IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SALVADOR AYALA, Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.	**No. 4:09-cv-00026-JEG** **O R D E R**

This matter comes before the Court on a Motion for Summary Judgment filed by Defendant City of Des Moines, Iowa, (the City) on December 14, 2009. Plaintiff Salvador Ayala (Ayala), appearing pro se, did not file a resistance by the January 7, 2010, deadline. By text order on January 21, 2010, and in a letter sent to Ayala's address of record, the Court extended the response deadline to February 4, 2010, indicating the matter would then be deemed submitted with or without a response. The parties have not requested a hearing, and the Court does not find one necessary. This matter is fully submitted and ready for disposition.

I. BACKGROUND[1]

Ayala was born on February 17, 1947. He began his employment with the City on November 11, 2001, as an H.S. Maintenance Mechanic A – non civil service, with the understanding that the job classification would change within a year. On June 24, 2002, the City

[1] Local Rule 56(b) states that a resisting party must file "[a] response to the statement of material facts in which the resisting party expressly admits, denies, or qualifies each of the moving party's numbered statements of fact . . . . The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." Ayala never submitted a response to the City's statement of undisputed material facts. Accordingly, the Court deems those facts set forth in the City's statement of material facts admitted by Ayala. See Anderson v. Nationwide Mut. Ins. Co., 592 F. Supp. 2d 1113, 1117 n.1 (S.D. Iowa 2009); Housley v. Orteck Int'l, Inc., 488 F. Supp. 2d 819, 822 n.1 (S.D. Iowa 2007). On facts not thereby established, the Court views the evidence and inferences reasonably drawn therefrom in the light most favorable to Ayala, the nonmoving party. E.g., Country Life Ins. Co. v. Marks, 592 F.3d 896, 898 (8th Cir. 2010).

appointed Ayala to H.S. Maintenance Mechanic B – civil service. The job duties for H.S. Maintenance Mechanic B included carrying up to ninety pounds, climbing ladders to change lights, and kneeling for prolonged periods of time.

On March 1, 2006, Ayala suffered a work-related injury to his knee and was later sent to the City's health clinic when he reported the injury to his supervisor, Keith Ellis, (Ellis) on March 3, 2006. The clinic imposed work restrictions prohibiting Ayala from kneeling, squatting, or climbing. The restrictions prevented Ayala from returning to work while he underwent treatment. In December 2006, Ayala was released to return to work without restrictions. Upon returning to work, Ayala experienced increased pain, decreased range of motion, and some edema, causing him to seek additional care. The clinic imposed new work restrictions on January 4, 2007, prohibiting Ayala from kneeling, squatting, climbing, and walking on uneven surfaces.

Dr. Peter Wirtz (Dr. Wirtz) evaluated Ayala's knee on February 2, 2007, indicating that Ayala was limited in his ability to squat, climb stairs and ladders, and engage in push/pull activities. By March 8, 2007, Ayala's physicians determined that Ayala's restrictions were permanent. In a letter dated April 11, 2007, the City notified Ayala that his physical restrictions could not be accommodated within the essential functions of a Housing Services Mechanic B, and his employment would be terminated effective April 13, 2007.

On June 3, 2007, Ayala commenced this lawsuit in the Iowa District Court for Polk County, asserting a claim for unfair dismissal and termination in violation of public policy. On January 16, 2009, in response to discovery interrogatories, Ayala attached two sheets describing rights and duties under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. Based on this response, and the indication Ayala was asserting a claim under federal law, the City timely removed the case to federal court on January 21, 2009. 28 U.S.C. § 1446(b); see also Chaganti & Assoc., P.C. v. Nowotny, 470 F.3d 1215, 1220 (8th Cir. 2006) (holding that the

thirty-day period for removal commences when it becomes clear that the opposing party is raising a federal claim); Maheshwari v. Univ. of Texas-Pan Am., 460 F. Supp. 2d 808, 810 (S.D. Texas 2006) (ruling that the thirty-day period for removal commenced when defendant received plaintiff's interrogatory answers identifying inter alia Title I of the ADA as a basis for a claim). The City filed this Motion for Summary Judgment on December 14, 2009. As of the date of this Order, Ayala had not responded to the City's motion.

II. DISCUSSION[2]

Construing Ayala's pro se pleadings liberally,[3] see Wishnatsky v. Rovner, 433 F.3d 608, 610 (8th Cir. 2006) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)), Ayala asserted claims based on his injury at work, age, and disability for (1) termination in violation of public policy; (2) failure to accommodate under the Iowa Civil Rights Act (ICRA); (3) violation of the Americans with Disabilities Act (ADA); and (4) violation of the Age Discrimination in Employment Act (ADEA).

A. Standard for Summary Judgment

Although the Court has a duty to liberally construe the pleadings of a pro se litigant, pro se litigants are not excused from compliance with Rule 56 of the Federal Rules of Civil Procedure. See Tolen v. Ashcroft, 377 F.3d 879, 883 n.3 (8th Cir. 2004). Summary judgement is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits, show

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[2] Ayala has failed to respond to Court orders and has not participated in his own case since the City filed its Motion for Summary Judgment. Nevertheless, the Court decides this case on the merits of Ayala's claims according to the standard for summary judgment despite the Court's inherent power to act on its own in dismissing a claim when a plaintiff does not pursue his claim. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991).

[3] Ayala was represented by counsel when he commenced the initial action in State court asserting a claim of termination in violation of public policy. That counsel was allowed to withdraw by order of December 5, 2008. Ayala was acting pro se when in January 2009 he responded to discovery in the State court action and seemingly enlarged his claims. Ayala has proceeded pro se since removal to this Court.

that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party." Miner v. Local 373, 513 F.3d 854, 860 (8th Cir. 2008). On a motion for summary judgment, the Court views the evidence and inferences in the light most favorable to the party against whom the motion is filed. Id.

B. Termination in Violation of Public Policy

Ayala's Petition and Jury Demand alleges one count of termination in violation of public policy. Specifically, Ayala alleges that he was fired because of his injury at work, disability, and age.

1. Injury at Work

The City argues that Ayala is not protected by any public policy upon which he can base his claim for termination in violation of public policy due to his work-related injury.

Under Iowa law, the elements of a cause of action for termination in violation of public policy are

> (1) existence of a clearly defined public policy that protects employee activity; (2) the public policy would be jeopardized by the discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination.

Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 761 (Iowa 2009) (citing Lloyd v. Drake Univ., 686 N.W.2d 225, 228 (Iowa 2004)). The cases wherein the Iowa Supreme Court has found that termination violated public policy generally fall into one of four categories of statutorily protected conduct: "(1) exercising a statutory right or privilege; (2) refusing to commit an unlawful act; (3) performing a statutory obligation; and (4) reporting a statutory violation." Id. at 762 (citations omitted). The Court determines, as a matter of law, whether a clearly defined public policy exists that protects employees in circumstances like Ayala's. See Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 282 (Iowa 2000).

The Court does not find that any clearly defined public policy in Iowa protects a worker from termination due to an injury at work unless the termination was in retaliation for filing a claim for workers' compensation. Cf. Springer v. Weeks & Leo Co., Inc., 475 N.W.2d 630, 632 (Iowa 1991) (Iowa public policy protects employees who are discharged for seeking workers' compensation due to injury at work). Ayala does not allege that he was fired because he filed for workers' compensation. Furthermore, Ayala has not alleged any facts, and the Court is unable to discern any facts in the pleadings or discovery materials,[4] that show that Ayala was exercising a statutory right, refusing to commit an unlawful act, performing a statutory obligation, or reporting a statutory violation when he was terminated. Accordingly, Ayala's claim for termination in violation of public policy due to his injury must fail as a matter of law. Fitzgerald, 613 N.W.2d at 282.

2. Disability and Age

The City argues that Ayala's claim of termination in violation of public policy due to age and disability is preempted by the ICRA. "To the extent the ICRA provides a remedy for a particular discriminatory practice, its procedure is exclusive and the claimant asserting that practice must pursue the remedy it affords." Smidt v. Porter, 695 N.W.2d 9, 17 (Iowa 2005). The Court concludes that the ICRA preempts Ayala's claims of termination in violation of public policy based on either age or disability. Hence, Ayala's claim of termination in violation of public policy based on age and disability must fail.

C. Disability and Age Under the ICRA

The City asserts that Ayala's claims under the ICRA fail because he has not exhausted his administrative remedies.

The ICRA prohibits employers from firing an employee based on his age or disability. Iowa Code § 216.6(1)(a) (2010). "Before the federal courts may hear a discrimination claim, an

[4] The Court is not required to search the entire record for facts to support Ayala's claim when he has not indicated those facts to the Court. Tolen, 377 F.3d at 883 n.3.

employee must fully exhaust [his] administrative remedies." Burkett v. Glickman, 327 F.3d 658, 660 (8th Cir. 2003). Under the ICRA, a person claiming unfair employment practices must first receive a right to sue letter from the Iowa Civil Rights Commission (ICRC) before commencing a court action. Iowa Code §§ 216.15-216.17.

Ayala did not receive a right to sue letter from the ICRC and therefore failed to exhaust his administrative remedies. See Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002) ("Administrative remedies are exhausted by the timely filing of a charge and receipt of a right-to-sue letter.") Thus, the Court may not entertain any claim for discriminatory termination based on Ayala's age or disability under Iowa law.

D. ADA

The City argues that Ayala has not met his threshold burden of alleging a prima facie case, showing that he was qualified to perform the essential functions of his job with or without accommodation by the City.

"Under the ADA, an employer may not discriminate against an employee because of the employee's disability." Lors v. Dean, ___ F.3d ___, No. 09-1382, 2010 WL 568621 at *2 (8th Cir. Feb. 19, 2010). The plaintiff has the initial burden to establish each of the following requirements: "(1) [he] had a disability within the meaning of the ADA; (2) [he] was qualified, with or without a reasonable accommodation, to perform the essential job functions of the position in question; and (3) [he] suffered and adverse employment action because of his disability." Id.

The City concedes that Ayala can create a material factual dispute that he had a disability within the meaning of the ADA based on Ayala's permanent physical restrictions. Ayala has not, however, established the second requirement by showing that he was qualified to perform the essential functions of his job with or without a reasonable accommodation.

Ayala concedes in the record that he could not do many of the duties of a Maintenance Mechanic B due to his physical restrictions after his injury; thus he could not perform the

essential functions of his job without accommodation. Ayala cannot create a material factual dispute that the City could have made a reasonable accommodation that would have allowed him to perform his essential job functions either by the use of tools or by reassignment. If an employee cannot perform the essential functions of his job without accommodation, he must "make a 'facial showing that other reasonable accommodation is possible.'" Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 712 (8th Cir. 2003) (quoting Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995)). No affirmative showing of accommodation has been made, none can be mined from the record, and the available record actually supports the negative. At a meeting with the City before his termination, when asked, Ayala did not know of any tools that he could use to avoid kneeling or climbing.

Likewise, with one inapplicable exception, Ayala has not alleged accommodation by way of job reassignment that the City would have been required to offer.[5] Ayala intimates that the City would have been required to accommodate Ayala by reassigning him as an Airport Custodial Worker. But, Ayala has not made a facial showing (1) that he could perform the essential functions of that job and, (2) what special circumstances existed that would have made a violation of the seniority clause reasonable, as it would have violated a labor contract seniority clause. See U.S. Airways v. Barnett, 535 U.S. 391, 406 (2002) (under the ADA accommodation requirement, "a showing that the [re]assignment would violate the rules of a seniority system warrants summary judgment for the employer – unless . . . plaintiff present[s] evidence of . . . special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable."); McPherson v. O'Reilly Auto., Inc., 491 F.3d 726, 731 (8th Cir. 2007) (affirming summary judgment on ADA claim where employee produced no evidence that he would be able to perform the essential job functions of jobs where he could have been reassigned). Likewise, despite Ayala's intimations to the contrary, reassignment to an H.S.

[5] Again, the Court is not required to search the entire record for facts to support Ayala's claim when he has not indicated those facts to the Court. Tolen, 377 F.3d at 883 n.3.

Maintenance Mechanic A or H.S. Projects Specialist would not have been reasonable since they would have been promotions. See Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1019 (8th Cir. 2000) (promotion is not required to accommodate disabled employee seeking reassignment under the ADA).

Accordingly, Ayala has not established an essential requirement of an ADA discrimination claim, and thus his ADA claim fails as a matter of law.

E. ADEA

The City argues that Ayala's ADEA claim fails because he cannot show that age discrimination was the "but-for" cause of his discharge.

Under the ADEA, it is unlawful for an employer to discharge an employee due to the employee's age. 29 U.S.C. § 623(a). To establish an ADEA claim, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause of the challenged employer decision." Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009).

Ayala has not presented any direct evidence that indicates that if it were not for his age, he would not have been fired. The City's letter of termination to Ayala indicated that Ayala was discharged because his permanent work restrictions prevented him from performing the necessary functions of his job. Ayala has not presented any statements made by the decision-maker in Ayala's discharge, Chris Johansen (Johansen), indicating that he based his decision to terminate Ayala on Ayala's age. See McCullough v. Univ. of Ark. for Med. Sci., 559 F.3d 855, 861 (8th Cir. 2009) ("[Direct evidence] most often comprises remarks by decisionmakers that reflect, without inference, a discriminatory bias.") Nor has Ayala presented any other evidence that shows a specific link between his age and his termination. See King v. U.S., 553 F.3d 1156, 1160 (8th Cir. 2009) ("[D]irect evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.").

Likewise, Ayala has not presented any circumstantial evidence that establishes a genuine issue of material fact that would defeat summary judgment. In his answers to interrogatories and at his deposition, Ayala indicated that Johansen's hiring of a younger employee for Ayala's job showed Johansen's discriminatory intent. However, Ayala acknowledges that the younger employee was hired over a year before Ayala was terminated. Because there is no nexus between the younger employee's hiring and Ayala's termination, Ayala has failed to show that the City filled his position with "an individual sufficiently younger to permit the inference of age discrimination." Hammer v. Ashcroft, 383 F.3d 722, 726 (8th Cir. 2004) (citations omitted).

Ayala has not met his burden of showing that age was the "but-for" cause of his termination due to the lack of direct or circumstantial evidence presented in this case. Ayala has generated no genuine issue of material fact that Johansen had a discriminatory intent when he terminated Ayala. Gross, 129 S. Ct. at 2351; Miner, 513 F.3d at 860. Therefore, the City is entitled to summary judgment on Ayala' ADEA claim.

III. CONCLUSION

For the reasons stated, Defendant's Motion for Summary Judgment (Clerk's No. 16) must be **granted**. The above-captioned action is **dismissed**.

IT IS SO ORDERED.

Dated this 2nd day of March, 2010.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT