STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 154-8-11 Oecv

John Ditcheos
Plaintiff

v.

Fairlee Feed & Saddlery, Inc.
Defendant

Decision on Defendant's Motions for Summary Judgment

At issue in this case is the question of whether an employee who has suffered a work-related injury may bring a retaliation claim against his employer under 21 V.S.A. § 710(b) when the employee is not eligible for reinstatement to his former position under 21 V.S.A. § 643b(b). Also at issue in the pending motions for summary judgment is the question of whether this particular plaintiff has shown a genuine issue for trial on his claim of disability discrimination.

The following background facts are set forth in the light most favorable to plaintiff. *Price v. Leland*, 149 Vt. 518, 521 (1988). Plaintiff John Ditcheos was employed as a store manager by defendant Fairlee Feed & Saddlery, Inc., a small business that employs fewer than ten employees on a regular basis. Plaintiff suffered a hernia on the job and was out of work for about a month, during which time he filed for workers' compensation benefits. Plaintiff then requested an opportunity to return to light-duty work with lifting restrictions, but defendant denied the request.[1] The relationship between the parties then soured, and defendant hired someone else to fill plaintiff's position, and eventually removed plaintiff from the payroll. The parties dispute whether plaintiff resigned or whether he was fired.

Plaintiff filed the present lawsuit alleging that: (1) he was fired in retaliation for filing a workers' compensation claim, in violation of the Workers' Compensation Act anti-retaliation provision, 21 V.S.A. § 710(b); and (2) he was discriminated against on the basis of a disability, namely post-concussive syndrome, in violation of the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1). On both claims, plaintiff seeks money damages, attorney fees, and costs. He is not seeking the remedy of reinstatement under § 643b(b).

[1] Plaintiff argued in his response to defendant's first summary-judgment motion that defendant's denial of his request to return to light-duty work amounted to disability discrimination because defendant had denied plaintiff's request for reasonable accommodation of his hernia disability. However, the Vermont Supreme Court has expressly held that employers are under no obligation to make reasonable accommodations with respect to the reinstatement of injured employees when the alleged disability is the work-related injury itself. *Fletcher Allen Health Care*, 171 Vt. 614, 617 (2000) (mem.). Summary judgment is granted on this limited issue.

Defendant then moved for summary judgment on both claims. Although plaintiff is not seeking the remedy of reinstatement, defendant nevertheless argues that plaintiff's retaliation claim is barred because plaintiff is not eligible for reinstatement to his former position. See 21 V.S.A. § 643b(a)(1) (explaining that the reinstatement requirements of the Workers' Compensation Act do not apply to small businesses that employ fewer than ten workers). Defendant argues second that plaintiff has failed to show a genuine issue for trial on his disability-discrimination claim on the issues of whether he has a "disability" within the meaning of FEPA and whether he ever requested a reasonable accommodation for his disability.

At issue first is the question of whether plaintiff's retaliation claim is barred because he was not eligible for reinstatement under the relevant provisions of the Workers' Compensation Act. In pertinent part, 21 V.S.A. § 643b(b) provides injured workers with a limited right of reinstatement when (1) the employer regularly employs more than ten workers, and (2) there is a "suitable" position that is "available" at the time the employee is ready to return to work. *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 617 (2000) (mem.); *Payea v. Howard Bank*, 164 Vt. 106, 109 (1995); *Thurber v. United Parcel Service, Inc.*, 2007 WL 3046261 at *5 (D.Vt. Oct. 16, 2007). A plaintiff may directly sue for reinstatement under § 643b(b), e.g., *Wentworth*, 171 Vt. at 617, but plaintiff has not done so here. Plaintiff has instead alleged that his employer retaliated against him for filing a workers' compensation claim.

A prima facie case of retaliation under § 710(b) of the WCA requires proof that: (1) the employee was engaged in a protected activity; (2) the employer was aware of the activity; (3) the employee suffered an adverse employment decision; and (4) there was a causal connection between the protected activity and the adverse employment decision. *Murray v. St. Michael's College*, 164 Vt. 205, 210 (1995). "If the plaintiff succeeds in establishing a prima facie case of retaliatory discrimination, the defendant must come forward with a legitimate, nondiscriminatory reason for the conduct at issue. If the defendant articulates such a reason, then the plaintiff will be required to show that the reason was a pretext for discrimination." *Lowell v. Int'l Business Machines Corp.*, 955 F.Supp. 300, 305 (D.Vt. 1997).

Here, defendant has argued that a retaliation claim is barred as a matter of law when the employee is not eligible for reinstatement, but defendant has not offered any legal support for its position. Nor is defendant's logic persuasive: the court does not understand why small employers should be insulated from all allegations of retaliation that may arise from their treatment of injured workers who are seeking to return to work. It may well be that small employers are not *required* to reinstate injured workers under § 643b(b), but neither are they *prohibited* from doing so, and there is no reason why small employers should be permitted to use retaliatory criteria when deciding whether or not to extend an offer of reinstatement to an injured worker. Hence, the court concludes that a worker may not bring a direct claim for reinstatement when they are ineligible for that remedy under § 643b(b), but there is no reason why the same worker should also be barred as a matter of law from pursuing actual damages for retaliation under § 710(b).

Other cases have agreed with this approach. In both *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 617–18 (2000) (mem.), and *Thurber v. United Parcel Service, Inc.*, 2007 WL 3046261 at *5 (D.Vt. Oct. 16, 2007), the employees filed claims for reinstatement under

§ 643b(b) and retaliation claims under § 710(b), and in both cases the employees were found to be ineligible for reinstatement because there were no suitable jobs available at the time the employees were seeking to return to work. Yet the retaliation claims were not therefore dismissed as a matter of law: rather, the courts went on to analyze whether the plaintiffs had made out *prima facie* cases of retaliation under the *Murray* framework discussed above. There is no reason why the same approach should not be taken here.

For these reasons, plaintiff will be given an opportunity to demonstrate a *prima facie* case of retaliation by showing that he was engaged in a protected activity, that his employer was aware of the activity, that he suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment decision. *Murray*, 164 Vt. at 210. If plaintiff succeeds in demonstrating that there was, in fact, an adverse employment decision that was causally related to the filing of his workers' compensation claim, the burden will shift to defendant to articulate a legitimate and non-discriminatory reason for the adverse employment action. See *Wentworth*, 171 Vt. at 617–18 (explaining that an employer may meet this element by pointing out that it was not required to reinstate the employee under § 643b(b)); *Thurber*, 2007 WL 3046261 at *5 (same). If the employer does this, then the burden will shift back to plaintiff to demonstrate that this reason was pretextual. *Wentworth*, 171 Vt. at 618; *Thurber*, 2007 WL 3046261 at *5. Defendant has not sought summary judgment on these issues, and thus its first motion for summary judgment is denied.

Defendant has also moved for summary judgment on plaintiff's claim of disability discrimination. Here, the relevant facts are as follows, again set forth in the light most favorable to plaintiff. Plaintiff has long experienced post-concussive syndrome as the result of a car accident, and the symptoms include dyslexia and short-term memory problems. Defendant has been aware of plaintiff's symptoms and limitations for a long time, and in fact has made a number of accommodations to enable plaintiff to perform the requirements of his position as store manager, including changes to the filing, accounting, and ordering systems. Yet, despite the accommodations, plaintiff continued to make substantial ordering mistakes from time to time.

At the time defendant's owner sat down to decide whether to remove plaintiff from the payroll or not, he made out a list of plaintiff's positive and negative qualities. Defendant's owner noted the ordering errors on the negative side of the ledger and made other references to plaintiff's forgetfulness and trouble following directions. Plaintiff has assembled these indications as evidence that defendant discriminated against him on the basis of his disability. In particular, plaintiff's claim is that defendant fired him instead of making reasonable accommodations for his disability.

Defendant has moved for summary judgment on the ground that plaintiff has failed to demonstrate a genuine issue for trial on his reasonable-accommodation claim. For the following reasons, however, defendant has failed to meet its burden of establishing that there are no genuine issues of material fact between the parties *and* that it is entitled to judgment as a matter of law. *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26–27 (1992).

