UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN DESGROSSEILLIERS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-230-B-S
	)	
REID'S CONFECTIONERY COMPANY,	)	
	)	
	)	
Defendant	)	

RECOMMENDED DECISION
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff John Desgrosseilliers brought the present two-count complaint against his employer, Defendant Reid's Confectionery Company ("RCC") alleging that RCC engaged in disability discrimination in terminating him and therefore violated the Americans with Disabilities Act (Count I) and the Maine Human Rights Act (Count II). Before me is RCC's motion for summary judgment on both counts. (Docket No. 9.) I recommend that the Court **GRANT** RCC's motion for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter at law." Fed. R. Civ. P. 56(c). A fact is "material" when it has the "potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A "genuine issue" exists when the evidence is "sufficient to support rational resolution of the point in favor of either party." Id. Summary judgment should be granted "against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The evidence is to be viewed, and justifiable inferences are to be drawn, in the non-moving party's favor. See Anderson, 477 U.S. at 255.

Facts

Desgrosseilliers began working at RCC in 1995 as a sales representative and in 1997 was promoted to Regional Manager for the southern territory in Maine. (Def.'s Statement of Material Facts ("DSMF") ¶¶ 1-2.) During the years of 1998 through 2000, Desgrosseilliers had positive performance evaluations. (Id. ¶¶ 6-7.) On November 13, 2000, after parking his car at an account, Desgrosseilliers turned to his laptop and at the same time reached to pick up a piece of paper. (Id. ¶¶ 39-40.) He felt a "pop" sensation in his lower back and experienced severe discomfort and pain isolated at the base of his spine and legs. (Id. ¶ 40; Pl.'s Resp. Statement of Material Facts ("PRSMF") ¶ 40; Ex. 4.) Desgrosseilliers telephoned Vaillancourt, who oversaw the workers' compensation program at RCC, and informed him of his injury. (DSMF ¶ 42.) He also spoke with his manager, Reynolds, telling him about the incident, how it was difficult to walk, and stating that the pain "would sometime[s] take [his] breath away." (Id. ¶ 43; Pl.'s Resp. Additional Statement of Material Facts ("PRASMF") ¶ 9.) Reynolds, the director of Sales and Marketing, understood Desgrosseilliers's injury to be only minor. (PRASMF ¶ 11; DSMF ¶ 33.)

A memorandum dated November 13, 2000, written by Vaillancourt documented that Desgrosseilliers experienced a "pop sensation" in his mid-to lower back and upon exiting the vehicle he experienced severe discomfort and pain isolated at the base of his spine and legs. (PRASMF ¶ 8; Ex. 4; Def.'s Resp. to Pl.'s Additional Statement of Material Facts ("DRSMF")

¶ 8.) The memo further states that Desgrosseilliers found it difficult to walk and described the pain by stating that "it would sometime[s] take my breath away." (Id.)

After his injury occurred, Desgrosseilliers wanted to wait a few hours to determine if it was necessary to see a doctor. (DSMF ¶ 44.) He received a physician referral from Vaillancourt and that afternoon he saw Dr. Pelletier. (Id. ¶¶ 45-46.) Pelletier's office notes dated November 13, 2000, state that Desgrosseilliers experienced progressive pain following his injury which caused him to have difficulty changing positions and standing straight. (PRAMSF ¶ 16.) After conducting an examination, Pelletier wrote "Thoracic Lumbar and Sacral Spine with T1 Lumbar Strain and Muscle Spasm." (DSMF ¶ 47; PRSMF ¶ 47, Ex. 5.) Desgrosseilliers reports that the doctor told him the condition was a back muscle strain. (DSMF ¶ 47; Desgrosseilliers Dep. at 67.) Pelletier prescribed a muscle relaxant, Baclofen, and gave Desgrosseilliers samples of Vioxx. (DSMF ¶ 48; PRSMF ¶ 48; Desgrosseilliers Dep. at 62.) Dr. Pelletier's medical report shows that he placed Desgrosseilliers under work restrictions requiring no bending or twisting at the waist and no lifting of more than twenty pounds. (DSMF ¶ 49; PRASMF ¶ 15.) These restrictions, along with Pelletier's written report of Desgrosseilliers's treatment were forwarded to RCC. (PRSMF ¶ 49.) RCC received these restrictions soon after November 13, 2000. (PRASMF ¶ 15.) Even with these work restrictions, Desgrosseilliers was able to perform his work duties. (DSMF ¶ 50.) His job did not require him to lift anything over twenty pounds. (Id. ¶¶ 50-51.)

Shortly after receiving the November 13, 2000 physician's report, Vaillancourt informed Reynolds of Desgrosseilliers's limitations. (PRASMF ¶¶ 18, 78; DRSMF ¶ 18.) In his deposition, Reynolds initially stated that he was not aware that Desgrosseilliers was under any work restriction, but then stated Desgrosseilliers had a restriction that did not affect his daily

performance and was not focused upon. (PRASMF ¶ 19; DRSMF ¶ 19.) For this reason, he reportedly did not inform the new President and CEO of RCC, Decker, of the restrictions. (PRASMF ¶ 19; DRSMF ¶ 19; DSMF ¶ 12.) Decker states he was not aware of Desgrosseilliers's work restrictions until after Desgrosseilliers was terminated. (PRASMF ¶ 24; DRSMF ¶ 24.) Vaillancourt and Reynolds report that they did not think there was a need to inform Decker of the injury and therefore did not inform him. (DSMF ¶ 62.)

