IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL A. MORRONE	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
UGI UTILITIES, INC.	:	NO. 99-36

O'Neill January , 2000

MEMORANDUM

Plaintiff Michael A. Morrone brings this action against defendant UGI Utilities, Inc., his former employer, for alleged violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101-12213 (Count I), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S.A. §§ 951-963 (Count II). In the complaint plaintiff alleges that he suffers from a permanent disability as a result of a workplace injury, that UGI refused to provide reasonable accommodations for his disability, and that UGI unlawfully terminated his employment as a result of his alleged disability.

The Court has subject matter jurisdiction over plaintiff's ADA claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. § 1367(a). Presently pending are defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and plaintiff's response thereto. In its motion defendant contends that summary judgment is appropriate because plaintiff is not "disabled" within the meaning of the ADA. Alternatively, defendant contends that even if plaintiff were disabled under the ADA, his failure to

discuss possible accommodations bars any claim.

I.

Morrone was employed by UGI from November 1988 until March 7, 1996. Am. Compl. ¶¶13, 30. From at least 1993, he was employed as a Customer Service Technician III. Morrone Dep. at 66-67. The duties of a Service Technician III include changing meters, minor adjustment and repair of commercial and residential natural gas appliances, connecting and disconnecting such appliances, basic pipe fitting, and meter reading. Morrone Aff. ¶5; Morrone Dep., Ex. 8, Fitness for Duty Examination Form, Job Description.

On March 25, 1993, Morrone suffered a work-related injury to his back and neck. Morrone Dep. at 70-71. He underwent surgery to treat this injury in May and returned to work on August 25. From August 1993 to 1994, UGI assigned Morrone to light duties consisting of meter reading and dispatching. Id. at 96, 101. Morrone worked in the dispatch office full-time from early 1994 to April 1995, when he experienced a recurrence of pain in his back and neck. Id. at 101-02. He underwent two additional operations on his neck and spine in April and May.

Six months later in January 30, 1996 Morrone was examined by Dr. Steven Valentino, an independent medical examiner. Dr. Valentino found that there was no evidence "to substantiate any degree of disability and concluded that Morrone was "fully recovered." Morrone Dep., Ex. 5. After receiving Dr. Valentino's evaluation, Robert Weaver, superintendent of human resources at UGI, notified Morrone by letter that he was to return to work on February 20 and that failure to do so would be considered a resignation on his part. Morrone Dep., Ex. 7.

Sometime in January, Morrone learned that there was a position open in UGI's storeroom.

Am. Compl. ¶28. After Dr. Valentino had found him fully recovered, he was told that he could bid for this position under the terms of the collective bargaining agreement. Morrone Dep. at 135. Though Morrone believes that he could have worked in the storeroom if all heavy lifting were assigned to others, id. at 133, he did not bid on the storeroom job and never requested an accommodation with respect to that position. Id. at 135-36. His decision not to pursue the storeroom position was based on his attorney's advice that to do so would jeopardize his Workman's Compensation claim and any other legal action. Id. at 124, 136.

On February 22, Morrone met with Weaver and stated that he was unable to return to his former position as a Customer Service Technician III. He asked Weaver for a "reasonable accommodation" but refused either to suggest specific accommodations or to describe his work restrictions. Morrone Dep. at 203-05.

Weaver sent a certified letter to Morrone on February 28 in which he stated that Morrone had to return to work on March 7 or, prior to that date, have his doctor fully complete an enclosed Fitness for Duty Form and specifically state any accommodations he was requesting. Morrone Dep., Ex. 8, Weaver letter dated 2/28/96. Neither Morrone nor his doctors responded to this letter. Weaver Aff. ¶9.

When Morrone did not return to work on March 7, Weaver again wrote to him and stated that based on the medical information available, UGI had determined that he was not disabled. Weaver went on to state that unless Morrone returned to work as a Service Technician III by March 14, UGI would terminate his employment. Weaver Aff., Ex. B.