First, defendant has argued that plaintiff has failed to establish that his post-concussive syndrome was a "disability" within the meaning of FEPA because plaintiff was found to be ineligible in the past for disability benefits. However, defendant has not offered any legal support for the position that an administrative denial of benefits automatically precludes a claimant's judicial lawsuit for disability discrimination, and in fact, the available authority suggests quite the opposite. See, e.g., *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805–07 (1999) (explaining that receipt of SSDI benefits may or may not have any relationship to an ADA claim, and the issue must be addressed on a case-by-case basis).

Second, defendant has argued that plaintiff's evidence is insufficient to establish that his mental-processing issues "substantially limit one or more major life activities" so as to amount to a disability within the meaning of FEPA, 21 V.S.A. § 495(d)(5). Here, there are indications in the federal cases that some mental-processing issues may not be serious enough to limit a major life activity, see, e.g., *Kamrowski v. Morrison Mgmt. Specialist*, 2010 WL 3932354 at *9 (S.D.N.Y. Sep. 29, 2010) (holding that a need for additional time for reading and writing assignments due to dyslexia and attention-deficit disorder is not sufficient to support a claim for disability discrimination under the ADA); *Teachout v. N.Y.C. Dep't of Educ.*, 2006 WL 452022, at *5 (S.D.N.Y. Feb. 22, 2006) (explaining that "completing work at a slower pace due to dyslexia does not ordinarily qualify as a disability under the ADA"), but there are also cases holding that disruptions in short-term memory may be sufficient to substantially impair the major life activity of thinking, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999); *Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005). In the absence of more information regarding the nature of plaintiff's limitations, defendant has not persuaded the court that plaintiff lacks sufficient evidence to prove that his mental-processing issues substantially limit the major life activity of thinking.

Finally, defendant has argued that plaintiff's claim fails because he never requested a reasonable accommodation from the employer on the basis of his disability. See, e.g, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 396 (2002) (explaining that one form of disability discrimination occurs when an employer refuses to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business). However, defendant has not fleshed the issue out in enough detail to permit a summary-judgment ruling at this time.

In particular, there are two competing strands of case law on the necessity of an employee's request for a reasonable accommodation. One line of cases represents the general rule that an employer cannot be held liable for failing to provide an accommodation when the employee has not requested one, e.g., *Taylor v. Principal Fin. Group.*, 93 F.3d 155, 165 (5th Cir. 1996); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 314 (5th Cir. 1997). The other line of cases represents the exception to the general rule: an employer has an obligation to make accommodations when it is already aware of the employee's limitations and the need for accommodations, e.g., *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008); *Felix v. New York City Transit Auth.*, 154 F.Supp.2d 640, 657 (S.D.N.Y. 2001). A third strand of cases involves additional considerations applicable when the employer has already accommodated the employee in the past, e.g., *E.E.O.C. v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1111 (9th

Cir. 2010). Here, defendant has not made any effort to situate the present case within the context of the general rule and the exceptions, and thus has not established that it is entitled to judgment as a matter of law on this issue.

Similarly, the cases suggest that a discrimination plaintiff bears a burden of articulating the nature of the reasonable accommodation that should have been provided to him, e.g., *Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995), and that a plaintiff cannot succeed on a reasonable-accommodation claim on a theory that the employer should have "accommodated" him by allowing him to remain in the same, unaltered position as he held before the adverse employment action, see, e.g., *Burch*, 119 F.3d at 314 (explaining that "an employee who requests only the opportunity to return to an unmodified, previously-held position fails to state a cognizable claim" for disability discrimination). Yet defendant has not made any arguments along these lines, and so has not established whether it is entitled to summary judgment on either of these grounds. For these reasons, defendant's second motion for summary judgment is denied.

ORDER

Defendant's Motion for Summary Judgment (MPR #4), filed June 13, 2012, is ***granted*** as to footnote #1, *supra*, and is otherwise ***denied***. Defendant's Second Motion for Summary Judgment (MPR #7), filed September 11, 2012, is ***denied***.

Dated at Woodstock, Vermont this 4 day of December, 2012.

Harold E. Eaton, Jr.
Superior Court Judge