



Cited
As of: Oct 27, 2013

**JEROME SHIPMAN, Plaintiff, v. BRUCE BABBITT, Secretary, U.S. Department
of Interior, Defendant.**

Civil Action 98-2729 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1999 U.S. Dist. LEXIS 21118

**September 17, 1999, Decided
September 17, 1999, Filed**

DISPOSITION: [*1] Defendant's motion to dismiss, or in the alternative, for summary judgment, denied.

COUNSEL: For JEROME SHIPMAN, plaintiff: Leizer Z. Goldsmith, THE GOLDSMITH LAW FIRM, Washington, DC.

For BRUCE BABBITT, federal defendant: Meredith Manning, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: Henry H. Kennedy, Jr., U.S. District Judge.

OPINION BY: Henry H. Kennedy, Jr.

OPINION

MEMORANDUM AND ORDER

In this suit, Jerome Shipman, a U.S. Department of Interior employee who suffers with significant respiratory disorders, alleges that the National Park Service discriminated against him on the basis of his handicap in violation of the Rehabilitation Act, 29 U.S.C. § 791 et seq., when it failed to select him for the Supply Technician position he sought. Contending that Shipman is not qualified for the Supply Technician position because he can not perform the essential functions of the job, de-

fendant moves to dismiss, or in the alternative, for summary judgment. Because there are material facts in dispute regarding whether Shipman is able to perform the essential functions of the job for which he was not selected, defendant's motion must be denied.

I. FACTUAL BACKGROUND

Shipman [*2] worked as a maintenance worker for the National Park Service at the Rock Creek Park Nature Center from 1976 - 1984. As part of his employment, he performed gardening and maintenance duties. During this time, Shipman was diagnosed with bronchospastic asthmatoïd disorder, multiple allergies and recurrent paroxysmal atrial tachycardia. Compl. P 9. Consequently, he suffers from a severe respiratory condition, which inhibits his ability to work outdoors. Compl. P 9. The work Shipman was required to perform as a maintenance worker caused him health difficulties related to asthma.

As a result of his medical difficulties, Shipman requested a transfer to a position which required less outdoor work. He accepted a transfer to a position as a Supply Clerk in the Property Management Division, which had a lower grade level, that of GS-5. As a Supply Clerk, Shipman spent approximately 80% of his time in the office and the remaining 20% of his time on site visits with his supervisor, Argerly Stokes. Shipman asserts that only a small amount of the time spent on site visits was

spent outdoors because most of the site visit was spent reviewing documents at buildings on the site. Shipman Aff. P 8. One [*3] of Shipman's supervisors, Thaddeus McKoy, described Shipman's responsibilities during the onsite visits this way: "We'll have him go out and look for certain pieces of property and we would have him do things like record vehicle numbers. We'd have him go around the record property numbers. And then we'll bring that information back and compare it with the permanent records." Interview of McKoy at 17.

In January 1991, Stokes retired. Stokes had held a GS-7 Supply Technician position. For the year and a half that the position was unfilled, Shipman performed Stokes' duties, which included site visits. Shipman Aff. P 12. In April 1992, the agency posted a vacancy for the GS-7 Supply Technician position. Shipman was one of three individuals whose names were forwarded to the selecting official, but Shipman was not selected for the position. Shipman continues to perform site visits as part of his current job and alleges that they have not resulted in any "detectable deterioration of his health." Shipman Aff. P 18.

Shipman has submitted documentation which indicates that the Supply Technician position does not require more outdoor work than Shipman's current position. The position description [*4] for Supply Technician describes the physical demands of the work as "mostly sedentary. . . Work is performed in offices and field locations, with no discomforts or unusual risks involved." Def. Ex. 5. In addition, McKoy's description of the Supply Technician job does not indicate that it requires more outdoor work than the Supply Clerk position. McKoy compared the Supply Technician position to Shipman's current position as follows:

"The supply technician job goes beyond [the Supply Clerk position] because they actually look at the parks policy versus the NPS policy. They actually make suggestions as to how people can better account for the property. They look at whatever type of systems the people have and evaluate the systems.

It's based on a lot of information that's gathered. All of them will gather information as they go along. We look at the purchasing procedures. We look at the disposal procedures. And pretty much just to see if they have some type of procedures in place or established for accountability of property and the various components of property management." Interview with McKoy at 18.

Defendant rebuts Shipman's description of the Supply Technician's duties [*5] with the affidavit of J.R. Parsons, the specialist who classified the position. Parsons states that when he classified the Supply Technician position, he "determined that property field reviews was a major duty of the position and was grade controlling. In other words, the property field reviews were a significant and substantial responsibility of the position. Further, I determined that if the outdoor site visits were not included in the positions responsibilities, the position should be classified as a GS-6 level." Declaration of J.R. Parsons, at P 7. Based on this description of the Supply Technician's responsibilities and a letter from Shipman's physician written in 1990 which states that an "indoor position [for Shipman] is a life-saving factor that cannot be altered," Def. Ex. 4, defendant argues that Shipman would endanger himself if he were allowed to perform the site visits required of the Supply Technician position.

II. ANALYSIS

The court treats defendant's motion as one for summary judgment because both parties have submitted matters outside the pleadings that are relevant to the resolution of the issue. See *Americable Int'l Inc. v. Department of the Navy*, 327 U.S. App. D.C. 159, 129 F.3d 1271, 1274 (D.C. Cir. 1997). [*6] Moreover, "since both parties have filed exhibits and affidavits, neither can complain that they lacked a reasonable opportunity to meet facts outside the pleadings." *Gryga v. Ganzman*, 991 F. Supp. 105, 107 (E.D.N.Y. 1998) (citing *In re G. & A. Books, Inc.* 770 F.2d 288, 295 (2d Cir. 1985)).

Under Fed. R. Civ. P. 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The Rehabilitation Act prohibits discrimination against disabled federal employees who are "otherwise qualified" individuals for employment. 29 U.S.C. § 794(a). The federal [*7] regulations implementing the Rehabilitation Act define a "qualified individual with handicaps" as "an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or

others..." 29 C.F.R. § 1614.203(a)(6). For purposes of this motion, it is uncontroverted that Shipman is a handicapped person. Accordingly, the only contested issue is whether Shipman can perform the essential functions of the Supply Technician position.

Defendant asserts that outdoor field visits are an essential function of the Supply Technician position and that Shipman is unable to perform this function. The circumstances recounted by Shipman, however, cast doubt upon the extent to which outdoor work is a component of the field visits. Shipman alleges that he has assisted with the responsibilities of the Supply Technician position when that job was vacant, and that he spent over half his time indoors on the site visits. McKoy's description of the job also supports Shipman's assertions.¹

¹ Defendant's reliance on *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983), in support of its position that Shipman is unable to perform the site visits required of the Supply Technician position because of his inability to work outdoors is misplaced. In *Treadwell*, the court held that the plaintiff was not otherwise qualified as a seasonal park technician because he did not meet the functional requirements of the position. The job required the plaintiff to walk six hours a day, whereas the plaintiff, who had undergone a quadruple bypass and pacemaker implant, could not walk more than a mile a day. *Id.* at 476. Here, by contrast, it has not been demonstrated that the outdoor work is a substantial part of the Supply Technician position.

[*8] Defendant can not win on summary judgment merely by alleging that the outdoor duties on the site visits are an essential function of the Supply Technician position. In *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 632 (7th Cir. 1998), the court held that an employer was not entitled to summary judgment on the issue of whether the plaintiff was a qualified individual because there were conflicting allegations regarding a job's requirements.² The plaintiff was a truck driver who lost his job after being diagnosed with insulin-dependent diabetes. *Id.* at 628. On appeal, the parties disputed whether the plaintiff could be qualified for a "driver helper" position even though he could not obtain a commercial driver's license. Although the employer alleged that it had a policy that required all driver helpers to have a commercial driver's license, the court held that the employer "may not obtain summary judgment by declaring it has a policy when [the plaintiff] may have evidence that [the employer] follows this policy selectively." *Id.* at 632. Similarly, in this case, Shipman has alleged facts which cast doubt upon the amount of outdoor [*9] work required of a Supply Technician.

² The case was brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12201-204, not the Rehabilitation Act, but the analysis in *Baert* is relevant here because the definition of "qualified" under the ADA closely tracks the Rehabilitation Act regulations. *Barth v. Gelb*, 761 F. Supp. 830, 832 n.4 (D.D.C. 1991), *aff'd* 303 U.S. App. D.C. 211, 2 F.3d 1180 (D.C.Cir. 1993).

Defendant relies on two cases to contend that no reasonable accommodation would allow Shipman to perform the essential functions of the Supply Technician position: *Carr v. Reno*, 306 U.S. App. D.C. 217, 23 F.3d 525, 529 (D.C.Cir. 1994), and *Adrain v. Alexander*, 792 F. Supp. 124 (D.D.C. 1992). While these cases support the proposition that an employee must show that he or she can perform the essential functions of a job in order to satisfy the "otherwise qualified" requirement of the Rehabilitation Act, their [*10] reasoning is not directly applicable to the facts of this case. In both *Carr* and *Adrain*, the employee could not perform substantial parts of the position.

In *Carr*, the court held that a staff worker at a U.S. Attorney's Office was not otherwise qualified because she could not attend work on a regular basis, which was an essential function of the job because of court filing deadlines. 23 F.3d at 529-530. In *Adrain*, the plaintiff asserted that the defendant was required to accommodate his handicap by providing him with a full-time writer. 792 F. Supp. at 125. The employer demonstrated however, that even with the assistance of a writer, the plaintiff's job performance did not improve. Consequently, the court held that the plaintiff was unable to perform the essential functions of his job even with reasonable accommodation. *Id.* at 128-129. Here, in contrast, it is uncontested that Shipman could perform most of the duties of a Supply Technician without accommodation. What is in dispute is the extent of outdoor work required. Therefore, a genuine issue remains as to whether Shipman could perform the essential functions of the position. [*11] As one court has stated, "the determination of those legitimate physical qualifications that are essential to the performance of public works jobs and the determination whether accommodation of plaintiff's handicap is possible are fact-specific issues." *Pecinovsky v. City of Lancaster*, 1991 U.S. Dist. LEXIS 9742, 55 Fair Empl. Prac. Cas. (BNA) 575, *5, 1991 WL 74140 (W.D.Wis. 1991).

III. CONCLUSION

For the foregoing reasons, the court concludes there is a genuine issue of material fact as to whether plaintiff is an "otherwise qualified" individual under the Rehabilitation Act.

Accordingly, it is this 17th day of September, 1999,
hereby

ORDERED that defendant's motion to dismiss, or in
the alternative, for summary judgment, is denied.

Henry H. Kennedy, Jr.
U.S. District Judge