Morrone did not return to work or respond to this letter. UGI subsequently terminated his employment on March 14. In April Morrone began working at Hannaberry HVAC. Morrone Dep.

at 9, 28. Hannaberry installs and services heating and air-conditioning equipment. Id. at 27. Morrone's responsibilities at Hannaberry include sales, customer service, and installation. Id. at 10.

II.

Summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, a court's responsibility is not to resolve disputed issues of fact but to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). The moving party bears the initial burden of identifying those portions of the record which it believes indicate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party must then point to specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). It must raise "more than a mere scintilla of evidence in its favor" to defeat the summary judgment motion; it must produce evidence on which a jury could reasonably find for the non-moving party. Liberty Lobby, 477 U.S. at 251. Though the non-moving party may not rely upon unsupported allegations or mere suspicions, id. at 248, it is entitled to have all reasonable inferences drawn in its favor. Id. at 255.

III.

Plaintiff alleges violations of both the ADA and the PHRA. Since the PHRA utilizes the same analytical framework as that established under the ADA, I will analyze the federal and state claims together. See Kelly v. Drexel University, 907 F. Supp. 864, 871 (E.D. Pa. 1995); Doe v. Kohn Nast & Graf, 862 F. Supp. 1310, 1323 (E.D. Pa. 1994).

The ADA prohibits employers from discriminating against a "qualified individual with a disability." 42 U.S.C.A. § 12112(a). To analyze a claim for disability discrimination under the ADA, this court must apply the burden-shifting framework first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997). Under that framework the plaintiff has the burden of proving a prima facie case by a preponderance of the evidence. To establish a prima facie case of discriminatory discharge, plaintiff must show that: (1) he is disabled as that term is defined by the ADA; (2) he is qualified, with or without reasonable accommodation, for the position; (3) he was discharged despite those qualifications; and (4) after the termination, the position remained open and the employer sought applicants with the plaintiff's qualifications. Id. If plaintiff presents sufficient evidence to establish a prima facie case, then defendant must articulate a legitimate, non-discriminatory reason for discharging plaintiff. Finally, if defendant does articulate such a reason, the burden shifts back to plaintiff, who must then prove that defendant's articulated reason is merely a pretext for discrimination. Id.

Under the ADA an individual is disabled if that individual has "a physical or mental impairment that substantially limits one or more major life activities," or has "a record of such impairment," or is "regarded as having such an impairment." 42 U.S.C.A. § 12102(2). In the present case plaintiff claims that he qualifies as "disabled" under the first prong of that definition since his injuries have "substantially affected several major life activities including bending, stooping, crouching, lifting and twisting." Am. Compl. ¶35. Based on plaintiff's filings, I will assume that Morrone is also alleging that he is substantially limited in the major life activity of working.

To determine if plaintiff is disabled under the ADA, I must first evaluate whether he is significantly restricted in performing a 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)(ii). The court may also consider the "nature and severity of the impairment," its "duration or expected duration" and any "permanent or long term impact." 29 C.F.R. § 1630.2(j)(2).

Defendant argues that plaintiff is not significantly restricted in his ability to work or to perform manual tasks such as bending or lifting. In support of this contention, defendant points to plaintiff's medical evaluations. Plaintiff has submitted six medical reports from various doctors. Most of these reports, however, relate to the back surgeries and treatments plaintiff underwent in 1993 and 1995. The only report which specifically discusses plaintiff's physical limitations as of 1996 is a letter from Dr. Barry Pollack to a Dr. Grover dated February 19, 1996. In that letter Dr. Pollack states that although plaintiff could not return to his previous position, he could "perform a job which required only light lifting, less than 25 pounds repeatedly or 40 pounds occasionally" and which would allow him "to move around and avoid prolonged standing or sitting." Pl.'s Ex. L.

The inability to perform a particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3). In this circumstance "substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . ." Id. More important, it is well established that moderate lifting and bending restrictions, such as those set forth in Dr. Pollack's letter, do not constitute a significant limitation on an individual's ability to work or to perform any other major life activity. See Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir.1996) ("[W]e hold, as a matter of law,

that a twenty-five pound lifting limitation--particularly when compared to an average person's abilities--does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."), cert. denied, 520 U.S. 1240 (1997); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir.1996) (twenty-five pounds lifting restriction was not "significant restriction" on major life activities). See also Thompson v. Holy Family Hosp., 121 F.3d 537, 540 (9th Cir. 1997) (employee's inability to lift more than 25 pounds on continuous basis, more than 50 pounds twice a day, or more than 100 pounds once a day did not substantially limit her ability to engage in major life activities of lifting and working); Panzullo v. Modell's Pa., Inc., 968 F. Supp. 1022, 1024 (E.D. Pa. 1997) ("Neither a general weightlifting or light-duty work limitation nor a restriction against performing heavy work per se constitutes a disability under the ADA.")

Moreover, plaintiff's deposition testimony shows that such physical restrictions have not significantly limited his ability to work or perform manual tasks. Plaintiff was able to find a new job at Hannaberry approximately one month after UGI terminated his employment. His duties there include manual tasks, such as putting in a supply line or installing a humidifier or thermostat, which he performs without aid or restriction.

Even if the Court were to find that an issue of fact exists as to whether plaintiff was disabled under the ADA, defendant cannot be found liable for failing to provide plaintiff with a reasonable accommodation. The Court of Appeals has explained that both the employer and the employee have a duty to engage in an interactive process under the ADA. See Taylor v. Phoenixville School Dist., 184 F.3d 296, 312 (3d Cir. 1999). Once an employer has notice of an employee's disability and desire for accommodation, the employer must request any additional information which it believes it needs. Id. at 315. However, "an employer cannot be faulted if after conferring with the employee

to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals." Id. at 317. Accordingly, an employee's failure to participate in this interactive process will preclude any claim that an employer violated the ADA by failing to provide reasonable accommodation.

Here, the evidence submitted shows that plaintiff repeatedly failed to respond to defendant's attempts to explore possible accommodations. During plaintiff's meeting with Weaver, plaintiff refused to suggest any accommodation. When asked what his medical restrictions were, he refused to answer. When Weaver requested information concerning plaintiff's current medical condition, neither he nor his doctors responded.

In response to this argument, plaintiff fails to point to any evidence from which a reasonable jury could conclude that he attempted to engage in an interactive process. Though plaintiff asserts in an affidavit that he requested a storeroom position as an accommodation, this assertion is directly contradicted by his deposition testimony, in which he stated that he neither bid nor requested an accommodation with respect to that position.[1]

Since I find that plaintiff has failed to produce evidence that he is disabled as defined under the ADA and that, even if a genuine issue of material fact did exist as to plaintiff's disability,

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[1] With respect to the storeroom position, Morrone testified:

Q: Did you ever speak to Mr. Weaver about the job?
A: No.

Q: Why didn't you go ask Mr. Weaver whether you could bid on that job with some accommodations to be given to you?
A: Because my attorney told me to stop having contact directly with them; that if there was any contact to be made anymore, it should be made through him.

Morrone Dep. at 135-36.

plaintiff failed to respond to defendant's efforts to reach an accommodation, I will grant defendant's motion. Summary judgment will be entered for defendant UGI Utilities, Inc. and against plaintiff Michael Morrone.

An appropriate Order follows.

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O R D E R

AND NOW this day of January, 2000, upon consideration of defendant's motion for summary judgment and plaintiff's response thereto, IT IS HEREBY ORDERED that defendant's motion is GRANTED. Judgment is entered in favor of defendant UGI Utilities, Inc. and against plaintiff Michael Morrone.

IT IS FURTHER ORDERED that plaintiff's motion to deny consideration of defendant's reply brief is DENIED AS MOOT.

THOMAS N. O'NEILL, JR., J.