IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-vs-

J. H. ROUTH PACKING COMPANY,.

Defendant.

Case No. 3:98 CV 7731

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Defendant's motion for judgment on the pleadings. For the following reasons, Defendant's motion will be granted.

BACKGROUND

Plaintiff Equal Employment Opportunity Commission ("EEOC") brings this employment discrimination on behalf of Jason Polak and all other similarly situated individuals. On April 10, 1995, Defendant J.H. Routh Packing Company made Polak an offer of employment as a meat cutter/trimmer, which offer was conditioned on Polak's passing a physical examination.

During the course of the examination, Polak disclosed that he had a history of epilepsy which was controlled with medication. As an adult, Polak has experienced approximately six petit

mal seizures a year, with each seizure lasting ten to thirty seconds. Prior to the onset of each seizure, Polak has a warning or "aura." He does not experience grand mal seizures.

When Defendant learned that Polak had epilepsy, it withdrew the employment offer. At that time, Defendant informed Polak that he would not be considered for a job involving the use of sharp implements unless he was seizure-free for at least six months.

On December 7, 1998, the EEOC brought this action, challenging Defendant's policy of not employing individuals with seizure disorders in jobs involving the use of sharp implements unless they have been seizure-free for at least six months. The EEOC claims that Defendant's policy violates the Americans with Disabilities Act ("ADA" or "the Act"). It seeks an order requiring Defendant to adopt a policy which provides for individualized assessment of an individual's ability safely to perform the job for which he or she is hired, and compensatory and punitive damages for Jason Polak.

Defendant responds that Polak was neither disabled nor qualified for a job as a meat cutter/trimmer. It argues that its policy of requiring its applicants to be seizure-free for six months is reasonable in light of the fact that it requires its meat cutter/trimmers to work on elevated platforms using sharp knives, saws, electric knives and other sharpened tools for cutting and disassembling hogs. Defendant has moved for judgment on the pleadings on the sole issue of whether the EEOC has sufficiently pled that Polak is disabled under the ADA.

The EEOC has filed opposition to Defendant's motion, and Defendant has replied thereto. The Court discusses the parties' contentions below.

DISCUSSION

A. Motions for Judgment on the Pleadings

On a motion for judgment on the pleadings pursuant to Rule 12(c), all well-pleaded allegations of the non-moving party must be taken as true. *United States v. Moriarty,* 8 F.3d 329, 332 (6th Cir. 1993), citing *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 479 F.2d 478, 480 (6th Cir. 1973). Judgment is granted only where there is no material issue of fact involved and the moving party is entitled to judgment as a matter of law. *Paskavan v. City of Cleveland Civil Service Comm'n,* 946 F.2d 1233, 1235 (6th Cir. 1991).

B. Disability Discrimination

The issue before the Court on this motion is whether Plaintiff has pled facts from which a finder of fact could ultimately determine that Polak is a "qualified individual with a disability" for purposes of the ADA, since only qualified individuals with disabilities are protected by the Act. The ADA prohibits a covered employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). A "disability" is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

The first question is whether the EEOC has sufficiently pled that Polak is an individual with a disability: *i.e.*, that he (A) has a physical or mental impairment that substantially limits one or more of her 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). It is clear that Plaintiff has sufficiently pled, at all times pertinent to this suit, an actual physical impairment within the meaning of the Act. *See* 29 C.F.R. § 1630.2(h)(1). The parties disagree about whether the EEOC has sufficiently pled facts from which a reasonable jury could find that Polak's physical impairment substantially limited one or more of his major life activities. "Major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). In determining whether an individual is substantially limited in a major life activity, the Court considers:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The 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). In determining whether an impairment is substantially limiting, the Court takes into account any measures – such as medication – that the person is taking to correct for or to mitigate the impairment. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999).

1. Physical Impairment That Substantially Limits a Major Life Activity

The Defendant Company argues that Polak's epilepsy does not substantially limit any of his major life activities. The EEOC does not claim that Polak is substantially limited in the major life activities of caring for himself, performing manual tasks, walking, seeing, hearing, speaking,

breathing, learning, or working. To the contrary, the EEOC represents that Polak's impairment is slight as long as he takes his medication; he has a few petit mal seizures a year, always with warning, and has been able successfully to work with sharp objects in the past.

The EEOC responds that it could present evidence from which a reasonable jury could determine that Polak's epilepsy substantially limits a major life activity, although even in its opposition it has not identified a single major life activity in which Polak is substantially limited. Instead, the EEOC argues that the representative list – "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" – given in the Federal Regulations is illustrative and not exhaustive, and that it might be able to produce evidence that Polak's impairment causes a substantial limitation on some other major life activity. The EEOC also argues that the symptoms associated with seizure disorders vary greatly, and that since a seizure disorder could, under appropriate circumstances, give rise to a finding of disability, it is entitled to present evidence that Polak's seizure disorder is a disabling condition.

The EEOC's argument that the list in the Federal Regulations is not exhaustive lacks merit. It is undoubtedly true that the representative list in the Federal Regulations is illustrative and not exhaustive. *See, e.g., Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-03 (1998) (finding reproduction to be a major life activity). Before the EEOC can take its case to a jury, however, it must identify some major life activity, whether on the list or not, in which Polak is substantially limited. It has not done so. The EEOC's wholly unsubstantiated speculation that it might, at some future time, be able to come up with some activity that Polak is substantially limited in his ability to perform is not sufficient to survive a motion for judgment on the pleadings.

The Court is required to accept all of the non-movant's well-pleaded factual allegations as true in a motion under Rule 12. But it cannot deny such a motion on the basis of allegations that have not been pled. The EEOC has not identified a single life activity in which Polak suffers a significant impairment, either in its complaint or in its opposition to Defendant's motion for judgment on the pleadings. On the record before the Court, the Court has no alternative but to find that the EEOC has not sufficiently pled a substantial limitation in Polak's major life activities.

