UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and AHMET DEMERELLI, Plaintiff-Intervener v. CONVERGYS CUSTOMER MANAGEMENT GROUP INC., Defendant.	)	No. 4:04CV00846CAS

Daniel Ott 4/12/06

Defendant's Motion for Judgment as a Matter of Law as to Plaintiff's Claim for Compensatory Damages

COMES NOW, Defendant Convergys Customer Management Group Inc., pursuant to Rule 50(a) of the Federal Rules of Civil Procedures, and seeks for this Court to render judgment as a matter of law as to Plaintiff's claim for compensatory damages.

Rule 50(a) of the Federal Rules of Civil Procedure expressly permits the Court to dismiss all or part of Plaintiff's claims on any particular issue after Plaintiff has been fully heard. Specifically, Rule 50(a)(1) reads:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

To recover compensatory damages based upon Convergys's alleged failure to accommodate his disability, Plaintiffs were required to present evidence that "the employer did not make *a good faith effort* to assist the employee in seeking accommodations" and that "the employee could have been reasonably accommodated but for the employer's *lack of good faith*." *McClean v. Case Corp., Inc.*, 314 F. Supp.2d 911, 918-19 (D.N.D. 2004) (emphasis added) (citing *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996)).

Plaintiffs have failed to meet this burden in their case in chief, and therefore a directed verdict as to Plaintiffs' claim for compensatory damages must fail. The Court has already held, and Plaintiffs have failed to present any evidence to the contrary, that Convergys made a "good faith effort" to accommodate Demirelli's disability by modifying his schedule and allowing him to sit in the training area. (*See* Order dated Jan. 19, 2006, at 17-18).

Plaintiffs evidence fail to make the requisite showing that Defendants failed to act in good faith in order to make the relief of compensatory damages available. Where (as in this case) no evidence exists that an employer failed to make a good faith effort to accommodate the employee's disability, courts in the Eighth Circuit do not hesitate to resolve the issue of "good faith" as a matter of law. For example, in *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1217 (8th Cir. 1999)—a case involving facts precisely analogous to those alleged here—the Eighth Circuit held that an employee's evidence of lack of good faith was legally insufficient. In *Mole*, the employer made several efforts to accommodate the plaintiff, including "help[ing] her seek medical treatment, grant[ing] her leaves of absences[,] … allow[ing] her time off and breaks when she returned to work, and distribut[ing] some of her work to other employees." *Id.* at 1217. The employee—like Plaintiffs here—nevertheless argued that the employer "knew or

should have known how to afford [the employee] further accommodations." *Id.* In rejecting the employee's argument, the Eighth Circuit explained:

> As the district court recognized, the problem with this contention is that prior to receiving a notice of termination Mole never advised [the employer] she needed additional accommodation, much less what accommodation specific to her position and workplace was needed. *In general, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed.* ... Only Mole could accurately identify the need for accommodations specific to her job and workplace. *Mole cannot expect the employer to read her mind and know she secretly wanted a particular accommodation and then sue the employer for not providing it.*

Id. at 1217-18 (emphasis added; citations omitted). *See also, e.g., Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1045 (8th Cir. 2005) ("A mere assertion that an accommodation [is] needed is insufficient; the employee must inform the employer of *the accommodation needed*.") (emphasis added); *McClean*, 314 F. Supp.2d 911, 918-19 (employee's post-termination affidavits suggesting additional accommodates "were never communicated to [the employer] at the time the interactive process was occurring, so Plaintiff cannot demonstrate bad faith on [the employer's] part by now informing the company of accommodations.").

The evidence presented in Plaintiffs' case in chief renders *Mole* dispositive. Because Convergys indisputably made good faith efforts to provide Demirelli with the accommodations he requested, and because Demirelli never requested the accommodation Plaintiffs now argue he should have received, Plaintiffs cannot, as a matter of law, show that Convergys failed in bad faith to accommodate his disability. Accordingly, Plaintiffs cannot recover compensatory or punitive damages, and the Court should exclude evidence and argument concerning such damages.

WHEREFORE, Defendant respectfully requests that the Court grant Convergys judgment as a matter of law with respect to Plaintiffs' claim for compensatory damages.

Respectfully submitted,

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