After November 13, 2000, Desgrosseilliers continued to go to work but consistently left work early due to his inability to tolerate the pain and symptoms associated with his condition. (PRASMF ¶¶ 1, 4.) As his job duties did not require him to report regularly to the main office in Bangor, he was able to leave early. (Id. ¶ 5.) According to Desgrosseilliers, there was an unwritten policy at RCC that when a person missed work due to an injury, that person's job was seriously in jeopardy. (Id. ¶ 3.) He explains that he feared losing his job or other retribution, so he continued to work and just left early. (PRSMF ¶ 55; Desgrosseilliers Aff. ¶ 4.) Desgrosseilliers did not inform anyone at RCC that he was having trouble performing his job or that he was leaving work early. (DSMF ¶ 55; PRASMF ¶¶ 2, 4.) Despite his injury, work restrictions, and leaving early, Desgrosseilliers was able to get his job done. (DRSMF ¶ 1.)

Desgrosseilliers visited Pelletier again on November 20, 2000, and on December 4, 2000. (DSMF ¶ 52.) On the December 4th appointment, Pelletier lifted the work restrictions, discharged Desgrosseilliers from his care, and told Desgrosseilliers to call if he experienced subsequent problems.[1] (Id. ¶¶ 58, 60.) He noted in the December 4th medical report that

[1] Desgrosseilliers denies he was discharged from Pelletier's care and was told to call if he experienced subsequent problems, but cites to deposition pages that are not included in the record. He references treatment by a Dr. Meyer at RCC's behest. (See PRSMF ¶ 60.) There is a portion of the Meyer deposition in the record (Ex. C, DRSMF and pp. 18-19 appended to Docket No. 14, PRSMF) and it indicates that Dr. Meyer did not begin to treat Desgrosseilliers until January 4, 2001, one month after his termination.

Desgrosseilliers stated that his back pain was bothering him at night making it hard to sleep. (PRSMF ¶ 58.) Nonetheless, Desgrosseilliers did not object to the removal of his work restrictions. (DSMF ¶ 59.) During the three-weeks Pelletier treated Desgrosseilliers, he did not consider Desgrosseilliers's injury to be anything more than a muscle strain and told Desgrosseilliers that it would take some time to heal but it was a temporary impairment. (Id. ¶ 56; PRSMF ¶ 56; Desgrosseilliers Dep. 67-68.)

At some point after November 13, 2000, RCC opened a workers' compensation file regarding Desgrosseilliers's injury. (PRASMF ¶ 26.) Pelletier's treatment summary of Desgrosseilliers was placed in Desgrosseilliers's employment file. (Id. ¶ 25.) Reynolds reports that he contacted Vaillancourt on December 5, 2000, the day before terminating Desgrosseilliers, to inquire about the status of Desgrosseilliers's workers' compensation file. (Id. ¶ 20; DRSMF ¶ 20.) Vaillancourt does not recall having any conversations with Reynolds regarding Desgrosseilliers's injury, work restrictions, condition, or workers' compensation file between the day he informed Reynolds of the work restrictions and the day Desgrosseilliers was terminated. (PRASMF ¶¶ 21, 22.)

Prior to Desgrosseilliers's injury, the owner of RCC, Robert Nagle, changed his status to semi-retired and in July of 2000, he hired Alan Decker as the new President and CEO of the company. (DSMF ¶¶ 10-12.) This was a new management position for the company and created a new line item in the budget. (PRASMF ¶¶ 52, 53.) When Nagle hired Decker, he had extensive discussions with Decker regarding the company's direction and Decker's role and objectives for managing the company. (Id. ¶ 54.) These discussions did not specifically include downsizing or the need for the company to eliminate or reduce employees and/or positions. (Id. ¶ 55.) However, Decker was given full authority to do what he thought was best for the

company in any manner he thought was appropriate. (DSMF ¶ 16.) Nagle turned over the day-to-day operations of the business to Decker and gave him the responsibility of managing the company expenses, operating a profitable company, and trying to grow the company, all in a fiscally prudent manner. (Id. ¶ 14.) Nagle continued to oversee Decker's work and the financial department. (PRSMF ¶ 14; PRASMF ¶ 57.) Although Nagle was not directly involved in the hiring or firing, he expected either to be made part of the process or to be informed at some point as to what was occurring. (PRSMF ¶ 15; Nagle Dep. at 4-5, 39.) During the fall of 2000, Decker did not mention the elimination of Desgrosseilliers's position. (PRASMF ¶ 59; DRSMF ¶ 59.) However, staffing issues were placed in Decker's hands. (DSMF ¶ 15.) Decker examined the overhead and determined that the sales department could not justify having three managers in a sales department with seven sales representatives, approximately a one to two ratio. (DSMF ¶ 21.)

Decker and Reynolds report they had a conversation sometime in October of 2000, in which Decker instructed Reynolds to terminate Desgrosseilliers. (PRASMF ¶ 71.) Reynolds selected December 6, 2000, as the date he would inform Desgrosseilliers of his termination. (DSMF ¶ 35.) He chose the sixth in order to minimize the disruption in coverage for vacations and holidays and in order to give Reynolds time to plan the transfer of responsibilities and the consolidation of the position. (Id. ¶ 36.) Further, the sixth was chosen because it was a Wednesday and Reynolds believed a Wednesday would be the least disruptive day of the week to implement the change. (Id. ¶ 38.) In contrast, Desgrosseilliers asserts that he was terminated on December 6th because Reynolds learned the day before from Vaillancourt that Desgrosseilliers's work restrictions were lifted. (PRSMF ¶¶ 33, 35, 36, 38.) Reynolds stated

that between the October conversation and December 6, he and Decker had absolutely no conversations regarding the termination of Desgrosseilliers. (PRASMF ¶ 74.)

On December 6, 2000, Reynolds drove to the Auburn area to meet with Desgrosseilliers. (DSMF ¶ 65.) Upon meeting with Desgrosseilliers, Reynolds asked him how his back was doing and Desgrosseilliers responded that it was "killing him." (PRSMF ¶ 66; Desgrosseilliers Dep. at 94.) Reynolds informed Desgrosseilliers that his position had been eliminated because of economic factors. (DSMF ¶ 66.) Desgrosseilliers asked Reynolds whether there were other jobs he could perform within the company. (Id. ¶ 81; PRASMF ¶ 29.) Reynolds immediately denied that request. (PRASMF ¶ 30.) He states that he did so because he knew there were no vacancies in his department. (DRSMF ¶ 30.) However, he did not know if there were openings otherwise within the company when he answered. (PRASMF ¶¶ 30, 32; DRSMF ¶ 30.) Although there were no full-time positions open within the company, there were "possibly and probably" some part-time positions open in RCC's tobacco-retail stores at the time. (PRASMF ¶ 35; DRSMF ¶ 35; Decker Dep. at 32.)

Nagle reported that Reynolds would not have the authority to make a decision on a request for employment without input from Decker. (PRASMF ¶ 31.) Decker reportedly did not discuss with Reynolds the possibility of Desgrosseilliers performing any other jobs within the company. (Id. ¶ 31.) According to Nagle, if an employee was actually eliminated for economic reasons and requested to do other jobs within the company, the company normally considered that request. (Id. ¶ 33.) However, when Nagle hired Decker, he gave Decker full authority to do what was best for the company. (DRSMF ¶ 33; Nagle Dep. at 40.) Decker asserts that he would not consider demoting Desgrosseilliers to one of the cigarette retail stores or the warehouse in order to retain him as that would have resulted in at least a fifty percent cut in pay. (DSMF

¶ 83.) Desgrosseilliers asserts that a sales representative, which Desgrosseilliers was in the past, has the potential to earn $22,000 to $30,000 depending on performance. (PRSMF ¶ 83.) At the time of his termination, Desgrosseilliers was earning approximately $40,000. (Id.) Desgrosseilliers was qualified to do other jobs within the company, as supported by Decker's statement that "had there been other jobs that would have given him equal to or better than lifestyle, there would have been no problem [placing him in a different position]." (PRASMF ¶ 36; DRSMF ¶ 36.) As far as Desgrosseilliers is aware, his position was eliminated when he was terminated (i.e. he was not replaced) and one of the remaining regional managers now manages the sales representatives he managed. (DSMF ¶ 67; PRSMF ¶ 67.)

During the years of Desgrosseilliers's employment, the company had a favorable view of his performance, saw him as a valued employee that did "pretty good things for the company," and recognized that he was liked by his customers. (PRASMF ¶ 49; DRSMF ¶ 49.) Desgrosseilliers's last annual performance evaluation was conducted in July of 2000. (PRASMF ¶ 76.) At that time, Reynolds was not aware of, nor had he received any information regarding downsizing in the future. (Id. ¶ 77.) The evaluation did not imply nor suggest that Desgrosseilliers's employment was in jeopardy and to the contrary indicated that Desgrosseilliers was to expand his role as a manager and take ownership of the sales region. (PRSMF ¶ 50.)

A December 11, 2000 memorandum from Reynolds to Nagle mentions that a meeting occurred between the two on December 8, 2000, two days after Desgrosseilliers was terminated. (PRASMF ¶ 41; DRSMF ¶ 41.) Nagle, the owner of the company for more than thirty years, states that a meeting of this type following the elimination of an employee would not be a part of a regular routine. (PRASMF ¶ 42; DRSMF ¶ 42.) However, Reynolds states that this type of

meeting would be a usual occurrence if the separation occurred outside the normal payroll cycle. (PRASMF ¶ 43; DRSMF ¶ 43.) In the memo to Nagle, Reynolds states that although the probability that Desgrosseilliers would initiate animosity towards the company was remote, in an effort to minimize the risk of hostility, he submits the following summary of information pertinent to the former employee's file:

> - as a member of management [Desgrosseilliers] is fully knowledgeable of category pricing and our cost structure, sales strategies, business practices and company programs
> - it is very likely that [Desgrosseilliers] will continue to work in our industry. If he reemerges - - we would prefer a cordial and professional relationship
> - as a result of our payroll cycle, 12 business days will expire (after the separation date) before his final paycheck is issued
> - there is no contract that prevents him from seeking employment directly with the competition
> - a worker's [sic] compensation claim was opened on 11/30/00, (back injury). The file was closed only 48 hours prior to the separation on 12/4/00. Could the injury conveniently re-develop?
> - 2000 auto allowance reflects $ 414.89 as taxable income (noted in 12/8/00 payroll)
>
> This is a unique case. The potential for backlash suggests that we may wish to explore aggressive methods to issue his last payroll check prior to the next cycle (12/22/00). Therefore, creating an opportunity to close this file immediately [sic].

(Ex. 7.)

According to Desgrosseilliers, Reynolds wanted to avoid backlash from him due to the closeness in his termination in relation to the lifting of his work restrictions, therefore Reynolds suggested aggressive methods to issue the final paycheck as an attempt to pacify him. (PRASMF ¶ 45; PRSMF ¶ 69.) Reynolds states that he wanted to stay on good terms with Desgrosseilliers, as he was concerned Desgrosseilliers would obtain a similar sales position with the competition and he sought to expedite the paycheck so that they could go their separate ways. (DSMF ¶¶ 69-70.)

Desgrosseilliers does not believe his job was eliminated because of unfavorable economic conditions, but stated that he might be able to agree, if he had a copy of the company's financial statements, that there were unfavorable economic conditions. (Id. ¶ 72.) He questions the company's logic of creating a new position of president and CEO when conditions were allegedly unfavorable. (Id. ¶ 73.) He asserts he was terminated because RCC knew "there were going to be some [substantial] bills coming and not to save money." (Id. ¶ 76.) Nonetheless, he acknowledges that at the time of his termination he no longer had any physical restrictions and no one knew that he was going to have any additional medical issues. (Id. ¶ 77.) Four months after his termination, Desgrosseilliers was diagnosed as having a herniated disc. (PRASMF ¶ 17; DRMSF ¶ 17.)

After Desgrosseilliers's termination and during his deposition, Decker read Vaillancourt's November 13, 2000 memo and stated that in reading the description of Desgrosseilliers's condition, he would have understood the injury to be significant. (PRASMF ¶ 12.) He stated that he would expect Reynolds to have told him about the injury if the "injury was considered severe and if it had put [Desgrosseilliers] out of the work place." (DRSMF ¶ 15.) Decker reports that between November 13, 2000 and December 6, 2000, Reynolds never mentioned to him that Desgrosseilliers had any work restrictions. (PRASMF ¶¶ 13, 48.)

According to Desgrosseilliers, when Reynolds saw him and when Vaillancourt talked to him on the phone, they would ask how his back was, how he was doing, and how he was feeling. (PRASMF ¶ 28; DRSMF ¶ 28.) In retrospect, Desgrosseilliers believes that perhaps Reynolds's asking him, prior to his termination, how he was doing is evidence of discrimination. (DSMF ¶ 80.)

Discussion

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against qualified individuals on the basis of a disability.[2] Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 29 (1st Cir. 2000) (citing 42 U.S.C. § 12112(a)). Where a plaintiff lacks direct evidence of discrimination, he can prove his case by using the prima facie case and burden shifting methods that originated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Katz v. City Metal Co., Inc., 87 F.3d 26, 30 n. 2 (1st Cir. 1996). To state a prima facie case under the ADA for disability discrimination, Desgrosseilliers must prove three elements, which will be discussed below. Upon Desgrosseilliers's making of a prima facie case, RCC has a duty of production to offer a legitimate nondiscriminatory reason for why it terminated plaintiff's employment. See Marcano-Rivera v. Pueblo Intern., Inc., 232 F.3d 245, 251 (1st Cir. 2000). Once RCC has met this burden of production, Desgrosseilliers must show there is a genuine dispute of material fact as to whether RCC's proffered reason for the termination is pretextual. (See id.)

To prove a prima facie case of discrimination under the ADA, Desgrosseilliers has the burden of showing three elements: "(1) he suffers from a disability as defined by the ADA; (2) he is otherwise qualified, that is, with or without reasonable accommodations, he is able to perform the essential functions of the job; and (3) his employer discriminated against him because of his disability." See Soileau v. Guilford of Maine, Inc., 928 F.Supp. 37, 46 (D. Me. 1996), aff'd, 105 F.3d 12 (1st Cir. 1997); Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 197 (1st Cir. 1999). RCC asserts that Desgrosseilliers cannot meet his burden of showing the first and

[2] In general, the District Court does not distinguish between analysis under the ADA and the MHRA. Bailey v. Georgia-Pacific Corp., 176 F.Supp.2d 3, 11 (D. Me. 2001). Here, Count I (ADA) and Count II (MHRA) are subject to the same analysis.

third elements. (Def.'s Mot. Summ. J. ("DMSJ") at 13.) In order to meet the first element, that he had a "disability" within the meaning of the ADA, the plaintiff has the burden of showing that he

> (A) has a physical or mental impairment that substantially limits one or more of his major life activities;
> (B) has a record of such an impairment; or
> (C) is regarded as having such an impairment.