The EEOC's argument that epilepsy is an impairment that could, under appropriate circumstances, give rise to a finding of disability, is equally without merit. There is no question that a seizure disorder that substantially limited an individual's ability to care for himself, walk, speak, learn, or work would constitute a disability. But that is not the case before the Court. As the EEOC has repeatedly stated in its brief, disability determinations must be made on an *individualized* basis. No claim has been made that the individual on whose behalf the EEOC is bringing this suit is substantially limited in any major life activity.

The EEOC has not pled facts sufficient to support a claim that Polak is disabled by reason of an impairment that significantly limits a major life activity.

2. Record of Such an Impairment

The EEOC next argues, however, that it has pled facts from which a reasonable jury could conclude that Defendant discriminated against Polak because he has a record of having a disabling seizure disorder.

The EEOC's second argument is infirm in two ways. First, the EEOC has not pled facts from which a reasonable jury could conclude that Polak has a record of having a disabling

impairment. It has not identified any major life activity in which Polak has ever been substantially limited because of his impairment.

Second, it is evident from both parties' pleadings that Defendant's sole concern was with Polak's current physical condition. No allegation has been made that Defendant withdrew Polak's job offer on the basis of a condition that was no longer affecting Polak, or that it would have refused a job offer to an individual with epilepsy who was presently seizure-free. The sole factual allegation before the Court – which the EEOC does not deny – is that Defendant would have offered Polak a job if he had been seizure-free for six months.

The EEOC has not pled facts sufficient to support a claim that Defendant discriminated against Polak on the basis of his having a record of an impairment that significantly limited a major life activity.

3. Regarded as Having Such an Impairment

Finally, the EEOC argues that it has pled facts from which a reasonable jury could conclude that Defendant discriminated against Polak because Defendant regarded Polak as having an impairment that significantly limited a major life activity. It is clear from the pleadings that Defendant regarded Polak as having an impairment that significantly limited his ability to work safely on an elevated platform using sharp knives, saws, electric knives and other sharpened tools for cutting and disassembling hogs.

An employer violates the ADA when it makes an employment decision based on an impairment, real or imagined, that is regarded as substantially limiting a major life activity. However, an employer "is free to decide that some limiting, but not *substantially* limiting,

impairments make individuals less than ideally suited for a job." *Sutton*, 119 S. Ct. at 2150 (emphasis in original).

The phrase "substantially limits" takes on a specialized definition when the major life activity under consideration is that of working. An individual is substantially limited in the major life activity of working only if he 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). If a number of different types of jobs are available to a plaintiff, he is not precluded from a broad range of jobs. *Sutton*, 119 S. Ct. at 2151; *accord Murphy v. United Parcel Serv.*, 119 S. Ct. 2133, 2139 (1999).

In this case, the only thing that has been alleged is that Defendant regarded Polak's epilepsy as precluding him from holding a position as a meat cutter/trimmer. Because the position of meat cutter/trimmer is a single job, this allegation does not support the claim that Defendant regards Polak as having a substantially limiting impairment. It is apparent from the face of the EEOC's own complaint that there are a number of other positions involving the use of sharp implements that are available to Polak.

The Supreme Court has expressly rejected the argument that if one were to assume that a substantial number of employers established physical requirements similar to the Defendant's, the Plaintiff would be substantially limited in the major life activity of working.

> It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be retarded as substantially limited in the major life activity of working only as a result of this imputation. An otherwise

> valid job requirement . . . does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers.

Sutton, 119 S. Ct. at 2152.

Indeed, the interpretation of the "regarded as" prong the EEOC urges this Court to adopt would effectively abrogate Congress' intent to restrict the ADA's coverage to a "confined and historically disadvantaged class," *Sutton*, 119 S. Ct. at 2152 (Ginsburg, J., concurring), by permitting virtually any individual with an impairment that does not meet the "actual impairment" prong of the test to bring a claim under the "regarded as" prong.

The EEOC has not pled facts sufficient to support a claim that Defendant discriminated against Polak because it regarded him as having an impairment that significantly limited a major life activity.

CONCLUSION

The EEOC has not pled facts in this case sufficient to support a claim that Polak is an individual with a disability under the ADA. Therefore, Polak is not covered by the ADA, and the complaint must be dismissed.

This case is on all fours with *Sutton*. As was the case with the *Sutton* plaintiffs, Polak has an impairment that does not substantially limit a major life activity. As in *Sutton*, Defendant determined that Polak was unqualified for a single job on the basis of that nondisabling impairment.

In addition, this case shares a third feature with *Sutton* that is not necessary to resolution of the dispute in this case: the interplay between the requirement that the applicant qualified for the position he seeks, and the requirement that the applicant be disabled. The EEOC cannot have it

both ways. Either Polak's epilepsy is uncontrolled enough to substantially limit a major life activity, or it is not. If Polak's epilepsy is truly uncontrolled, he is not qualified to work on an elevated platform using sharp knives, saws, electric knives and other sharp implements. If Polak's epilepsy is controlled, he is not disabled. *Compare Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 903 (10th Cir. 1997); *Sorenson v. University of Utah Hosp.*, 1 F. Supp. 2d 1306, 1309 (D. Utah 1998); *Murphy v. United Parcel Serv.*, 946 F. Supp. 872, 878 (D. Kan. 1996). Either way, an ADA claim cannot be brought on his behalf in this case.

For the foregoing reasons, Defendant's motion for judgment on the pleadings is granted.

IT IS SO ORDERED.

DAVID A. KATZ
U. S. DISTRICT JUDGE