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

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SOUTHERN DISTRICT OF IOWA

MICHAEL JEROME OLLIE,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 4-00-CV-10457
vs.	)	
	)	
TITAN TIRE CORPORATION,	)	ORDER
	)	
Defendant.	)	

The Court has before it defendant Titan Tire Corporation's ("Titan Tire") motion for summary judgment, filed December 17, 2001. Plaintiff resisted the motion February 12, 2002, and the motion is considered fully submitted.

I. BACKGROUND

The following facts either are not in dispute or are viewed in a light most favorable to plaintiff.

Defendant Titan Tire operates a tire manufacturing facility in Des Moines, Iowa. On or about August 4, 1998, plaintiff Michael Ollie applied for a position with Titan Tire through a labor service. Next to the phrase "Position Applied For" on the application form, plaintiff indicated: "Forklift driver - tire builder - anything." Appendix of Documents in Support of Motion for Summary Judgment ("Def. App.") at 1. Next to the phrase "Alternate Position," plaintiff wrote: "anything open." *Id.*

At the time of application and consistent with Titan Tire policy, plaintiff was told he needed to pass a drug screen and a physical examination. Plaintiff was sent to the Occupational

Health Center and was seen by Anthony J. Sciorrotta, D.O.

At the Occupational Health Center, plaintiff was asked to complete a questionnaire relating to his past and present medical history. In response to the question: "Have you ever had asthma," plaintiff wrote "Y" for "yes."[1] *Id.* at 4.

After completing his physical examination of plaintiff and presumably reviewing the medical history questionnaire, Dr. Sciorrotta indicated plaintiff was "medically able to do the essential functions of the job with accommodations listed below." *Id.* at 3. In the comment section at the bottom of the Medical Examination Report completed by Dr. Sciorrotta, Dr. Sciorrotta indicated first that plaintiff should wear hearing protection, and second, that plaintiff "may have difficulty in areas with dust or fumes." *Id.* The parties dispute whether Dr. Sciorrotta made this latter assessment believing plaintiff currently "has asthma," or had a *history of* "hx asthma." *Id.*[2]

Based on the results of plaintiff's medical examination, Titan Tire concluded it could not accommodate Mr. Ollie, and withdrew its conditional offer of employment. It appears plaintiff discussed the decision with a Titan Tire representative named "Betty," who informed plaintiff that Dr. Sciorrotta had concluded plaintiff "could not work around smoke or something like that."

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[1] As noted by plaintiff, the phrasing of questions asked on the form varies from "Do you ever have . . ." to "Have you ever had . . ." to "Do you have." *See* Appendix of Documents in Support of Motion for Summary Judgment ("Def. App.") at 4. The Court further notes that at the top of the questionnaire, the "type of exam" was described as "post-offer." *Id.*

[2] In addition, the record indicates Dr. Sciorrotta had examined plaintiff approximately one month earlier for a different employer. *See* Plaintiff's Appendix in Support of Plaintiff's Resistance to Defendant's Motion for Summary Judgment ("Pl. App.") at 5-10. As part of this examination, Dr. Sciorrotta gave plaintiff a pulmonary function test. On plaintiff's first attempt, the results showed plaintiff had a "mild restriction," but that he had given "poor effort." *Id.* at 7-10. On the second attempt, plaintiff showed "good effort," and achieved "normal" results. *Id.*

Def. App. at 20. Betty then told plaintiff Titan Tire had no other job available for plaintiff. *Id.* Plaintiff is not sure whether he and Betty discussed the option of wearing a mask. *Id.*

Plaintiff admits that due to the machinery used to make tires, dust and fumes may exist in some areas, as well as the fork lifts that are operated in the plant. He disputes, however, that he suffered from any medical condition which would prevent him from working at the plant with or without accommodation.

Plaintiff filed the present action in this Court on August 22, 2000. Specifically, plaintiff alleges defendants discriminated against her on the basis of an actual or perceived disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Iowa Civil Rights Act ("ICRA"), IOWA CODE §§ 216.1 *et seq.* Plaintiff further contends Titan Tire committed common law defamation by indirectly compelling plaintiff to disclose the reason he was not hired to Job Service of Iowa and the Iowa Civil Rights Commission.

