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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

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

JOHN VICE, Plaintiff, v. CUB FOODS, RANDALL STORES, INC., AND JOHN SCHEWE, Defendants.	*	3-99-CV-90063 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion for Summary Judgment, filed June 16, 2000. Defendants, Cub Foods, Randall Stores, Inc., and John Schewe ("Schewe"), seeks summary judgment on all claims brought by Plaintiff, John Vice, Sr. ("Vice"), in his Complaint filed on March 10, 1999. On July 17, 2000, Vice filed a Resistance to Defendant's Motion for Summary Judgment. Cub Foods filed a Reply and Request for Oral Hearing on August 10, 2000. The Court sees no need for a hearing and considers the motion fully submitted.

I. FACTS

The pertinent facts are as follows. Cub Foods operates a retail grocery store in Iowa City, Iowa. At the time in question, Randall Stores, Inc. owned the store and Schewe managed it. In September of 1994, one month prior to opening, Cub Foods hired Vice to be its meat manager.

During Vice's employment at Cub Foods he suffered two injuries. The first of those

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injuries occurred on November 22, 1994, when Vice injured his left shoulder while trying to catch a turkey that another employee dropped. This injury required surgery. Vice missed no work prior to the surgery and received full wages for the time he missed after the surgery. Vice also filed for and received worker's compensation for his shoulder injury. As a result of the shoulder injury Vice was sensitive to cold temperatures and his doctors placed lifting restrictions on him, including a restriction from lifting anything above shoulder level.

Vice's second injury occurred on August 16, 1997. While cutting meat, Vice amputated approximately one-half inch of his right index finger. Vice missed two days of work after this injury, for which Cub Foods paid him his full wages. Vice sought worker's compensation benefits for this injury as well. The amputation of part of his finger rendered the remaining tip of his finger sensitive to cold temperatures. Vice states that the restrictions caused by these two injuries have made him incapable of performing the job of meat manager or meat cutter.

Vice maintains that while he did what was necessary to get his job done adequately at Cub Foods (i.e., enlisting the help of fellow employees), he was treated differently because of his injuries. Vice contends that after his shoulder injury Schewe pushed him to work too many hours and contacted his doctor about the possibility of Vice working even more hours. Schewe told him that he did not care how long Vice came in to work, so long as Vice could come in and perform certain duties. Vice stated that he felt compelled to be at the store longer than he was comfortable with, and that it was not possible to just come in for an hour or so.

Vice claims that various comments were made by Schewe and the assistant manager, Kyle Tryon ("Tryon"). He claims that on one occasion Schewe questioned him about why he would want a lawyer for his worker's compensation claim. On another occasion Vice said that he asked Schewe if Schewe were in Vice's position would he stay, to which Schewe responded,

"no." Vice also claims that Tryon made a comment to other employees to the effect that Vice's shoulder injury cost more than Tryon's house.

Vice points out the fact that he did not get a raise after Schewe wrote him up for not meeting his profit goal. On May 22, 1997, Cub Foods gave Vice a written notice that he had failed to meet profit goals and that if he continued to fail in meeting them he would be terminated. Vice admits not meeting the goals, but contends that the threat of termination was improper. Vice contends that the established order of disciplinary action for Cub Foods was to first issue a contact order or verbal warning, and then give up to two written warnings, before terminating an employee. Moreover, Vice exclaims that he failed to meet his profit goals at least in part because some merchandise was not properly credited to his department. Vice admits, however, that Cub Foods at least attempted correct the problem. Vice also complains that a particular high-profit type of fish was sold in another department instead of his, that Schewe limited his department to two brands of chicken, and that Cub Foods moved the smokehouse out of his department.

Finally, Vice asserts that Cub Foods paid one of the employees under Vice's supervision more than Vice. Schewe explains that the employee in question, Gary Kock, was paid by the hour, while Vice was a salaried employee. Schewe states that Mr. Kock may have made more, but that if he did it was because he got paid time and a half for any hours over 40 per week. Schewe also points out that it was store policy to eliminate overtime whenever possible and that it would have been Vice's responsibility to eliminate it in Mr. Kock's case.

On November 11, 1997, Vice quit his employment at Cub Foods. Vice admits that Cub Foods made every accommodation for him. However, Vice claims that in light of the above stated treatment he left after he "had taken all [he] could." (Vice Depo. at 172.)

II. SUMMARY JUDGMENT STANDARD

As the Eighth Circuit has noted, "[t]his court has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based. . . . Summary judgment is not appropriate unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998) (citations omitted). "[S]ummary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991), *cited in Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997); *see Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). This is because "inferences are often the basis of the claim . . . and 'summary judgment should not be granted unless the evidence could not support any reasonable inference' of discrimination." *Breeding v. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (quoting *Lynn v. Deaconess Med. Ctr.-West Campus*, 160 F.3d 484, 486-87 (8th Cir.1998)).

Nevertheless, the plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Snow*, 128 F.3d at 1205 (citing *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 762 (8th Cir.1995)).

The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most

favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The Court does not weigh the evidence or make credibility determinations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. See *Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. *See* Fed.R.Civ.P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. ANALYSIS

Vice's lawsuit against Cub Foods, Randal Stores, Inc. and Schewe appears to be based on two claims. First, Vice alleges that Cub Foods constructively discharged him in violation of the

Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. and the Iowa Civil Rights Act, § 216 et seq (ICRA). Second, Vice alleges that he was constructively discharged in violation of public policy after filing for worker's compensation benefits. The Court will deal with these in turn.

A. Disability Discrimination Claim

Vice claims that Cub Foods treated him, with regard to the effect of his injuries, in such a manner as to constructively discharge him in violation of the ADA and ICRA. Initially, the Court notes that because of the similarity of the language of the ADA and ICRA courts treat them similarly for purposes of their analysis. *See Berg v. Norand Corp.*, 169 F.3d 1140, 1144 n.5 (8th Cir. 1999) (stating "Iowa courts look to the ADA, its regulatory interpretations, and its caselaw in construing a disability claim under the ICRA."); *Fuller v. Iowa Dept. of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998) (stating that in interpreting the ICRA the Iowa Supreme Court looks to the ADA, its regulations and cases interpreting the ADA). Thus, this Court will analyze Vice's ADA and ICRA claims together.

In order to establish a prima facie case under the ADA the plaintiff must prove three elements. He must prove (1) that he is disabled within the meaning of the ADA, (2) that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job at issue, and (3) that he has suffered an adverse employment action because of the disability. *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000). Summary judgment is then proper if the plaintiff fails to establish any element of his prima facie case. *Wilking v. County of Ramsey*, 153 F.3d 869, 872 (8th Cir. 1998).

The ADA defines "disability" as follows:

(A) a physical or mental impairment that substantially limits one or more of

the major life activities of such individual;
(B) a record of such impairment; or
(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Major life activities refers to such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(h)(2)(i). With respect to working, "[t]he term substantially limits means 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." *Id.* at § 1630.2(h)(3)(i) "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

Vice did not have a disability as defined by the ADA. In *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995), the 8th Circuit held that the plaintiff was not disabled where his impairments only prevented him from performing a narrow range of meatpacking jobs. In that case, the plaintiff's doctor restricted the plaintiff to light duty work, no work with meat products and no work in a cold environment. *Id.* Vice's restrictions closely parallel the plaintiff's restrictions in *Wooten*. Vice was also restricted in his lifting capabilities and his ability to withstand cold temperatures. And, as in *Wooten*, Vice claims that his inability to perform a narrow range of meatpacking jobs renders him disabled for purposes of the ADA. There is no evidence that Cub Foods regarded Vice as being restricted beyond the inability to be a meat manager or meat cutter. Thus, this court finds that even if Vice was incapable of performing the duties of a meat manager or a meat cutter (or was regarded by Cub Foods as being unable to perform those duties), he is not disabled within the meaning of the ADA.

Vice has therefore failed to satisfy the threshold requirement. "The threshold requirement for coverage under the ADA is that the plaintiff be a 'qualified individual with a

disability.'" *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996). It is therefore unnecessary for the Court to analyze the remaining two elements of Vice's prima facie case.[1]

Similarly, Vice fails to make out a prima facie case for supervisor liability. Under Iowa law, a supervisory employee may be held individually liable for unfair employment practices. *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999). However, Vice does not establish that he was disabled. Therefore, as explained above, Vice also fails to make out a prima facie case of disability discrimination against Schewe.

B. Discharge in Violation of Public Policy Claim

Vice fails to create a genuine issue as to whether he was discharged in violation of Iowa public policy. In Iowa, all employees are presumed to be at-will. *Anderson v. Douglas and Lomason Co.*, 540 N.W.2d 277, 281 (Iowa 1995). That is, an employer may discharge an employee "at any time, for any reason, or for no reason." *Fitzgerald v. Salsbury*, 613 N.W.2d 275, 280 (Iowa 2000) (quoting *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 202 (Iowa 1997). However, an exception to this presumption exists where an employer discharges an employee in violation of a "well recognized and defined public policy of the state." *Springer v. Weeks and Leo Co.*, 429 N.W.2d 560 (Iowa 1994). The elements of an action for discharge in violation of public policy are as follows: (1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge. *Fitzgerald*, 558 N.W.2d at 281. The Iowa Supreme Court has recognized that discharge in retaliation for seeking worker's

[1]It is unclear from Vice's pleadings whether he alleges a hostile environment harassment claim. The 8th Circuit has yet to recognize such a claim under the ADA. *See* Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998) (stating that the 8th Circuit is uncertain whether a claim for hostile environment harassment exists under the ADA). Regardless, if Vice did allege such a claim summary judgment would be appropriate due to the fact that he fails to establish that he was disabled within the meaning of the ADA.

compensation benefits is against such policy. *Id.* at 560-561; see also *Fitzgerald*, 558 N.W.2d at 275 (laying out and adding to the situations where an employer violates a well recognized and defined public policy of the state).

Vice has failed to create a genuine issue of fact as to whether he was constructively discharged. Under Iowa law, a constructive discharge occurs "when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission*, 315 N.W.2d 83, 87 (Iowa 1982). The plaintiff must show that a reasonable person in his position would have felt compelled to resign. *Reihmann v. Foerstner*, 375 N.W.2d 677, 683 (1985).

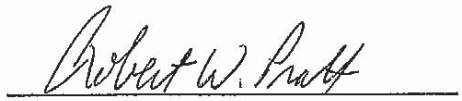
Vice fails to create a genuine issue as to whether his work environment was so intolerable that a reasonable person would have felt compelled to resign. Vice proffered essentially five pieces of evidence regarding his treatment at Cub Foods: (1) the fact that Schewe questioned why Vice would want a lawyer for his worker's compensation claim; (2) a "no" response by Schewe when asked if he would stay if he was in Vice's position; (3) a statement by the assistant manager that Vice's shoulder injury cost more than his house; (4) the fact that he made less than one of the employees he supervised; and (5) the fact that he did not get a raise after being written up for not meeting his profit goals. However, Vice does not dispute that fact that he failed to meet his profit goals. As to one of the employees Vice supervised making more money than him, Cub Foods seemed to adequately explain why that may have been the case (i.e., the employee in question was an hourly employee while Vice was a salary employee). This evidence falls short of establishing an objectively intolerable work environment.

IV. CONCLUSION

Vice fails to make out a prima facie case for either of his claims. He did not have a disability as defined by the ADA. Vice did not establish a genuine issue as to whether he was constructively discharged in retaliation for seeking worker's compensation benefits. Summary judgment on all claims brought by Vice in his March 10, 1999 Complaint is therefore GRANTED in favor of Randall Stores, Inc., Cub Foods and John Schewe.

IT IS SO ORDERED.

Dated this 31st day of August, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE