2006 WL 1280940
United States District Court,
W.D. Texas,
San Antonio Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
MOTHERS WORK, INC., Defendant.

Civil Action No. SA-04-CA-0873-XR. | May 8, 2006.

Attorneys and Law Firms

David C. Rivela, Robert B. Harwin, Judith G. Taylor, EEOC, San Antonio District Office, San Antonio, TX, for Plaintiff.

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Opinion

ORDER

XAVIER RODRIGUEZ, District Judge.

***1** On this date, the Court considered Defendant's motion for summary judgment (docket no. 45).

I. Background

The Equal Employment Opportunity Commission (EEOC) brings suit against Mothers Work, Inc. for disability discrimination. *See* Americans with Disabilities Act of 1990(ADA). Specifically, the EEOC alleges that Mothers Work discharged Monica Sarfaty from her position as a regional manager because she was disabled. Mothers Work argues that it is entitled to summary judgment because Sarfaty was not disabled as that term is defined under the ADA. Alternatively, it argues that it discharged Sarfaty for legitimate, non-discriminatory reasons and that the decision makers were not aware of Sarfaty's condition at the time they decided to terminate her employment.

Sarfaty became employed with Mothers Work in October 1997. She was promoted to regional sales manager in September 1999. As a regional sales manager she was responsible for 113 stores and eight district managers. In 2003, she assumed additional responsibilities which resulted in increased work-related travel. In July 2003, Sarfaty interviewed for a Director of Stores position in Mothers Work's Pea in the Pod division.

On or about August 7, 2003, Sarfaty's supervisor, Sharon Gottlieb, questioned Sarfaty regarding various expense reimbursements she submitted. On or about September 29, 2003, Sarfaty called in sick. Sometime prior to September 29, 2003, Sarfaty informed two of her subordinates, Mary Lisa Wise and Nicole Leddy, that she did not like working for Gottlieb, she had been interviewing for another job with other retail stores, and she intended to take a medical leave of absence that would coincide with the holiday season. Sometime in October 2003, Wise and Leddy informed Gottlieb of the above. In addition, Wise and Leddy complained to Gottlieb that Sarfaty was rude to her managers and had taken bath products purchased with company funds and intended as employee rewards.

On October 8, 2003, Sarfaty completed a disability claim form. In that form her physician diagnosed her as suffering from a major depressive disorder with extreme anxiety and panic attacks. The form contains contradictory information. In one paragraph the form states that Sarfaty has been suffering from this condition for several years. In another sentence the physician states that her symptoms first appeared on September 24, 2003. The physician opined that she believed that Sarfaty would be able to return to work on November 17, 2003.

On October 13, 2003, Mothers Work notified Sarfaty that her request for a leave of absence had been approved and that her 12-week Family and Medical Leave would expire on December 23, 2003.

While on medical leave, the company continued its investigation regarding possible reimbursement irregularities by Sarfaty, verbal abuse complaints lodged by Sarfaty's subordinates, claims that Sarfaty interviewed for positions with other retail companies while on company time, and claims that Sarfaty sent disparaging emails about the company. Mothers Work contends that it attempted to contact Sarfaty on a number of occasions about its concerns, however, Sarfaty refused to return any of its telephone calls. After it concluded that Sarfaty was refusing to cooperate with their investigation, Mothers Work terminated Sarfaty's employment either on October 17[1] or October 31, 2003 for job abandonment.

1 The actual date that Sarfaty was discharged is uncertain. Mothers Work sent a letter dated October 17 by overnight mail to Sarfaty stating: "Having been unable to reach you after several attempts, we are forced to conclude that you have voluntarily abandoned

your position....” However, personnel records reflect an October 31 discharge date.

***2** In early 2004, Sarfaty applied for various managerial positions with other retailers. Sarfaty’s psychiatrist established a medication protocol for her and deemed that Sarfaty was able to return to work in April 2004. Sarfaty began working for Victoria’s Secret in April 2004 as a district manager. Sarfaty testified that with her medication regimen she is able to concentrate, focus on analyzing business statistics and sales figures, take care of herself, engage in correct eating habits, speak intelligently, and enjoy gardening and reading.

II. Summary Judgment Standard

A summary judgment movant must show by affidavit or other evidence that there is no genuine issue regarding any material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). To establish that there is no genuine issue as to any material fact, the movant must either submit evidence that negates the existence of some material element of the nonmoving party’s claim or defense, or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidence in the record is insufficient to support an essential element of the nonmovant’s claim or defense. *Lavespere v. Niagra Machine & Tool Works, Inc.,* 910 F.2d 167, 178 (5th Cir.1990), *cert. denied,* 510 U.S. 859 (1993). Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate. *See Fields v. City of South Houston,* 922 F.2d 1183, 1187 (5th Cir.1991).