See 42 U.S.C. § 12102(2).

Desgrosseilliers claims he was disabled under all three prongs. (Compl. ¶ 20.) If Desgrosseilliers is unable to establish a prima facie case under one of these three prongs of § 12102(2), he is not protected by the ADA. Each prong will be discussed separately.

(A) Was There an Impairment that Substantially Limits One or More Major Life Activities?

Desgrosseilliers asserts he is a qualified individual with a disability because on December 7, 2000, the day he was terminated, he possessed an impairment, namely his back condition, that substantially limited the major life activity of working.[3] (Compl. ¶ 9-10, 20.) However, not all physical impairments qualify as a "disability" under the ADA. Santiago Clemente, 213 F.3d at 30 (citing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)). For an impairment to qualify as a disability, it must substantially limit one or more major life activities. The determination of whether an impairment substantially limits one or more of an individual's major life activities is guided by a three-step analysis considering: (1) whether the problem constitutes a physical

[3] Although Desgrosseilliers's memorandum in opposition to summary judgment primarily focuses on the major life activity of working, there are two points where he uses the general phrase "major life activities." (See Pl.'s Memorandum of Law (Docket No. 12) at 4, 8.) However, his complaint alleges that he has a "disability" and is "regarded as" having a disability that substantially limits his major life activity of "working." (Compl. 20.) Thus, only the activity of working is considered here under prong (A) and (C) of § 12102(2). In regard to his claim under prong (B), the complaint states that he had "a record of an impairment that substantially limited one or more of his major life activities." (Id.) Major life activities are functions such as caring for oneself, walking, seeing, hearing, speaking, and working. 29 C.F.R. § 1630.2 (h)(2)(i).

impairment; (2) whether the life activities upon which plaintiff relies constitute major life activities under the ADA; and (3) whether the impairment substantially limited one or more of the major life activities. Santiago Clemente, 213 F.3d at 30 (citing Bragdon v. Abbott, 524 U.S. 624, 631 (1998)).

Reading the record most favorably to Desgrosseilliers, I find he satisfies the first two steps of this analysis. His back condition falls within the ADA's definition of a physical impairment. See 29 C.F.R. § 1630.2(h)(1) (listing "physiological disorder, or condition... affecting... the musculoskeletal" system).[4] The activity Desgrosseilliers claims is impaired is "working," which is recognized as a major life activity under EEOC regulations.[5] See Lebron-Torres v. Whitehall Lab., 251 F.3d 236, 240 (1st Cir. 2001) (citing 29 C.F.R. § 1630.2(i)).

The third step requires a showing that the impairment substantially limited the performance of the claimed major life activity. RCC asserts that Desgrosseilliers fails to establish a prima facie case because Desgrosseilliers's impairment did not "substantially limit" his ability to work. (DMSJ at 14-15.) Desgrosseilliers asserts that the fact that he had pain and symptoms resulting from his condition that caused him to consistently leave work early; that he

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[4] As both parties utilize the EEOC guidelines in their memoranda, I apply the guidelines and do so without consideration to the validity of the guidelines and what, if any, deference they are due. See Sutton v. United Air Lines, Inc., 527 U.S. 471,478-481 (1999) (discussing, without determining, the EEOC's authority to issue regulations implementing the ADA); Toyota Motor Mfg., Kentucky, Inc. v. Williams , 534 U.S. 184, -- , 122 S. Ct. 681, 689 (2002)(applying the EEOC regulations, where the parties have accepted the regulations as reasonable, without determining reasonableness and the level of deference due).

[5] RCC requests that the Court conclude that working is not a major life activity. (DMSJ at 14.) As Desgrosseilliers fails to establish a prima facie case using working as a major life activity, there is no need to address the issue in this case. In a prior case, this Court commented as follows on that issue:

> The Court notes, despite the regulatory language, its discomfort with the concept that "working" can be regarded as a major life activity. See Sutton, 527 U.S. at 471, 119 S. Ct. 2139, infra; Gelabert-Ladenheim v. Am. Airlines, Inc., 252 F.3d 54, 58-59 (1st Cir. 2001). At a minimum, the First Circuit appears to disagree with the EEOC about the criteria for finding that one is substantially limited in one's ability to work. Compare Gelabert-Ladenheim, 252 F.3d at 58-59, with 29 C.F.R. § 1630.2(j) App. § 1630.2(j).

Jewell v. Reid's Confectionery Co., 172 F.Supp.2d 212, 216, n. 1 (D.Me. 2001), Singal, J.

experienced difficulty walking, sleeping, and standing straight; and that he had work restrictions establishes that he is significantly restricted in his ability to work. However, the major life activity of working is "substantially limited" only where an individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Santiago Clemente, 213 F.3d at 32 (citing 29 C.F.R. § 1630.2(j)(3)(i). EEOC regulations identify several factors that should be considered when determining whether an individual is "substantially limited" in working, including the "nature and severity of the impairment; ...[t]he duration or expected duration of the impairment; and ...[t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment" (29 C.F.R. § 1630.2 (j)(2) & (3)(ii)), as well as "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographical area [reasonably accessible to the individual], from which the individual is also disqualified."). See Santiago Clemente, 213 F.3d at 32 (citing 29 C.F.R. § 1630.2 (j)(3)(ii)(B)).

As to the nature and severity of Desgrosseilliers's impairment, the record shows that on November 13, 2000, the day of his injury, Dr. Pelletier documented that his pain made it difficult to change positions and stand straight (PRASMF ¶ 16) and diagnosed him as having lumbar strain and muscle spasm. (DSMF ¶ 47; PRSMF ¶ 47.) Pelletier placed him on work restrictions limiting his twisting, bending, and heavy lifting. (DSMF ¶ 49; PRASMF ¶ 15.) Over the course of Desgrosseilliers's treatment, however, Pelletier did not consider his impairment permanent. (DSMF ¶ 56; PRSMF ¶ 56.) On December 4, 2000, three weeks after Desgrosseilliers's injury, Pelletier concluded the condition was better, released Desgrosseilliers from his care, and lifted the work restrictions. (DSMF ¶¶ 58, 60.) The only symptom Pelletier documented during this

final appointment is that Desgrosseilliers had difficulty sleeping due to pain. (PRSMF ¶ 58.) Thus, according to the record Desgrosseilliers's condition was not severe, was not considered a permanent impairment, and was not actually permanent or of long-duration. The evidence presented does not indicate that Desgrosseilliers was "substantially limited" in the major life activity of working. See, e.g., Carroll v. Xerox Corp., 294 F.3d 231, 240-241 (1st Cir. 2002) (stating that to withstand summary judgment, plaintiff "must produce sufficient evidence that his impairment was 'profound enough and of sufficient duration, given the nature of [his] impairment,' to significantly restrict him in working."); Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30, 33-34 (1st Cir. 2001) (finding plaintiff was not significantly limited because impairment was mild, reversible, and short-lived).

Furthermore, the record is void of any evidence that Desgrosseilliers's back condition precluded him from a substantial class of jobs or a broad range of jobs. Lebron-Torres, 251 F.3d at 240 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 491-492 (1999) and Santiago Clemente, 213 F.3d at 33-34.). Desgrosseilliers claims he was limited in performing his job at RCC because he could work only part of the day due to the pain. However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Lessard, 175 F.3d at 197 (citing 29 C.F.R. ¶ 1630.2 (j)(3)(i)). As Desgrosseilliers has not proffered any evidence specifying the kind of jobs his back condition prevented him from performing, he fails to show he had a disability under prong (A) of § 12102(2). See Lebron-Torres, 251 F.3d at 241 (affirming grant of summary judgment by the district court where plaintiff failed to proffer evidence establishing the class or range of jobs for which he was disqualified and citing similar cases).

(B) Was There a Record of an Impairment that Substantially Limits One or More Major Life Activities?

The complaint alleges that Desgrosseilliers had a "record of impairment" that substantially limited one or more major life activities. (Comp. ¶ 20.) RCC argues that a record of impairment does not exist where the condition was brief and the evidence does not suggest the ability to work was substantially limited. (DMSJ at 16-17.) In order to prevail on a claim that one has a record of a physical or mental impairment that substantially limits one or more major life activities, a plaintiff must have a history of, or been misclassified as having, an impairment that substantially limits a major life activity. See 29 C.F.R. § 1630.2(k). The linchpin of a "record of impairment" claim is that the recorded impairment must be one that substantially limited a major life activity. Santiago Clemente, 213 F.3d at 33 (citing 29 C.F.R. § 1630.2 (k); Sorensen v. University of Utah Hospital, 194 F.3d 1084, 1087 (10th Cir. 1999); Hilburn v. Murata Elect. North Am., Inc., 181 F.3d 1220, 1229 (11th Cir. 1999). As discussed above, after Desgrosseilliers's injury, he suffered from pain that made it difficult to walk, stand, and change positions. (PRASMF ¶¶ 9, 16.) His physician diagnosed him on November 13, 2000, as having a temporary condition consisting of a lumbar strain and muscle spasm. (DSMF ¶¶ 47, 56; PRSMF ¶¶ 47, 56; Ex. 5; Desgrosseilliers Dep. 67-68.) Three weeks later, on December 4, 2000, the physician concluded he was better and that he did not need to return to see him unless there were further problems. (DSMF ¶¶ 58, 60.) At his final appointment, the only documented symptom was pain that caused difficulty sleeping. (PRSMF ¶ 58.) A few days after Desgrosseilliers's final appointment with his physician, RCC fired Desgrosseilliers. (DSMF ¶ 66.)

This three-week period is too short to create a history of substantial limitation or a record of impairment. See Jewell v. Reid's Confectionery Co., 172 F.Supp.2d 212, 217 (D. Me. 2001)

(stating that plaintiff's condition that arose less than three months before employment termination and from which plaintiff has fully recovered does not place him within the "record of impairment" category of disability and citing Sorensen, 194 F.3d at 1087 (finding there was no record of substantial impairment where plaintiff could not perform any life activities during five-day hospitalization) and 29 C.F.R. § 1630, App. § 1630.2(j) (eight week recovery from broken leg is an impairment of "brief" duration)). Desgrosseilliers has not established any genuine issues of material fact in dispute on this point. Further, he has not provided any evidence indicating that he had a history of, or was misdiagnosed as having, a substantially limiting impairment. Thus, he fails to show he had a "disability" under prong (B) of § 12102(2).

