Analysis
As of: Oct 27, 2013

MICHAEL JOHNSON, Plaintiff, v. JESSE BROWN, as Secretary, Department of Veterans Affairs, Defendant.

Civil Action 96-1686 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1999 U.S. Dist. LEXIS 17947

August 9, 1999, Decided
August 9, 1999, Filed

DISPOSITION: [*1] Michael Johnson's motion for partial summary judgment GRANTED; Medical Center's cross-motion for summary judgment DENIED.

COUNSEL: For MICHAEL JOHNSON, plaintiff: Leizer Z. Goldsmith, THE GOLDSMITH LAW FIRM, Washington, DC.

For TOGO D. WEST, federal defendant: Anthony Michael Alexis, Sr., Fred E. Haynes, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: Henry H. Kennedy, Jr., United States District Judge.

OPINION BY: Henry H. Kennedy, Jr.

OPINION

MEMORANDUM OPINION

Plaintiff Michael Johnson alleges that the Department of Veterans Affairs Medical Center ("Medical Center") violated the Rehabilitation Act, 29 U.S.C. ßß 701 et seq., when it terminated him from a position in the Medical Center's operating room "pack room."

This court previously denied the Medical Center's motion for summary judgment, finding in particular that Johnson had presented evidence from which it could be inferred that it would have been reasonable to allow him to work indefinitely in the pack room. *Johnson v. Brown*, 26 F. Supp. 2d 147 (D.D.C. 1998). Before the court are Johnson's motion for partial summary judgment on the issue of liability and the Medical Center's cross-motion for [*2] summary judgment. Having considered the motions and the record of this case, the court concludes that Johnson's motion should be granted because there is no genuine factual issue in dispute as to whether it would have been reasonable to allow him to work indefinitely in the pack room or whether such accommodation would have constituted an undue hardship for the Medical Center. For the same reasons, the Medical Center's cross-motion will be denied.

I. FACTUAL BACKGROUND

The facts of this case have been set forth in this court's memorandum opinion on the Medical Center's first motion for summary judgment and are incorporated herein by reference. *Johnson v. Brown*, 26 F. Supp. 2d 147, 148-49 (D.D.C. 1998).

II. STANDARD OF REVIEW

A motion for summary judgment should be granted if and only if it is shown "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). The moving party's "initial responsibility" consists of "informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and [*3] admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (internal quotation marks omitted).

If the moving party meets its burden, the burden then shifts to the non-moving party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). The non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor. *Laningham v. Navy*, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1242 (D.C. Cir. 1987). Such evidence must consist of more than mere unsupported allegations or denials and must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. 317 at 322 n.3., 106 S. Ct. 2548 at 2552 n.3, 91 L. Ed. 2d 265. If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). [*4]

III. ANALYSIS

A. Johnson's Motion

To establish liability under the Rehabilitation Act, 29 U.S.C. ßß 701 et seq., a plaintiff must show that he is a "'qualified handicapped person' who, with 'reasonable accommodation, can perform the essential functions of the position in question.'" *Barth v. Gelb*, 303 U.S. App. D.C. 211, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994) (citing 29 C.F.R. ß 1613.702(f)). Thus, the plaintiff must establish by a preponderance of the evidence that he or she is a "qualified handicapped person" within the meaning of the Rehabilitation Act and that the specific accommodation sought is reasonable. *Id.* If the plaintiff meets this burden, the defendant may then offer the affirmative defense of "undue hardship on the operation of its program." *Id.*

This court has previously found that to be "a qualified individual with handicaps" within the meaning of the Rehabilitation Act, "Johnson must only show that he can perform the essential functions of the position to which he seeks reassignment, [and] it is irrelevant . . . that Johnson cannot perform the essential [*5] functions of the janitorial position." *Johnson*, 26 F. Supp. 2d at 150. While the Medical Center contends that Johnson is not competent to perform the full range of pack room duties, it is undisputed that Johnson can perform the essential functions of the light duty pack room position he seeks. The Medical Center contends, however, that placing Johnson into the light duty pack room position at the WG-2 level would have been an unreasonable accommodation and would constitute an undue hardship on the operation of its program.

Reassignment of a federal employee is a reasonable accommodation if it is "reasonably available under the employer's existing policies." *Woodman v. Runyon*, 132 F.3d 1330, 1346 (10th Cir. 1997) (quoting *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987)). Reassignment may be shown to be "reasonably available" by, *inter alia*, evidence that the employer has used such reassignment to accommodate a similarly situated employee. *See Woodman*, 132 F.3d at 1346; *Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488, 1492 (M.D. Ala. 1994). [*6]

In *Howell*, the plaintiff sought reassignment to a permanent light-duty position as reasonable accommodation for his disability notwithstanding his employer's contention that it allotted a maximum of 13 weeks for a temporary light-duty rotation. 860 F. Supp. at 1490. The court first reasoned that the issue of whether reassignment to a position was a reasonable accommodation should be determined by reference to the status of that position when it was created:

> Reasonable accommodation . . . does not require that an employer create a light-duty position or a new permanent position. But, if an employer has a vacant light-duty position or a vacant permanent position for which the disabled employee is qualified, it would be a reasonable accommodation to reassign the employee to that position. If the position was created as temporary job, the reassignment to that position need only be for the temporary period of the job. Therefore, if a light-duty job is a temporary job, reassignment to that job need only be for the temporary period of the job, and an employer need not convert a temporary job into a permanent one. However, if a light-duty job is a permanent job, the [*7] assignment to the job must be for the entire time the job exists.

Id. at 1492. The plaintiff cited a suitable permanent vacancy that had been available when Howell sought reassignment, but was filled instead by the reassignment of another employee. *Id.* at 1493. According to the plaintiff, the circumstances suggested that the other employee's reassignment was actually a placement in a temporary post and that the permanent vacancy stayed unfilled. *Id.* The court found that the plaintiff's contention, insofar as it "may be further evidence of the company's ability to accommodate workers without relying on specific vacancies," raised a genuine issue of material fact sufficient to deny the employer's motion for summary judgment.

In denying the Medical Center's motion for summary judgment, this court noted the undisputed fact that another employee, Clarence Walker, was reassigned to a light-duty assignment in the pack room at about the same time that Johnson was terminated. *Johnson*, 26 F. Supp. 2d at 152. This fact has two implications for the reasonableness inquiry.

First, as this court has already found, "although the Medical [*8] Center has attempted to distinguish [one] employee's situation because he still fulfills some of his original job duties," Walker's situation was sufficiently similar to Johnson's to serve as a basis for an inference that it was reasonable to allow Johnson to work indefinitely in the pack room. *Id.*

Second, and more significantly, the Medical Center's placement of Walker and another employee in light duty assignments at the WG-2 level is evidence of its "ability to accommodate workers without relying on specific vacancies." Regarding its ability to accommodate workers in the pack room on a permanent basis, the Medical Center's sole contention is that employment in the pack room is a "specialty job" where only WG-3 employees "can be counted upon not to make mistakes" while working with "minimal supervision" over an "extended period of time." Def.'s Answer to Pl.'s First Set of Interrogatories at PP 6, 16, 17. The Medical Center, however, has offered no evidence of an "existing policy" that defines the "extended period of time" beyond which employees are incapable of working in the pack room in light duty positions at the WG-2 level. To the contrary, the Medical Center concedes [*9] that Walker worked in the pack room in a light duty position at the WG-2 level "longer than anyone anticipated." Def.'s Opp'n at 3-4. The Medical Center distinguishes Walker's situation from Johnson's by noting that "Walker could perform his housekeeping duties" and "it was clear that [Walker] would heal one day." *Id.* Under an accommodation policy based on the limited competence of WG-2 employees to undertake specialized pack room responsibilities over an "extended period of time." the facts that Walker was housekeeping and healing would not have prolonged his reassignment.

There is nothing in the summary judgement record to suggest the existence of a policy precluding the Medical Center from accommodating Johnson without relying on specific vacancies. Moreover, it is undisputed that the Medical Center continues to have several full-time vacancies at the WG-2 level. *See id.* at 4. Thus, the Medical Center's contentions that it was "extremely short-handed at plaintiff's old position" and "placing plaintiff into the Pack Room position would constitute a promotion and reclassification," *id.* at 1, do not pose an impediment to the accommodation sought by Johnson. Accordingly, the court finds that there are no disputed issues of fact regarding whether granting Johnson a light duty pack room position would have been a reasonable accommodation.

B. The Medical Center's Cross-Motion

In support of its cross-motion for summary judgment, the Medical Center contends that Johnson "cannot establish that he could be accommodated." *Id.* at 4. The Medical Center's argument is entirely based on the fact that Johnson could no longer perform any of the duties of his previous housekeeping position, a fact this court has already found irrelevant to the determination that Johnson "qualified" within the meaning of the Rehabilitation Act. *Johnson,* 26 F. Supp. 2d at 150. Nor, as discussed *supra*, does Johnson's inability to perform his former duties distinguish his situation from that of Walker for the purposes of defining reasonable accommodation. The arguments made in support of the Medical Center's cross-motion therefore do not disturb the court's conclusion that Johnson not only could have been accommodated in the manner sought, but that such accommodation would have been reasonable. [1] Accordingly, the Medical Center's cross-motion must be denied.

1 The Medical Center also notes that Johnson did not even formally apply for the pack room position. As this court has already found, this fact is no obstacle to Johnson's claim. *Johnson*, 26 F. Supp. 2d at 152 n.7 (citations omitted).

[*10] **IV. CONCLUSION**

For the foregoing reasons, it is this 9th day of August, hereby

ORDERED that Michael Johnson's motion for partial summary judgment is **GRANTED;** and it is further

ORDERED that the Medical Center's cross-motion for summary judgment is **DENIED**.

Dated: 8/9/99

Henry H. Kennedy, Jr.

United States District Judge