Summary judgment is required if 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); *Celotex Corp.,* 477 U.S. at 322. In order for a court to conclude that there are no genuine issues of material fact, the court must be satisfied that no reasonable trier of fact could have found for the nonmovant, or, in other words, that the evidence favoring the nonmovant is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 n. 4 (1986). In making this determination, the court should review all the evidence in the record, giving credence to the evidence favoring the nonmovant as well as the “evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses” and disregarding the evidence favorable to the nonmovant that the jury is not required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 152 (2000).

III. Analysis

A. Does Plaintiff suffer from a disability?

A plaintiff makes a prima facie showing of ADA discrimination by establishing that she 1) is disabled or is regarded as disabled; 2) is qualified for the job; 3) was subjected to an adverse employment action on account of her disability; and 4) was replaced by or treated less favorably than non-disabled employees. *McInnis v. Alamo Cmty. Coll. Dist.,* 207 F.3d 276, 279-80 (5th Cir.2000).

***3** The EEOC argues that Sarfaty is disabled, because she is “substantially limited in the major life activities of interacting with others, thinking, caring for oneself, concentrating, sleeping, eating, as well as working, based on her diagnosed illness Bipolar Disorder, which was initially diagnosed as Severe Recurrent Major Depressive Disorder.”

There is evidence that from September 29, 2003 to April 2004, Sarfaty was unable to care for herself, required hospitalization, and was unable to work. Since April 2004, Sarfaty alleges that she sometimes spends an entire weekend in her pajamas because of lethargy, which she claims stems from her bipolar disorder. She further alleges that on occasion she has difficulty concentrating and that requires changing the dosage on her medications. She admits that she is able to perform her job, interact with her fellow employees and perform the reduced travel demands that she now faces. Sarfaty also admits that she has not requested any accommodations from her new employer regarding performance of her job-a job that she describes as very similar to the one performed at Mothers Work. Sarfaty admits that prior to giving notice of her request for FMLA leave, she never requested any accommodations from Mothers Work.

The essence of the EEOC’s claim is that Mothers Work was aware of Sarfaty’s condition in October 2003, when Sarfaty notified the company’s benefits manager, Donna Dougherty. As a result of that notification, the company was aware that Sarfaty was diagnosed as suffering from major depression and thus was precluded, as a matter of law, from discharging Sarfaty.

Nowhere in the EEOC’s complaint does it argue that Mothers Work regarded (or perceived) Sarfaty as disabled.[2] In addition, although the EEOC argues strenuously that Mothers Work has a history of retaliating against employees who seek a medical leave of absence, the EEOC does not bring a claim for retaliation under

either the ADA or the FMLA.

2 Despite the absence of any "regarded as" allegation, the EEOC argues that a fact issue exists on this claim. Pl.'s Resp., at 16. Mothers Work responds to this issue in its reply brief and apparently is trying this issue by consent. Def.'s Reply, at 12. Accordingly, the Court will address the claim in paragraph III. D. of this order.

"A plaintiff cannot survive summary judgment by showing that an impairment like his own could substantially limit a major life activity of another person or in his own future; rather, he must show that his impairment has actually and substantially limited the major life activity on which he relies." *Waldrip v. General Elec. Co.,* 325 F.3d 652, 655 (5th Cir.2003). The effects of an impairment, even some serious ones, may not rise to a substantial limit. *Id.* at 656. "[N]either the Supreme Court nor [the Fifth Circuit] has recognized the concept of a per se disability under the ADA, no matter how serious the impairment; the plaintiff still must adduce evidence of an impairment that has actually and substantially limited the major life activity on which he relies." *Id.*

This Court agrees with Defendant's arguments and finds that Plaintiff has not rebutted Defendant's summary judgment evidence with significant probative evidence to raise a genuine issue of material fact regarding whether Sarfaty's impairments or condition substantially limits her major life activities. In addition, any impairment suffered by Sarfaty was corrected by the medication protocol established for her. "Plaintiff's assertion that [she] fits a textbook definition of bipolar disorder as well as suffers from some of the common symptoms ... is insufficient. 'The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.' *Taylor v. Principal Fin. Group, Inc.,* 93 F.3d 155, 164 (5th Cir.1996). Plaintiff has failed to adduce evidence that, when taken in a light most favorable to [her], shows that [her] bipolar disorder has substantially limited one or more major life activities." *Curl v. United Supermarkets, Ltd.,* 2005 WL 221227 (N.D.Tex.2005). *See also Collins v. Prudential Inv. & Retirement Services,* 119 Fed. Appx. 371 (3d Cir.2005)("It is clear that '[m]erely having an impairment does not make one disabled for purposes of the ADA.' "[W]hether a person has a disability under the ADA is an individualized inquiry.' An ADA plaintiff 'need[s] to demonstrate that the impairment limits a major life activity.'.... A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity." Accordingly, the court found that ADHD/ADD impairment corrected with medication is not a disability under the ADA.); *Krause v. Merck-Medco Rx Services of Texas LLC,* 198 F.3d 241 (5th Cir.1999)(plaintiff's bipolar disorder did not substantially limit a major life activity); *Kronner v. McDowell & Assocs., Inc.,* 2005 WL 3478358 (E.D.Mich.2005)(bipolar disorder did not substantially limit plaintiff's activities); *Price v. Facility Management Group, Inc.,* 403 F.Supp.2d 1246 (N.D.Ga.2005)(same); *Velez v. Janssen Ortho LLC,* 389 F.Supp.2d 253 (D. Puerto Rico 2005)(same); *Olynyk v. CRA Occupational Health, Inc.,* 2005 WL 1459547 (N.D.Ohio 2005)(same); *Berardi v. Delaware River Port Authority,* 2005 WL 1366526 (D.N.J.2005)("Because the record shows that Berardi has been able to work without restriction after receiving treatment, and because the record contains no evidence that Berardi's depression and diabetes affected any of his major life activities other than work, a reasonable jury could not find that Berardi has a record of substantial limitation in a major life activity.").

B. EEOC's position.

***4** The EEOC argues that Sarfaty is disabled because her physician opined that from October 2 through November 17, 2003 she required psychiatric care. That evidence, however, only shows that she was incapacitated for a definite period of time. *See Winters v. Pasadena Ind. Sch. Dist.,* 124 Fed. Appx. 822 (5th Cir.2005)("Specifically, Winters asserts that the fact that she went on medical leave for depression and was hospitalized in a mental institution during this time is evidence that she has a record of disability. Simply being hospitalized does not establish a record of a mental disability. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay.... To accept [the proposition that a hospital stay establishes that an impairment substantially limits major life activities] would work a presumption that any condition requiring temporary hospitalization is disabling-a presumption that runs counter to the very goal of the ADA.") (citations omitted).

The EEOC also argues that Sarfaty will continue to suffer from her bipolar disorder for the unforeseeable future. When Sarfaty was discharged from the psychiatric hospital on November 12, 2003, she was advised to continue medication management and obtain depression support group therapy on a weekly basis. The EEOC also argues that Sarfaty continues to be substantially limited in the following major life activities: interacting with others, thinking, concentrating, caring for oneself, eating, sleeping and working. Sarfaty's own affidavit, however, establishes that she believed she could return to work at Mothers Work in December 2003. Further, the mere fact that Sarfaty states that she has been taking psychiatric medications since 2002 does not establish that she is per

se disabled. The EEOC provides no evidence that Sarfaty's ingestion of psychiatric medications prevents her from successfully performing her current job at Victoria's Secret. Indeed, Sarfaty's testimony contradicts the EEOC's position.

Further, Sarfaty's statements that she is obsessed with sales numbers, gets frustrated with employees if her sales numbers are lower than desired, experiences occasional memory lapses, has on occasion had difficulty speaking before co-workers and has a limited social life does not evidence a substantially limitation in the major life activity of interacting with others. *See Jacobs v. Georgia-Pacific West Inc.,* 144 Fed. Appx. 608 (9th Cir.2005)(Mere trouble getting along with coworkers is not sufficient to show substantial limitation on major life activity of interacting with others under ADA); *Rohan v. Networks Presentations LLC,* 375 F.3d 266 (4th Cir.2004)(same).

Sarfaty's statements that on occasions she becomes obsessed with french fries, candy or chocolate or that on other occasions she loses her appetite and has to force herself to eat does not evidence a substantial limitation in the major life activity of eating. *See Waldrip v. General Elec. Co.,* 325 F.3d 652 (5th Cir.2003)(Plaintiff produced no evidence that chronic pancreatitis "substantially limits" the major life activity of eating. "The substantial-limit requirement is the linchpin of § 12102(2)(A). Without it, the ADA would cover any minor impairment that might tangentially affect major life activities such as breathing, eating, and walking. For this reason, an impairment must not just limit or affect, but must substantially limit a major life activity.").

***5** Likewise, the EEOC presents no evidence to support the claim that Sarfaty is substantially limited in the major life activity of sleeping. Although the EEOC makes references to problems sleeping in 2003, no evidence was tendered of any such problems post-2003. *See Hollon v. Louisiana Pacific Corp.,* 2005 WL 1398711 (E.D.Tex .2005)("Even construing sleeping as a major life activity, the evidence simply does not support Mr. Hollon's contention that his sleeping is substantially limited. The only evidence he presents is his own testimony that no matter how much he sleeps, he is always tired; that he never feels rested, and he has to nap.... At the same time, Mr. Hollon acknowledged that he can engage in regular activities, such as driving a car, cooking, dressing and functioning "like a normal person." ... Plaintiff simply has not shown that there is any issue of material fact with regard to the life activity of sleeping. By his own testimony he is able to carry on daily life. Despite his condition and the alleged difficulties with his sleep, he engages in "normal" activities and has been able to work for several employers both before and after Louisiana Pacific. The Court therefore cannot conclude that his ability to sleep is so severely and significantly restricted that it rises to the level of "substantially limited" as defined by law.).

Of greater concern is Sarfaty's allegation that she suffers, and continues to suffer from panic attacks, even with her new medication regimen. During these panic attacks, Sarfaty feels that she loses her composure and wants to avoid contact with others. She testifies that she experiences these attacks at least once per week. She states that the panic attacks affect her work, her relationships with people, and her ability "to get around in the world." Sarfaty, however, fails to explain her contradictory deposition testimony that she is successfully employed in a mid-level management position in the demanding retail industry.

Further, the EEOC presents no evidence to support the claim that Sarfaty is substantially limited in the major life activities of thinking, concentrating, or caring for oneself.

The Court recognizes that bipolar disorder is a mental impairment under the ADA. Further, the Court agrees that Sarfaty's condition is chronic. The question, however, is whether Sarfaty's continuing impairment remains a disability as that term is defined by the ADA. Chronic, episodic conditions could possibly impact "how well a person performs an activity as compared with the rest of the population." *Parker v. City of Williamsport,* 406 F.Supp.2d 534 (M.D.Pa.2005)(recognizing that a chronic, episodic condition could qualify as a disability under the ADA, but finding that plaintiff's depression, anxiety disorder and panic attacks did not qualify). However, as in *Parker,* the condition expressed here, controlled by medication, allows Sarfaty to resume her managerial work. Given the facts in this case, the EEOC has not adduced sufficient evidence so that a reasonable factfinder could find that Sarfaty has a persistent serious condition that qualifies as a disability under the ADA. *See Jacques v. DiMarzio, Inc.,* 386 F.3d 192 (2nd Cir.2004)(affirming summary judgment regarding bipolar claim); *Kourianos v. Smith's Food & Drug Centers, Inc.,* 65 Fed. Appx. 238 (10th Cir.2003)(affirming summary judgment regarding depression and anxiety claims); *Huge v. General Motors Corp.,* 62 Fed. Appx. 77 (6th Cir.2003)(depression did not qualify as an ADA disability); *Boshaw v. Spartan Stores, Inc.,* 2005 WL 3277986 (W.D.Mich.2005)(depression, obsessive compulsive disorder and panic attacks did not qualify); *Kramer v. Hickey-Freeman, Inc.,* 142 F.Supp.2d 555 (S.D.N.Y.2001)(bipolar disorder did not substantially limit him in major life activity of working); *Horwitz v. L & J.G. Stickley, Inc.,* 122 F.Supp.2d 350 (N.D.N.Y.2000)(employee's brief hospitalization for bipolar disorder and six weeks of psychiatric center care was insufficient to constitute record of disability).

C. Defendant's articulated non-discriminatory reasons for discharge.

***6** Alternatively, Mothers Work argues that it had a legitimate, non-discriminatory reason for discharging Sarfaty, namely job abandonment after she failed to respond to its telephone messages. As stated above, the ADA claim fails because Sarfaty's condition was temporary, corrected by medication, and Plaintiff fails to present evidence that the condition affects any major life activities. However, in the event the Court has erred in reaching that decision, we shall proceed to address Defendant's alternative arguments.

Mothers Work advances three arguments. First, it believed, based on information supplied from Sarfaty's subordinates, that Sarfaty intended to leave her employment. Second, despite the fact that it granted a leave of absence to Sarfaty it had the right to pursue the investigation it began prior to her calling in sick. Third, the decision makers involved in the termination decision were not aware of Sarfaty's medical condition.

As to it's first argument, a fact issue exists in this regard. Despite other employee statements that Sarfaty was intending to quit, Sarfaty has testified that she intended to return to her former position when medically able. As to the second argument, Mothers Work was entitled to continue its investigation during Sarfaty's leave, however, given that it approved a leave of absence until December 23, 2003, it's discharge of Sarfaty on October 17 or October 31 raises suspicion. However, the reality here is that no claim of ADA or FMLA retaliation has been alleged in this case. As to Defendant's third argument-that neither Gottlieb, Neil Cohen, or Craig Swartz was aware of the extent of Sarfaty's medical condition-this argument requires a more detailed discussion.

The EEOC argues that Sarfaty's application for disability benefits provided notice to Mothers Work of her medical condition. On or about October 8, 2003, Sarfaty transmitted her disability claim form to the company's benefits manager. The form indicated that Sarfaty became disabled on September 25, 2003. The form also indicated that she was receiving outpatient hospital treatment and that she was being treated by a psychiatrist and psychologist. Her physician noted that she was suffering from "major depression, severe, recurrent." The physician noted that she expected Sarfaty to be able to return to work on November 17, 2003.

The benefits manager, Donna Dougherty, testified that the company approved Sarfaty for FMLA leave and that she did not contest Sarfaty's disability claim with their disability insurance carrier. Accordingly, at the time it discharged Sarfaty, Mothers Work was aware that Sarfaty had been hospitalized, required continuing treatment, was suffering from major depression, but was expected to recuperate and return to work in December. The EEOC fails to present any evidence that at the time of her discharge, Mothers Work was aware that Sarfaty suffered from any bipolar condition.

D. The EEOC fails to produce evidence that Mothers Work regarded Sarfaty as disabled.

***7** There are two apparent ways in which a person may be regarded as having a physical or mental impairment that substantially limits one or more major life activities: an employer mistakenly believes that a person has a physical or mental impairment that substantially limits one or more major life activities, or the employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 489 (1999). However, the EEOC has failed to adduce any evidence to support a reasonable finding that Mothers Work regarded Sarfaty as disabled. The evidence submitted would only permit the finding that Mothers Work viewed Sarfaty as having undergone psychiatric treatment and that she was expected to be medically released to return to work in November 2003. The EEOC's argument that Mothers Work did not contest Sarfaty's long-term disability claim is evidence that it considered Sarfaty disabled is somewhat novel, but unpersuasive. A similar claim was advanced, and rejected, in *Gordon v. MCG Health, Inc.,* 301 F.Supp.2d 1333 (S.D.Ga.2003). In *Gordon,* a staffing director called the plaintiff "disabled," and told her that she was "a liability" and should look into getting long term disability insurance. The court noted that referring to the plaintiff as "disabled" and suggesting she look into getting disability insurance is not synonymous with regarding the plaintiff as substantially limited in one or more major life activities. *Id.* at 1342. "Further, courts have held that a plaintiff's receipt of disability leave or disability insurance was insufficient to show that an impairment substantially limited a major life activity, or that the plaintiff had a record of a disability. Therefore, it is reasonable to conclude that a supervisor's suggestion that an employee seek disability insurance also fails to show that the employer regarded a plaintiff as disabled." *Id.* (citations omitted). Mothers Work did not contest Sarfaty's long-term disability claim because it believed Sarfaty was unable to "do anything that was related to her position with the company." That statement is not synonymous with regarding her as substantially limited in one or more major life activities.

Conclusion

The EEOC has failed to adduce evidence that, when taken in a light most favorable to it, shows that Sarfaty's bipolar disorder has substantially limited one or more major life

activities. Alternatively, the EEOC fails to present any evidence that at the time of her discharge, Mothers Work was aware that Sarfaty suffered from any bi-polar condition. Finally, the EEOC has failed to adduce any evidence to support a reasonable finding that Mothers Work regarded Sarfaty as disabled. Defendant's motion for summary judgment (docket no. 45) is GRANTED.

Parallel Citations

17 A.D. Cases 1806, 32 NDLR P 193