(C) Was He Regarded As Having an Impairment that Substantially Limits One or More Major Life Activities?

The final prong in which Desgrosseilliers may show he had a "disability," prong (C) of § 12102(2), states that an individual who is "regarded as" having an impairment that substantially limits a major life activity is nevertheless "disabled" within the meaning of the ADA." See 42 U.S.C. § 12102(2)(C). Under the EEOC regulations, an individual is regarded as having such an impairment if he

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) Has [no physical or mental impairment within the meaning of the regulations] but is treated by a covered entity as having a substantially limiting impairment.

Santiago Clemente, 213 F.3d at 33 (citing 29 C.F.R. ¶ 1630.2(l)).

Desgrosseilliers asserts RCC regarded him as having an impairment that substantially limited his major life activity of working. (Compl. ¶ 20.) In the context of working, "substantially limits" is defined as "significantly restricted in the ability to perform either a class of jobs or a broad range

of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. ¶ 1630.2 (j)(3)(i).

Desgrosseilliers asserts in his memorandum that numerous factors show, or a genuine issue of material fact exists, that at the time of his termination, RCC perceived him as substantially limited in the major life activity of working. He suggests that Vaillancourt's November 13, 2000 memorandum would allow the factfinder to infer that RCC viewed him as having a "very disabling and limiting condition." (Pl.'s Memorandum of Law (Docket No. 12) at 5). Further, Desgrosseilliers points to the fact that he had work restrictions requiring him to refrain from twisting at the waist, bending, and lifting more than twenty pounds and that his symptoms were apparent upon seeing him. He asserts that RCC received Pelletier's medical report that documented the progressive pain he had following his injury and the difficulty he had in walking, standing straight, and sitting for any length of time due to the pain. Desgrosseilliers further points to Decker's comment (made during his deposition and after reading Vaillancourt's November memo) that he views Desgrosseilliers's November 13 injury, as described in Vaillancourt's memo, as a substantial injury. (PRASMF ¶ 12.)

These facts merely show that RCC was aware that Desgrosseilliers was injured, had symptoms, and had work restrictions limiting twisting, bending, and heavy lifting. That the employer is aware of an employee's condition, even a serious condition, does not lead to an inference that the employer regarded the employee as unable to perform the major life activity of working. See Heffernan v. Provident Life & Accident Ins. Co., 45 F.Supp.2d 1147, 1154 (D. Kan. 1999) (rejecting the argument that a reasonable inference can be made that because the employer knew of the employee's heart condition, it regarded the employee as unable to perform jobs involving stress or strenuous physical activity). Desgrosseilliers also seeks to specifically

show that Decker was aware of his condition and his work restrictions prior to terminating him. As Decker's knowledge of Desgrosseilliers's injury or restrictions is not dispositive, the resolution of this dispute is not imperative. Thus, there is no genuine issue of material fact in this regard.

Desgrosseilliers asserts that he had several conversations with Reynolds and Vaillancourt regarding the condition of his back and how he was doing. (Pl's Memorandum at 7-8.) The record shows that when Reynolds or Vaillancourt saw Desgrosseilliers or spoke with him on the phone, they would ask him questions such as how he was doing, how his back was, and how he was feeling. (PRASMF ¶ 28; DRSMF ¶ 28.) Further, when Reynolds met with Desgrosseilliers to inform him of his termination, Reynolds asked Desgrosseilliers how his back was doing and Desgrosseilliers responded it was "killing him." (PRSMF ¶ 66; Desgrosseilliers Dep. at 94.) Desgrosseilliers now believes that Reynolds's asking him how he was doing is evidence of discrimination. (DSMF ¶ 80.) The fact that Desgrosseilliers had general conversations with RCC regarding his injury does not suggest that RCC had a discriminatory animus when terminating him. See Williams v. Imperial Eastman Acquisition Corp., 994 F.Supp. 926, 931 (D. Ill. 1998) (finding plaintiff did not establish that he was treated as or viewed as disabled where the only evidence presented is that plaintiff had a conversation with the head of his department, Deets, about his back problems and that on one occasion Deets gave him "a bad look" when he asked for assistance in lifting something, as this evidence does not address the effect of plaintiff's back complaints on management's attitudes and at most shows that management knew plaintiff complained of back problems).

Desgrosseilliers also asserts that RCC's refusing to place him in another position within the company is direct evidence that RCC perceived him as unable to perform a broad range of

jobs.[6] Desgrosseilliers has shown that at the time of his termination there likely were part-time sales openings in the tobacco-retail stores where he was qualified to work as a sales representative. (PRASMF ¶ 35; DRSMF ¶ 35; PRSMF ¶ 83.) According to the record, RCC was aware that Desgrosseilliers had a back injury, RCC received copies of his November 13 medical report, RCC knew that Desgrosseilliers endured pain, and RCC was aware of the work restrictions limiting twisting, bending, and heavy lifting. (DSMF ¶¶ 42-43; PRSMF ¶ 49; PRASMF ¶ 8; Ex. 4; DRSMF ¶ 8.) Desgrosseilliers claims that because of these factors, RCC perceived him as being substantially limited in his ability to work. However, "[a]s with real impairments, ... a perceived impairment must be substantially limiting and significant." Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) (citing Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907, 913 (11th Cir. 1996)). As discussed in (A) above these conditions do not amount to a substantial limitation on the major life activity of working.

There is no evidence in the record indicating that RCC treated Desgrosseilliers as though his condition was permanent or as though he was unable to perform the duties of regional manager or the duties of another position. RCC did not even view Desgrosseilliers's work restrictions as something that prevented him from performing his job as regional manager. (DRSMF ¶ 19.) Desgrosseilliers did not inform RCC that he was unable to complete a full day of work due to pain (DSMF ¶ 55; PRASMF ¶¶ 2, 4), and there is nothing in the record indicating that RCC was aware of this. Desgrosseilliers worked up to the moment of his termination and did not request any accommodations from RCC. Further, according to Desgrosseilliers, the day before Reynolds terminated him, Reynolds learned that Desgrosseilliers's work restrictions had been removed. (PRSMF ¶¶ 33, 35, 36, 38.) Desgrosseilliers does not suggest, and there is

[6] Desgrosseilliers has not alleged that RCC failed to assign him to a vacant position as an accommodation or refused to hire him (after his termination) due to a disability.

nothing in the record to indicate, that RCC made comments to Desgrosseilliers regarding his condition or that RCC took any other action that could be inferred as treating Desgrosseilliers as substantially limited in his ability to work. The only action in the record taken by RCC was the termination, and there is no evidence that indicates, or upon which it can be reasonably inferred, that this action was taken because RCC regarded Desgrosseilliers as substantially limited in the major life activity of working.

Desgrosseilliers further asserts that the December 11, 2000 memo from Reynolds to Nagle shows that RCC was concerned with backlash from Desgrosseilliers due to his back condition and the timing of his termination. The memo contains six bulleted items, one of which states "a worker's [sic] compensation claim was opened on 11/30/00, (back injury). The file was closed only 48 hours prior to the separation on 12/4/00. Could the injury conveniently re-develop?" (Ex. 7.) The fact that the memo mentions Desgrosseilliers's back injury in this manner does not show that Desgrosseilliers's termination two days prior was based on his disability. The memo also notes Reynolds's primary concerns surrounding the possibility that Desgrosseilliers will go to work for a competitor and the attendant need to maintain cordial relations with him. (See Ex. 7.) It would not be reasonable to infer that RCC regarded him as substantially limited in his ability to work when one of its major concerns attendant to the termination relates to the probability that Desgrosseilliers will be employed by a competitor.

Finally, Desgrosseilliers argues that it can be inferred from the inconsistent statements made by Reynolds, Decker, and Vaillancourt, regarding when and if they became aware of the injury and restrictions, that RCC is attempting to conceal the true reasons for his termination and that there is discriminatory animus. Desgrosseilliers also suggests that discriminatory animus should be inferred because there was no reason to fire him, as he was an excellent employee, and

prior to his injury no one mentioned that he was going to be terminated. However, based on the facts in the record, it would not be reasonable to infer that this is evidence of discrimination. Cf. Lessard, 175 F.3d at 198 (declining to draw an inference during the "regarded as" analysis where inference was not reasonable given the record). Although RCC was aware that Desgrosseilliers was injured in November, was in pain, and had work restrictions, as far as it knew, Desgrosseilliers was continuously coming to work, was working a full day, was completing his job duties, and doing all of these without special accommodations. (PRASMF ¶¶ 1, 2, 15; DRSMF ¶ 2; DSMF ¶ 50; PRSMF ¶ 49.) Further, RCC had received Pelletier's medical report stating the impairment was not expected to be permanent. (PRSMF ¶ 77; Ex. 5 at 3.) Thus, the record does not indicate that RCC regarded or treated Desgrosseilliers as having an impairment that substantially limited his major life activity of working.

None of the above creates a genuine issue of material fact with regard to whether RCC regarded Desgrosseilliers as having a disability within the meaning of the ADA. Further, the evidence presented, viewed in the light most favorable to Desgrosseilliers does not reflect a misperception by RCC that Desgrosseilliers had an impairment that substantially limited the major life activity of working. Accordingly, I conclude that Desgrosseilliers has failed to establish he had a "disability" under prong (C) of § 12102(2).

As Desgrosseilliers has failed to show that he had a "disability" under any of the three prongs of § 12102(2), he has failed to show the first element required in establishing a prima facie case of disability discrimination. Consequently, both his ADA claim and his MHRA claim fail.

Conclusion

I recommend that the Court **GRANT** the motion for summary judgment on both counts.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 14, 2002

TRLIST STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-230

DESGROSSEILLIERS v. REID'S CONFECTIONERY Filed: 11/14/01
Assigned to: Judge GEORGE Z. SINGAL Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 442
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:12101 American Disabilities Act

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