Defendant now moves for summary judgment on all claims.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties

will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *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.*

"Summary judgment should seldom be used in employment discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). Summary judgment should be granted only on the rare occasion where no dispute of fact exists and there is only one conclusion. *Id.* (citations omitted) (quotations omitted). The Court should not grant a defendant's summary judgment motion "unless the evidence could not support any reasonable inference for the nonmovant." *Id.* (citations omitted).

B. Disability Discrimination

Initially, the Court notes the legal analysis used to evaluate state and federal discrimination claims is virtually identical. *See, e.g., Boelman v. Manson State Bank*, 522 N.W.2d 73, 79 (Iowa 1994) (applying federal ADA cases to analyze state disability discrimination claim). The Court therefore will consider plaintiff's state and federal disability discrimination claims together for purposes of this motion.

Claims made under the ADA (and ICRA) follow the familiar burden-shifting framework set forth in *McDonnell Douglas*. *See Keil v. Select Artificials, Inc.*, 169 F.3d 1131, 1134-45 (8th Cir. 1999) (citing *McDonnell Douglas*, 411 U.S. at 802-05)). First, a plaintiff must present a prima facie case of disability discrimination. *Keil v. Select Artificials, Inc.*, 169 F.3d at 1134-35.

The burden then shifts to the employer to "rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action." *Id.* at 1135. If the employer is able to provide such a reason, the burden shifts back to the plaintiff to show the employer's proffered reason was pretextual. *Id.*

1. Whether Plaintiff Can Establish a Prima Facie Case

To establish a prima facie case of discrimination under the ADA, a plaintiff must show: 1) he was disabled under the meaning of the ADA; 2) he was qualified to perform the essential functions of the position with or without accommodation; and 3) he "suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination." *Id.* In the present case, defendant contends plaintiff has failed to create a material issue of fact as to whether he could perform the essential functions of the available positions, with or without accommodation.[3] This Court does not agree.

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[3] Defendant does not argue in its present motion that plaintiff is not disabled under the meaning of the ADA. To succeed at trial, however, plaintiff must nevertheless establish this element of his claim. Disability is defined in relevant part under the ADA as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [or]
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). To establish a prima facie case of discrimination based on a perceived disability, plaintiff must show: (1) Titan Tire perceived him to have an impairment that substantially limits a major life activity, in this case, working; (2) he was qualified to perform the essential functions of his position; and 3) he suffered an adverse employment action due to the perceived disability. *Kampouris v. St. Louis Symphony Society*, 210 F.3d 845, 848 (Bennett, J., dissenting) (citing *Roberts v. Unidynamics Corp.*, 126 F.3d 1088, 1092 (8th Cir. 1997) and *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570 574 (8th Cir. 2000)). *See also Howell v. Merritt Co.*, 585

a. whether plaintiff was qualified

Titan Tire argues it reasonably relied upon Dr. Sciorrotta's determination in reaching its conclusion that plaintiff was unqualified for the positions for which he applied. This Court does not agree.[4]

The record reflects defendant gave plaintiff an offer of employment contingent on his ability to pass a drug screen and medical examination, which suggests Titan Tire believed plaintiff possessed the skills, aptitude and other intangible characteristics required to perform a position in or around its manufacturing facility. In addition, after performing his medical examination, Dr. Sciorrotta expressly found that plaintiff *was* "medically able to do the essential functions of the job with accommodations listed below." Def. App. at 4.[5] Although Dr. Sciorrotta indicated plaintiff "*may* have difficulty in areas with dust or fumes," issues of fact remain as to whether the dust and fumes in the areas in which plaintiff would be working were sufficiently prevalent to adversely

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N.W.2d 278, 280-81 (Iowa 1998) (expressly recognizing "perceived disability" as within scope of ICRA).

[4] Titan Tire cites to *Bay v. Cassens Transport Co.*, 212 F.3d 969, 974 (7th Cir. 2000) and *Campbell v. Federal Express Corp.*, 918 F. Supp. 912 (D. Md. 1996) in support of this argument. In both of these cases, however, the physicians determined the plaintiffs were not "DOT certifiable," which rendered them *legally* unable to drive the defendants' commercial vehicles. *Bay*, 212 F.3d at 974; *Campbell*, 918 F. Supp. at 916. In the present case, however, no such certification is at issue, and the practical impact of Dr. Sciorrotta's medical conclusions is a disputed issue of fact.

[5] In its Statement of Material Facts Not in Dispute, defendant cites plaintiff's admission to the Iowa Civil Rights Commission that he had a history of childhood asthma and had a recurrence of symptoms during his service in the Navy as evidence he was unable to perform a position with Titan Tire. *See* Statement of Material Facts Not in Dispute ¶ 12. As argued by plaintiff, however, the fact he experienced symptoms of asthma in the past does not prove as a matter of law he would suffer debilitating symptoms again under the conditions present in defendant's plant.

Likewise, although plaintiff may have indicated during an ICRC interview that he "flunked" a breathing test, he continued by stating he "was never diagnosed with asthma and I really never had a doctor tell me that I had asthma." Def. App. at 20.

affect plaintiff's health and/or job performance.

b. whether accommodation was possible

Even assuming plaintiff's symptoms of asthma rendered him otherwise unqualified for the position, plaintiff may nevertheless establish a prima facie case of discrimination if the employer could have reasonably accommodated him. Such reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies. . . ." 42 U.S.C. § 12111(9). The applicable regulations state that "it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). It is important to note, however, that the interactive process is not triggered until the plaintiff requests an accommodation for his disability. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000).

In the present case, the Court finds a material issue of fact exists as to whether plaintiff provided Titan Tire with sufficient information to trigger the interactive process. Clearly, Titan Tire was familiar with Dr. Sciorrotta's report, which indicated plaintiff could perform the essential functions of the position with certain accommodations. Def. App. at 3. In addition, plaintiff stated in his ICRC interview that he was unsure whether he suggested the possibility of wearing a mask. *Id.* at 21. It is for a jury to determine whether plaintiff in fact provided Titan Tire with sufficient information to begin the process and if so, whether: (1) Titan Tire failed to make a good

faith effort to help plaintiff investigate the possibility of accommodations; and (2) Titan Tire could reasonably have accommodated plaintiff if it had acted in good faith. *See Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 950 (8th Cir. 1999) (outlining elements of failure to accommodate claim).

2. Conclusion regarding ADA claim

For the reasons outlined above, the Court finds material issues of fact exist as to whether plaintiff was disabled under the meaning of the ADA and the ICRA, and subjected to unlawful discrimination by defendant on the basis of his actual or perceived disability. Defendant's motion for summary judgment is denied with regard to plaintiff's claims of disability discrimination under both the state and federal statute.[6]

D. Plaintiff's Defamation Claim

Paragraph 15(c) of plaintiff's complaint sets forth a cause of action for defamation. The Iowa Supreme Court has defined common law defamation as "the publication of written or oral statements which tend to injure a person's reputation and good name." *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996). Defamation in the form of written statements is referred to as libel, and defamation in the form of oral statements is known as slander. *See Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994). To establish a claim for defamation or slander, a plaintiff generally must prove that the defendant, acting with malice, communicated false statements to one or more persons and caused damage to plaintiff. *Huegerich*, 547 N.W.2d at

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[6] Ordinarily, the burden would shift back to defendant to articulate "a legitimate, non-discriminatory reason for the adverse employment action." *Keil*, 169 F.3d at 1135. If the employer is able to provide such a reason, the burden shifts back to the plaintiff to show the employer's proffered reason was pretextual. *Id.* The Court need not address these issues in the present case, however, due to the fact defendant focused exclusively on plaintiff's prima facie case.

221. "A key element of any defamation claim is proof of publication by the defendant to someone other than the subject of the allegedly defamatory statement." *Thiesen v. Covenant Medical Ctr.*, 636 N.W.2d 74, 83 (Iowa 2001) (citing *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982)).

In the present case, plaintiff failed to specify in his complaint which statement or statements he believes to be defamatory. It appears from his resistance memorandum, however, that plaintiff bases his claim on the fact Titan Tire allegedly misinterpreted Dr. Sciorrotta's report to conclude plaintiff *has* asthma[7] and was therefore unable to work, and informed plaintiff it was withdrawing the offer of employment on this basis. Assuming defendant wrongfully concluded plaintiff could not work at Titan Tire due to asthma, however, defendant contends plaintiff has failed to create a material issue of fact as to whether the conclusion was published by defendant to a third person.

