court upon Defendant's Motion for Summary Judgment (Doc. 30) and Plaintiff's Motion for Partial Summary Judgment. (Doc. 31) The parties have also filed motions *in limine* to exclude expert testimony under Fed.R.Evid. 703. (Docs.29, 65)

A. *FACTS*

This is an action under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991 to correct alleged discrimination on the basis of disability. Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), also seeks compensatory relief for Jeffery Bowman and a class of similarly situated persons.

1. *Jeffery Bowman*

Claimant Jeffery Bowman has a seizure disorder that is partially controlled by medication. Despite his medication, Bowman has approximately one seizure per year. (Doc. 40, Grisolia Depo. at 11-12) Bowman's seizures are of the "grand mal" variety, characterized by the following symptoms: loss of muscle control, loss of bowel and bladder control, biting the tongue, and violent jerking of his limbs. (Doc. 35, Bowman Depo. at 151-152) Prior to having a seizure, Bowman experiences an "aura" or "prodrome" for at least 30 minutes prior to the seizure. (Id. at 42-44) Bowman also experiences some side effects from his medication, Depakote. Bowman has had gastrointestinal symptoms in the past, but those have resolved themselves for the most part. (Id. at 53-54) Bowman also reported moodiness, but stated that he no longer has this problem since his dosage has been lowered. (Id. at 54) Bowman has also experienced some effects on his personality, including paranoia and "flat effect." (Id. at 54) Bowman believes this "flat affect" has kept him from getting a job because his career counselors advised him to "liven it up" when interviewing. (Id. at 52-53) However, Bowman stated that during the relevant time period, he was able to do most normal activity. (Id. at 88) Bowman also stated that he did not believe that his personality or affect has prevented him from holding a job, or maintaining his marriage for twenty-five years. (Id. at 55)

For approximately two weeks in July of 1996, Bowman was a temporary worker at Defendant Overnite Transportation Company's ("Overnite") service center in Columbus, Ohio. (Id. at 72-73) While working at the service center, Bowman applied for permanent employment as a dockworker for Overnite. (Id. at 75) The essential functions of the dockworker position include using a forklift for extended periods of time at a rapid pace. (Doc. 34, Bowen Depo. at 34-43; Ex. 1) The dockworker must also handle hazardous materials. (Id.) After an interview, Overnite extended a conditional offer of employment to Bowman. (Bowman Depo. at 77) One condition of the offer was that Bowman complete a medical screening. On his medical questionnaire, Bowman indicated that he had epilepsy by checking the "yes" box in response to the question whether in the past five years he had "epilepsy/fainting spells/severe headaches." (Doc. 50, Ex. A to Neely Declaration) in the "Comments" section, Bowman wrote, "I am epileptic. I am under a doctor's care. I rarely have seizures and they do not create a problem for me being able to do any type of work." (Id). Overnite sent this questionnaire to its independent contractor, Pembrooke Occupational Medicine ("Pembrooke"), for further review. (Bowen Depo. at 12)

***2** Dr. John Cametas, a physician employed by Pembrooke, was responsible for reviewing Bowman's file. (Doc. 37, Cametas Depo. at 67) Dr. Cametas is familiar with Overnite's Columbus facility and the job requirements of various workers at the facility. (Id. at 16, 39-41, 65) Dr. Cametas is also familiar with the Department of Transportation ("DOT") regulations. (Id. at 13-15)[1] Dr. Cametas explained that while the DOT regulations placed driving restrictions on people with

diabetes and seizure disorders:

> I don't follow the DOT regs for other employees, such as, those that may work on the dock. I don't just categorically say, the DOT regs won't let you drive a truck, so therefore I can't let you on the dock.... I evaluate every person on the basis of what I think that person can do. Every one-everything is tailored to that particular situation. So there's not a direct correlation: You have diabetes, on insulin, you can't drive a truck; therefore, you can't work on the dock. That doesn't work that way.... Every individual is different ...
> (Id. at 34)[2]

[1] Under these regulations, a person shall not drive a "commercial motor vehicle" unless he or she is physically qualified to do so. 49 C.F.R. § 391.41(a). A "commercial motor vehicle" is defined as "any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property" which meets certain weight and use requirements. 49 C.F.R. § 390.5.

[2] In a telephone interview during the EEOC's investigation, Dr. Cametas stated that in the case of Bowman, he "used the same guidelines that the Department of Transportations uses for its truck drivers, sometimes I am a little more lenient with people who are on the dock because they are not driving continuously but statistically if someone hasn't had a seizure for a long time I let them work as opposed to Mr. Bowman here who has had two previous seizures." (Cametas Depo., Ex. 1)

Dr. Cametas stated that he would recommend someone for hire who had diabetes, even if it was not well-controlled. (Id. at 20) Dr. Cametas explained that he would talk to the potential hire's doctor to explain the work being done on the dock, and to see if the doctor could get his diabetes better controlled. (Id.) Dr. Cametas stated that he could not preclude someone with diabetes from working on the dock. (Id. at 21)

Dr. Cametas explained that he was "a little biased and fearful" of epileptics harming themselves and others because he has had several patients who have died during a seizure. (Id. at 28, 30, 31) For example, one patient died when he fell into the bathtub and drowned. (Id. at 30) Dr. Cametas stated that he would feel more comfortable with hiring a person with epilepsy if that person has been on the same medication and has not had any seizures for a period of time. (Id. at 29) Dr. Cametas explained that this seizure-free period of time would need to be more than five years. (Id. at 37) Dr. Cametas stated that he would also find out if the person was diligent in taking his or her medication. (Id. at 45) Dr. Cametas explained that he would learn this type of history from talking to the patient and his or her doctor. (Id.) Dr. Cametas also stated that he did not believe that the feeling of an aura or prodrome were reliable in predicting and preventing seizures. (Id. at 50-51, 55) Finally, Dr. Cametas stated that he has not consulted any scientific studies or outside sources, such as the Epilepsy Foundation, when assessing the risk that a potential hire with epilepsy poses. (Id. at 38-39) Instead, Dr. Cametas makes the decision based on his personal judgment. (Id. at 39)

Bowman had suffered two seizures in the year preceding his application for employment with Overnite. (Id. at 60-61) Dr. Cametas reviewed Bowman's medical records and spoke with Bowman, but did not speak with Bowman's physician. (Id. at 67, 69, 73) Dr. Cametas did not ask Bowman about the frequency of his seizures. (Bowman Depo. at 79) Dr. Cametas stated that the following risks concerned him regarding Bowman working in the dockworker position:

> ***3** If he were to have ... a seizure, the forklift could continue to run off the dock, which is four or five ... feet from ground level. There are a lot of people on the dock. He could run into somebody and pin someone. He could tip it over with freight on it pinning someone. He could kill himself.... For example, if he had a pallet full of hazardous materials and he has a seizure, he falls ... off the dock and he releases hazardous materials in that area, he could hurt himself and other people. It's just too dangerous of a place for a person to have a seizure.

(Id. at 39-41) As Dr. Cametas explained: "I can't in good conscience tell that person to go ahead and do that job when I think that he may end up hurting himself when there are other jobs available that he could that would not run that risk." (Cametas Depo. at 40) Dr. Cametas recommended that Overnite not hire Bowman. (Id. at 72-73)

Allegedly relying on that recommendation, Overnite decided not to hire Bowman. (Id. at 72-73) In Overnite's spreadsheet identifying applicants whom Pembrooke recommended not be hired, the reason stated for Bowman's rejection is "Cannot Perform the Essential Functions Necessary for Employment." (Doc. 49, Appendix to Personen Aff. at 11, 14) When Dr. Cametas informed Bowman of his decision not to recommend Bowman's hiring, he did not attempt to inquire how Bowman might otherwise be accommodated or what measures could be taken to reduce the risks posed by Bowman's condition. (Bowman Depo. at 78-79)

Dr. Cairns, Bowman's treating physician, wrote letter regarding Bowman after Dr. Cametas made his negative recommendation. (Doc. 36, Cairns Depo., Ex. 3) Dr. Cairns states that he "would not feel that there should be any restrictions on [the] proposed employment." (Id .) However, Dr. Cairns states that he would defer to the decision of the "Corporate Physicians" which are more familiar with Bowman's work place. (Id.)

Both before and after his application to work at Overnite, Bowman has been successfully employed in positions requiring the use of forklifts. From 1981 through 1995, Bowman worked at Nissan, spending an average of an hour a day on a forklift. (Id. at 20-21) Bowman lost his job at Nissan as a result of a plant shutdown. (Id. at 11) In May of 1997, Bowman was hired by Rockwell as a machine operator, a job requiring an hour or two per day on a forklift. (Id. at 105-107) While at Rockwell, Bowman's condition was accommodated by keeping a supply of Bowman's medication with a company nurse at all times. (Doc. 50, Bowman Affidavit attached to Neely Declaration) Bowman was laid off from his job at Rockwell in May of 2003. (Bowman Depo. at 135)

2. ***Jeremy Smith***

The facts relating to Jeremy Smith are similar to those relating to Bowman. In March of 1996, Smith applied for a dockworker position at Overnite's Memphis, Tennessee facility. Smith also has a seizure disorder, and had experienced two seizures within months of his application. (Doc. 45, Smith Depo. at 51, 54) Smith stated that he has no limitations on his activities as long as he takes his medications. (Id. at 60-61) However, Smith explained that these medications cause him to have migraine headaches and mood swings "every once in a while." (Id. at 53)

***4** Dr. Cametas reviewed Smith's medical files and spoke to Smith about his condition. (Cametas Depo. at 108-109) Dr. Cametas did not have Smith's most recent medical records, and was not aware of the recent seizures. (Id. at 80, 108) Dr. Cametas determined that Smith could not safely perform the duties of a dockworker at the Memphis facility. (Id. at 81) Dr. Cametas explained that Smith had repeated changes in his medication, had complained to his doctor on one occasion that he was sleepy from his medication, and had an abnormal EEG. (Id. at 80-82) As a result, Smith was not hired.

Prior to applying for work at Overnite, Smith worked for two months at Southern Estates in a job where he was required to operate a forklift on a raised platform three or four times a day. (Smith Depo. at 12) However, Smith has admitted that if he were to not take his medication and have a seizure while at work, he "will die" or be "very hurt." (Id. at 61-64)

Smith never filed a charge with the EEOC, but was identified during discovery as the only other applicant for a position as a dockworker at Overnite who has epilepsy.

3. ***John Spindler***

John Spindler is not a claimant in this case. Spindler suffers from a seizure disorder, similar to that of Bowman and Smith. (Doc. 46, Spindler Depo. at 26) He did not disclose this condition to Overnite, and in July 1991, he was hired. (Id. at 6) Overnite employed Spindler for twelve years as a dockworker. (Id. at 6, 8) Spindler suffered a seizure at work in June 1997. (Id. at Ex. 3) Spindler's manager at the time, Mr. John Reed, was not concerned about Spindler's ability to continue working on forklifts. (Doc. 43, Reed Depo at 18-31) Spindler continued to work on forklifts until 2003, when he took medical leave for reasons unrelated to his seizure disorder. (Spindler Depo. at 24-25)

B. ***ANALYSIS***

1. ***Summary Judgment Standard***

Summary judgment is proper when the record "show[s] 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). While the moving party must demonstrate an absence of evidence to support the non-moving party's case, "the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden of production, the non-moving party may not rest on his pleadings, but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Such evidence must be sufficient for a jury to reasonably find in favor of the non-moving party. *Id.* at 252.

2. ***Laches***

***5** Overnite argues that the EEOC should be barred from pursuing this action based on its unreasonable delay in filing this action. The EEOC responds that as a governmental agency, it is not bound by the doctrine of laches.

The Supreme Court has indicated otherwise. In *Occidental Life Ins. Co. of California v. EEOC,* 432 U.S. 355, 373, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), the Court explained that despite the procedural protections of the statute, "a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts." The Court stated that when this occurs, the federal courts do not lack discretionary remedial power. *Id.* Although the actual language of *Occidental Life* does not mention laches, a number of district and circuit courts have applied the doctrine to bar untimely Title VII suits filed by the EEOC. *EEOC v. Luby's Inc.,* 2005 WL 3560616, *7, n. 2 (D.Ariz.2005); *EEOC v. Autozone, Inc.,* 258 F.Supp.2d 822, 826 (W.D.Tenn.2003); *EEOC v. Peterson, Howell & Heather, Inc.,* 702 F.Supp. 1213, 1220 (D.Md.1989); *EEOC v. Louisiana Power & Light Co.,* 1989 WL 35915, *2 (E.D.La.1989); *EEOC v. Star Tool and Die Works, Inc.,* 699 F.Supp. 120, 121 (E.D.Mich.1987), *citing EEOC v. Dresser Industries, Inc. .,* 668 F.2d 1199, 1201-202 (11th Cir.1982); *EEOC v. Alioto Fish Co.,* 623 F.2d 86 (9th Cir.1980); *EEOC v. Liberty Loan Corp.,* 584 F.2d 853 (8th Cir.1978) (and district court cited therein); *see also EEOC v. Rama Printing,* 1991 WL 64060, *3 (W.D.N.Y.1991) (stating that it is evident that a defendant unduly prejudiced by excessive EEOC delay may have an avenue of relief, whether it is under the Administrative Procedures Act, the doctrine of laches, or *Occidental Life*). In an unpublished, *per curiam* decision, the Sixth Circuit applied the doctrine of laches in a EEOC subpoena enforcement case arising under Title VII. *E.E.O.C. v. National City Bank,* 1988 WL 136541, *2 (6th Cir.1988). To apply laches in the context of an EEOC action, a court must find "both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants." *Dresser Indus., Inc.,* 668 F.2d at 1202.

Courts have taken varying positions on what constitutes an unreasonable delay between the filing of an EEOC charge and the filing of a lawsuit. *See EEOC v. Acorn Niles Corp.,* 1995 WL 519976, *4 (N.D.Ill.1995), *citing EEOC v. Dresser Indus., Inc.,* 668 F.2d 1199, 1202 (11th Cir.1982) (delay of five years and eight months unreasonable); *EEOC v. Alioto Fish Co.,* 623 F.2d 86, 88 (9th Cir.1980) (delay of five years and two months unreasonable); *EEOC v. Massey-Ferguson, Inc.,* 622 F.2d 271, 278 (7th Cir.1980) (delay of four years and nine months unreasonable); *EEOC v. Liberty Loan Corp.,* 584 F.2d 853, 857-58 (8th Cir.1978) (delay of four years and four months unreasonable); *EEOC v. Peterson, Howell & Heather, Inc.,* 702 F.Supp. 1213, 1222 (D.Md.1989) (delay of five years and three months unreasonable); *EEOC v. Star Tool and Die Works, Inc.,* 699 F.Supp. 120, 122 (E.D.Mich.1987) (delay of seven and one-half years unreasonable); *EEOC v. Firestone Tire and Rubber Co.,* 626 F.Supp. 90, 92 (M.D.Ga.1985) (delay of four years and eleven months unreasonable); *EEOC v. Bray Lumber Co.,* 478 F.Supp. 993, 997 (M.D.Ga.1979) (delay of four years and five months unreasonable); *EEOC v. Warshawsky and Co.,* 768 F.Supp. 647, 657 (N.D.Ill.1991) (delay of four years and two months not unreasonable); *EEOC v. Jacksonville Shipyards, Inc.,* 690 F.Supp. 995, 1000 (M.D.Fla.1988) (delay of five years and ten months not unreasonable).

***6** Here, the total time between the filing of Bowman's charge and the EEOC's filing of its lawsuit was approximately five years and six months. However, one district court has suggested that the reasonableness of the EEOC's delay does not depend on the total amount of time between filings, but on the EEOC's reason for the delay. *EEOC v. Autozone, Inc.,* 258 F.Supp.2d at 826-27. In this case, the EEOC states that the period of time of three years and seven months from the filing of Bowman's charge until the failure of conciliation should not be considered for purposes of laches. The EEOC argues further that two months of this period of time is attributable to Overnite's own request for additional time to respond to EEOC's requests for information. The EEOC admits that the two-year and two month period after the failure of conciliation is lengthy, but argues that this is a complex case. The Court rejects the EEOC's arguments, and finds that a delay of five years and six months is unreasonable based on both the amount of time and the EEOC's reason for the delay.

A finding of unreasonable delay alone is insufficient to warrant the application of laches. Overnite must also show that it was unduly prejudiced. Overnite argues that it was prejudiced because the ultimate decisionmaker in the decision to not hire Bowman has retired from Overnite and other witnesses have no recollection of Bowman or conversations with Bowman. Overnite also states that it has not been able to locate any Overnite employee with personal knowledge regarding Smith's application for employment, and Smith's application was discarded according to company policy, given that there was no charge filed by Smith.

As one district court has noted, the weight of circuit authority supports the proposition that a defendant's failure to preserve evidence upon prompt notice of a pending claim from the EEOC should not be held against the Commission. *EEOC v. Autozone, Inc.,* 258 F.Supp.2d at 828-29, *citing Howard v. Roadway Express, Inc.,* 726 F.2d 1529, 1533 (11th Cir.1984) (holding that the defendant was not prejudiced because it had prompt notice and "could have maintained its records and taken testimony of key employees in anticipation of the ensuing litigation.") Accordingly, the Court finds that Overnite was not unduly prejudiced. Therefore, Overnite is not entitled to the application of the laches defense.

3. *Discrimination under the ADA*

In order to prove discrimination under the Americans with Disabilities Act ("ADA"), the EEOC must prove the following three elements: (i) that he is an individual with a disability; (ii) that he is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and (iii) that he suffered an adverse employment action "because of" his disability. *Holiday v. City of Chattanooga,* 206 F.3d 637, 642 (6th Cir.2000).[3] Overnite argues that the EEOC has not established the first two elements.

[3] The Sixth Circuit has explained that there is no need to apply the *McDonnell Douglas* burden-shifting analysis in cases where the issue is whether the employee is qualified to perform the essential functions of the job with or without a reasonable accommodation. *Monette v. Electronic Data Systems Corp.,* 90 F.3d 1173, 1183 (6th Cir.1996).

***7** Under the ADA, an individual has a disability if he: (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2). The EEOC argues that Bowman and Smith were both actually disabled and were "regarded as" disabled because of their epilepsy.

An individual suffering from epilepsy can be disabled under the ADA. *See Otting v. J.C. Penney Co.,* 223 F.3d 704, 709-10 (8th Cir.2000); *see also Rutlin v. Prime Succession, Inc.,* 75 F.Supp.2d 735, 737 (W.D.Mich.1999) (stating that epilepsy can be disabling, depending on how it affects the individual). Congress specifically contemplated epilepsy as a potentially disabling impairment when it passed the ADA. *See* H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334. The EEOC presents literature concerning the effects of epilepsy on the affected population. However, the Supreme Court has stated that characterizing groups of people as disabled was not the intent of Congress, and that each individual's impairment must be evaluated on a case-by-case basis. *Sutton v. United Air Lines,* 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *see also Rutlin,* 75 F.Supp.2d at 737 (specifically rejecting the contention that epileptics are *per se* disabled).

The EEOC argues that Bowman and Smith are substantially limited in the major life activities of caring for themselves, interacting with others, and thinking. The term "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.

29 C.F.R. § 1630.2(j)(1). When determining whether an individual is substantially limited by a major life activity, the Court is instructed to consider:

(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. § 1630.2(j)(2). In addition, the mitigating effects of medication must be considered when evaluating the impairment. *Sutton,* 527 U.S. at 488 (stating that "the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures"); *Hein v. All America Plywood Co., Inc.,* 232 F.3d 482, 487 (6th Cir.2000) (noting that an individual is not disabled where an otherwise substantially limiting impairment is brought under control by medication.). In addition, the Fourth Circuit has held that "[t]o hold that a person is disabled whenever that individual suffers from an occasional manifestation of an illness would expand the ADA beyond all bounds." *EEOC v. Sara Lee Corp.,* 237 F.3d 349, 352 (4th Cir.2001); *see also Rutlin,* 75 F.Supp.2d at 737-38 (plaintiff with intermittent seizures held not disabled, following rationale stated in *Sara Lee Corp.*).

***8** There is no evidence in the record that Bowman and Smith are significantly restricted as to the condition, manner or duration under which they care for themselves, interact with others, and think compared to the average person. Both Bowman and Smith stated that their epilepsy does not limit them in the normal activities of life because their epilepsy is largely controlled by medication. While Bowman and Smith still experience seizures despite medication, and are not capable of such activities during a seizure, the ADA does not encompass such occasional manifestations of an illness.

However, if the medication itself produces disabling side-effects, a finding of disability is appropriate. *Sutton,* 527 U.S. at 484. Bowman stated that his medication has caused gastrointestinal problems and moodiness, but he explained that these problems have resolved over time. Bowman claims that his medication affects his ability to interact with others, but Bowman has maintained a twenty-five year marriage, and has had no difficulty in

holding a job. Moreover, Bowman's personal physician, Dr. Cairns, stated that Bowman has not complained of his medication having any effect on his mood or affect. (Doc. 36, Cairns Depo. at 31). Similarly, Smith states that his medication causes occasional migraine headaches and moodiness, but that he has no limitations on his activities while he is taking his medications. (Id. at 60-61) The Court finds that these side effects are not of the nature, severity, or duration which would lead to a finding of a disability. *Accord Rutlin,* 75 F.Supp.2d at 738 (holding that very minor side effects of epilepsy medication are not substantially limiting). Therefore, the EEOC has not raised a genuine issue as to whether either claimant was actually disabled under the ADA.

However, an individual can also prove he is disabled under the ADA if he can show that the employer regarded him as having a disability. *See* 42 U.S.C. § 12102(2). An individual may be "regarded" as having a disability if the employer "mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or "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." *Id.*

The purpose of the "regarded as" prong is to prevent an employer from acting against an individual based on myths and stereotypes. *Ross v. Campbell Soup Co.,* 237 F.3d 701, 708 (6th Cir.2001). Proving that an employer regarded a job applicant as disabled is a question of the employer's state of mind. *Id.* This question is not easily answered at the summary judgment stage. *Id.* at 706.

***9** The EEOC argues that Dr. Cametas regarded Bowman and Smith as being disabled in the major life activities of thinking, interacting with others, and working. Overnite points out that Dr. Cametas is an independent contractor, and is not employed by Overnite. However, the Sixth Circuit has made it clear that "[e]mployers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties." *Holiday,* 206 F.3d at 645.

The EEOC has produced no evidence that Dr. Cametas regarded the claimants as substantially limited in the major life activities of thinking or interacting with others. However, the EEOC also argues that Dr. Cametas regarded the claimants as substantially limited in the major life activity of working. When proving that an employee is regarded as disabled in the major life activity of working, a plaintiff must show that the employer thought that the employee's disability would prevent him from performing a broad class of jobs. *Holiday,* 237 F.3d at 709. The EEOC has submitted testimony by Dr. Cametas stating that in addition to the dockworker position at Overnite, he would not want individuals with epilepsy to work as a window washer. (See Cametas Depo. at 64) Dr. Cametas also states that he would be concerned if an individual with epilepsy was working with a saw or cutting equipment. (Id. at 66)[4] Based on the testimony of Dr. Cametas, the Court finds that there is a genuine issue as to whether Dr. Cametas thought that an individual with epilepsy would be prevented from performing a broad class of jobs.

[4] Dr. Cametas was questioned about other situations, such as working with a drill press, but he replied that he would need to look at the whole environment to determine whether he would recommend an individual with epilepsy for that position. (Cametas Depo. at 63-66)

The Court also finds that there is a genuine issue as to whether Bowman and Smith were qualified for the dockworker position. It is a defense if, with or without reasonable accommodation, an employee poses a direct threat to himself or others at the workplace. *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73, 78, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002). A direct threat means that there is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *Hamlin v. Charter Tp. of Flint,* 165 F.3d 426, 431 (6th Cir.1999), *quoting* 29 C.F.R. § 1630.2(r). A "significant risk" is one where there is a "high probability of substantial harm; a speculative or remote risk is insufficient." *Id.* at 432, *quoting* 29 C.F.R. § 1630.2(r).

The analysis of whether a job applicant poses a direct threat considers four factors: (1) the duration of the risk; (2) the nature and potential severity of the harm; (3) the likelihood that the potential harm would occur; and (4) the importance of the potential harm. *Holiday,* 206 F.3d at 648. These factors operate on a sliding scale; if the consequences of the risk are severe, a low likelihood of risk may still justify an adverse employment action. *Mauro v. Burgess Medical Center,* 137 F.3d 398 (6th Cir.) (holding that employer was justified in terminating an HIV-positive surgical technician because the risk, though small, could result in death), *cert. denied,* 525 U.S. 815, 119 S.Ct. 51, 142 L.Ed.2d 39 (1998).

***10** There is a dispute among the circuit courts as to who bears the burden of proof on the issue of whether an employee poses a direct threat. *See Branham v. Snow,* 392 F.3d 896, 906, n. 5 (7th Cir.2004) (holding that it is employer's burden to show that employee posed a direct threat to workplace safety that could not be eliminated by

a reasonable accommodation, but noting caselaw to the contrary). The Sixth Circuit has not yet ruled on the issue, but has made reference to the "defense" of direct threat. *Hamlin,* 165 F.3d at 431 ("As a defense to [plaintiff's] claims, [defendant] argued that [plaintiff] posed a direct threat ..."); *see also E.E .O.C. v. Northwest Airlines, Inc.,* 246 F.Supp.2d 916, 926 (W.D.Tenn.2002) (holding that defendants failed to carry their burden of proving that plaintiff posed a direct threat in setting forth legitimate, non-discriminatory reason why he was not hired); *EEOC v. Chrysler,* 917 F.Supp. 1164, 1171-72 (E.D.Mich.1996) (relying on language of the ADA itself and placing burden on employer), *rev'd,* 172 F.3d 48 (6th Cir.1998) (reversed on other grounds). The ADA provides:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a). The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b). Based on the language of the ADA and the facts of this case, the Court finds that Overnite has the burden of proving that Bowman and Smith posed a direct threat to themselves or others.

Dr. Cametas recommended that Overnite not hire Bowman or Smith. Dr. Cametas decided that, because of the fast-paced environment at Overnite's facility and the hazardous nature of the materials dockworkers handle, the elevated risk posed by an applicant whose seizures are only partially controlled was unacceptable. The EEOC points out that Bowman operated forklifts both before and after his period of temporary employment with Overnite. However, one employer's willingness to bear the risk of harm does not constitute evidence rendering other employers liable under the ADA for their refusal to bear that same risk. *See LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir.1998); *but see Gilday v. Mecosta County,* 124 F.3d 760, 765-66 (6th Cir.1997) (where ADA plaintiff currently holds a position similar to the one from which he was terminated, there is sufficient evidence to create factual question as to whether plaintiff was qualified to perform the essential functions of the job).

***11** The EEOC also argues that Dr. Cametas failed to make the type of individualized inquiry required by the ADA. As the Sixth Circuit has explained:

> The ADA mandates an individualized inquiry in determining whether an employee's disability or other condition disqualifies him from a particular position. In order to properly evaluate a job applicant on the basis of his personal characteristics, the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question.

Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir.2000).[5] Overnite argues that under *Pesterfield v. Tennessee Valley Authority,* 941 F.2d 437 (6th Cir.1991), it is entitled to rely on reasonably rely on Dr. Cametas' opinion. However, courts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence. *Holiday,* 206 F.3d at 645.

[5] The Sixth Circuit has explained that this same individual assessment must be made when there is a determination that an individual poses a direct threat. *Holiday,* 206 F.3d at 647 n. 4, citing 29 C.F.R. § 1630.2(r).

Overnite also cites to *Smith v. Chrysler Corp.,* 155 F.3d 799 (6th Cir.1998), wherein the Sixth Circuit stated that "[i]n deciding whether an employer reasonably relied on the particularized facts then before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned." *Id.* at 807. Instead, "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Id.*

The Court notes that both Bowman and Smith had operated forklifts without incident before applying for employment with Overnite. The Court also notes that Dr. Cametas did not ask Bowman about the frequency of his seizures, nor did he consult with Bowman or Smith's treating physicians. Finally, the Court notes that Dr. Cametas does not consult scientific studies regarding the risks a person with epilepsy may pose in the workplace, but instead relies on his own personal judgment.

The Court concludes that Dr. Cametas' testimony creates

a question of fact as to whether Bowman and Smith were qualified to perform the essential functions of the dockworker position. *Accord Holiday,* 206 F.3d at 645. In addition, the Court finds that there is a genuine issue as to whether Overnite reasonably relied upon the opinion of Dr. Cametas in deciding to not hire the Bowman and Smith.

Based on the foregoing, neither party is entitled to summary judgment on the EEOC's ADA discrimination claims.

4. *Motions* in limine

The parties have also filed motions *in limine* to exclude expert testimony under Fed.R.Evid. 703. Overnite argues that this Court should exclude the testimony of Regis C. Worley, the EEOC's proposed engineering expert. EEOC argues that this Court should exclude the testimony of H. Frank Entwisle, Overnite's proposed industrial safety expert. Both parties rely upon the Supreme Court's decision in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and its progeny. The Court will take both of these motions under submission.

5. *Blanket exclusion based on DOT regulations*

***12** The EEOC also maintains that Overnite should be enjoined from relying on any DOT regulation or similar regulation which would operate as a blanket exclusion against hiring any individual with epilepsy or a clinical diagnosis of insulin-dependent diabetes mellitus into the position of dockworker. The EEOC admits that there is no evidence of such an individual being rejected from a dockworker position based upon diabetes, and therefore the EEOC is not seeking monetary relief for any such individual.

The Court finds that there is no evidence that Overnite relies solely upon any DOT regulation, or other similar regulation. It was Dr. Cametas testimony that he does not strictly follow the DOT regulations for dockworker positions. The EEOC has not presented any evidence that Dr. Cametas or Overnite rely on any similar regulations. Therefore, Overnite is entitled to summary judgment on this claim.

6. *Pattern or Practice of Discrimination*

The EEOC also argues that Overnite has a pattern of discriminating against epileptics because Overnite has employed only one other epileptic in recent years. Overnite argues it does not have a pattern of rejecting epileptics, as it currently employs one, and the existence of two rejections over the course of several years does not establish a pattern of discrimination. Overnite argues that the EEOC lacks standing to raise a "pattern or practice" claim, particularly for the class of individuals with diabetes, as neither Bowman nor Smith have diabetes.

In order to make out a *prima facie* case of a pattern or practice of discrimination, a plaintiff must show that discrimination is the defendant's "standard operating procedure-the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). A *prima facie* case based on indirect evidence requires "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* In *Int'l Brotherhood of Teamsters,* the government carried its burden by providing extensive evidence regarding a company's 6,472-person workforce, comparing the demographics of that workforce to that of the population at large in the relevant labor markets. *Id.* at 337. The government also produced direct evidence of over forty instances of discrimination. *Id.* at 338.

The evidence in this case provides, at best, proof of sporadic and isolated discriminatory acts. Out of thousands of applicants for dockworking positions at Overnite, the EEOC has produced evidence that only two applicants suffering from epilepsy were rejected for employment. Further, although he did not disclose his condition before employment, John Spindler was permitted to continue working at Overnite even after Overnite became aware of his epilepsy. The EEOC has provided no direct evidence of a rule against hiring epileptics, and the indirect evidence is insufficient to support a *prima facie* case of a discriminatory pattern or practice at Overnite. Therefore, Overnite is entitled to summary judgment on the EEOC's pattern or practice claim.

***13** Based on the foregoing, it is hereby ORDERED that:
1. Defendant's Motion for Summary Judgment (Doc. 30) is GRANTED in PART and DENIED in PART;

2. Plaintiff's Motion for Partial Summary Judgment (Doc. 31) is DENIED; and

3. Motions *in limine* to exclude expert testimony under Fed.R.Evid. 703 (Docs.29, 65) are TAKEN UNDER SUBMISSION.

IT IS SO ORDERED.

Parallel Citations

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