Plaintiff contends the publication occurred when plaintiff was compelled to disclose the alleged basis for his termination while applying for unemployment benefits, and in filing his civil rights complaint with the Iowa Civil Rights Commission ("ICRC") and Equal Employment Opportunity Commission ("EEOC"). *See Thiesen*, 636 N.W.2d at 83. As noted by the Iowa Supreme Court in *Thiesen*:

> [A]lthough it is the general rule that an injured party cannot create a defamation action by repeating the statement originally made only to him or her, this court recognized in *Belcher* an exception to the rule where the subject is under "strong compulsion" to repeat the allegedly defamatory statements. *Id.* The exception rests on the concept of foreseeability–if the person making the statement can reasonably foresee that the person defamed will be compelled to repeat the defamatory statement to a third party, "there is a strong causal link between the originator's actions and the harm caused to the defamed person, and . . . this causal connection makes the imposition of liability reasonable." 50 Am. Jur.2d *Libel and*

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[7] Plaintiff argues Dr. Sciorrotta found only that plaintiff had a history of asthma.

> *Slander* § 242, at 501 (1995). Such foreseeability is especially apparent in employment situations because an employee will ordinarily seek new employment after being terminated for alleged wrongdoing. *Id.*

Despite the relatively liberal view of "publication," however, the *Thiesen* court went on to emphasize that employers "are not without protection." *Id.* (emphasis added). A qualified privilege attaches to communications made: (1) in good faith; (2) concerning a subject in which the speaker has an interest; (3) in the proper setting and to proper parties. *Id.* at 84; *see also Taggart v. Drake Univ.*, 549 N.W.2d 796, 803 (Iowa 1996).

Whether or not Mr. Ollie in fact suffered from asthma at the time the offer of employment was withdrawn, Titan Tire clearly informed him of its interpretation of Dr. Sciorrotta's medical report as an explanation for the employment decision. Titan Tire had an "undisputed interest in the subject of the statement." *See Thiesen*, 636 N.W.2d at 84. Likewise, plaintiff does not allege, nor is there evidence, that Titan made the statement in an inappropriate setting or to unnecessary persons. Absent evidence of actual malice, *i.e.* "proof that the statement was made with ill will or wrongful motive," defendant's motion for summary judgment is appropriately granted on plaintiff's defamation claim. *Taggart*, 549 N.W.2d at 803 (publication no longer subject to qualified privilege upon showing of actual malice).[8]

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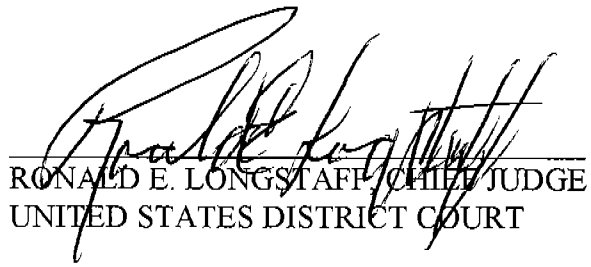
[8] Plaintiff also alleged a cause of action for defamation *per se*. Complaint at ¶ 15(c). Statements that are ambiguous, however, requiring extrinsic evidence "to ascertain the exact meaning of the statement" cannot constitute slander or libel *per se*. *Lowe v. Todd's Flying Service, Inc.*, No. 99-0708, 2001 WL 58113 (Iowa Ct. App. 2001). In the present case, assuming plaintiff was compelled to inform prospective employers, Job Service of Iowa and the ICRC that Titan Tire withdrew its employment offer on the basis of asthma, any reasonable third party would investigate further before making a final determination regarding plaintiff's employability. Summary judgment is therefore denied on plaintiff's claim of defamation per se.

III. CONCLUSION

For the reasons outlined above, defendant's motion for summary judgment is denied with regard to the state and federal disability discrimination claims, and granted with regard to plaintiff's defamation claim.

IT IS ORDERED.

Dated this 6th day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT