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Miller v. Heritage Products, Inc.
S.D.Ind.,2004.
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United States District Court,S.D. Indiana, Indianapolis Division.
Jason K. MILLER, Plaintiff,
v.
HERITAGE PRODUCTS, INC., Defendant.
No. 1:02-CV-1345-DFH.

April 21, 2004.

James E. Ayers, Wernle Ristine & Ayers, Linden, IN, for Plaintiff.
Nathan A. Baker, John R. Maley, Barnes & Thornburg, Indianapolis, IN, for Defendant.

ENTRY ON MOTION FOR SUMMARY JUDGMENT

HAMILTON, J.
***1** Plaintiff Jason K. Miller operated metal presses for defendant Heritage Products, Inc., which manufactures auto parts and other metal products. Miller suffered a series of back injuries, and Heritage eventually terminated Miller's employment after he was placed on permanent restrictions by his doctor. Miller has sued Heritage for violating the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101*et seq.,* by firing him and failing to accommodate his disability. Defendant Heritage has moved for summary judgment. The motion is denied. Whether Miller is disabled under the law and whether Heritage failed to provide reasonable accommodations for his disability depend on genuine issues of fact that cannot be resolved on a motion for summary judgment.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). As required when deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the nonmoving party. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Baron v. City of Highland Park,* 195 F.3d 333, 337-38 (7th Cir.1999). The court is not authorized to choose between conflicting testimony or to resolve credibility issues.

Undisputed Facts

In light of the summary judgment standard, the court assumes the following facts are true for purposes of defendant's motion. Plaintiff Miller worked for Heritage Products, Inc. from July 17, 2000 to October 23, 2001. He was hired to work as a press operator in the Press Operator "A" position. Hawkins Aff. ¶ 5.

On January 17, 2001, Miller injured his back while at work. Miller Dep. at 61. Miller took time off of work and visited a worker's compensation physician who placed him on temporary restrictions requiring that he avoid twisting and avoid lifting more than 25 pounds. Miller returned to work with those restrictions.*Id.* at 62.Miller was off work again in February for his back pain. He was again placed on temporary work restrictions requiring that he not work more than four hours in a work

day and not lift over 15 pounds, bend or twist, or pull or push over 30 pounds. *Id.* at 72.He returned to work again after several days off. *Id.* at 71-72.Miller worked for a day or two and went back to the doctor because of the pain in his back. *Id.* at 73.He took an extended leave at that time and was eventually scheduled for surgery. He was released to return to work prior to the scheduled surgery with temporary work restrictions requiring that he not work more than six hours per day and not lift more than 15 pounds or repetitively lift, twist or bend. *Id.* at 76.

***2** On April 12, 2001, Miller had back surgery. *Id.* at 79.On June 22, 2001, he was released by the doctor to return to work with no restrictions.*Id.* at 84.Miller returned to work that day. *Id.* On August 8, 2001, Miller reinjured his back. *Id.* at 90.He was placed on temporary restrictions requiring that he not lift more than 15 pounds. He returned to work the next day. *Id.* at 91.Miller worked with the temporary restrictions until October 2001 when he went to see his family doctor because of his continuing back pain. *Id.* at 94.At that time, the doctor ordered him not to return to work until a precise determination regarding the problem with his back could be made. *Id.*

Brian Houmes, press supervisor and Miller's immediate supervisor, testified by affidavit that each time Miller returned to work with temporary restrictions, Houmes found light-duty tasks for Miller to perform. Houmes Aff. ¶ 6. Houmes claims that he even found light-duty tasks for Miller to complete when Miller was not on formal temporary restrictions but was complaining of pain. *Id.,* ¶ 7.

On October 22, 2001, Miller's doctor imposed permanent work restrictions. Under these restrictions, he could not lift more than 20 pounds, bend or twist. Miller Dep. at 101. The next day, October 23, 2001, Miller returned to work and informed Heritage of his permanent restrictions.

On October 23, 2001, Miller was called into a meeting with Human Resources Director Rick Hawkins, Production Manager Dave Lancaster, and Houmes. *Id.* at 134.At that meeting, Hawkins, Lancaster and Houmes advised Miller that they could not accommodate his permanent restrictions and that he was terminated. Miller asked about the possibility of alternative employment with Heritage.*Id.* at 134-35.Hawkins told Miller that Heritage was not required to accommodate his permanent restrictions. *Id.* at 135.If Miller was required to perform not just one position but all the press operator positions, he would have been required to perform some tasks that his injury prevents him from doing.

Heritage takes the view that Miller's position as a Press Operator "A" required him to be able to rotate among all of the different aspects of the position, including work on several different presses, work on robotic and manual lines, and some work on a forklift. See Houmes Aff. ¶ 3. Miller has raised a factual dispute as to whether that requirement is actually what the ADA calls an "essential function" of the job. Miller pointed out in his affidavit that it is rare for any press operator actually to operate more than one press, and the ADA's requirement for reasonable accommodations means that an employer "must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."*Vande Zande v. Wis. Dep't of Admin.,* 44 F.3d 538, 542 (7th Cir.1995).

Miller timely filed an employment discrimination charge with the Equal Employment Opportunity Commission alleging that Heritage had discriminated against him based on his disability by failing to accommodate him. The EEOC issued a dismissal of the charge and a right-to-sue letter. Miller timely filed his complaint against Heritage on August 28, 2002 seeking back pay, compensatory damages, punitive damages, attorney fees, and reinstatement at Heritage.

Discussion

I. *Miller's Affidavit*

***3** Defendant Heritage has argued that the court should disregard key portions of plaintiff Miller's affidavit submitted in opposition to summary judgment. Heritage argues that the affidavit is based on speculation, is vague and ambiguous as to time, lacks foundation, and contains opinion testimony and testimony lacking personal knowledge. Heritage also argues that the affidavit contains numerous statements that contradict Miller's deposition testimony. The court rejects these challenges, which seem to argue that only management can have personal knowledge about such issues as essential job functions, and which seek to blame Miller for ambiguities and gaps in the questions asked in his deposition.

Rule 56(e) of the Federal Rules of Civil Procedure provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."Rule 602 of the Federal Rules of Evidence also requires that a witness have "personal knowledge" of a matter to which the witness will testify in order for the witness's statement to be admissible in any form. Miller's affidavit submitted in opposition to summary judgment must contain factual evidence to support his statements that purport to create a genuine issue of material fact. See *Ward v. First Fed. Sav. Bank,* 173 F.3d 611, 618 (7th Cir.1999) (where affidavit does not "reveal the source" of affiant's awareness, the affidavit fails to establish affiant's personal knowledge on the subject); *Drake v. Minnesota Min. & Mfg. Co.,* 134 F.3d 878, 887 (7th Cir.1998) ("[a]lthough 'personal knowledge' may include inferences and opinions, those inferences must be substantiated by specific facts....Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). Presentation of factual evidence through the witness's personal knowledge is appropriate. *Drake,* 134 F.3d at 887.

Heritage argues that paragraphs four, eight and fourteen of Miller's affidavit contain inadmissible conclusory statements without the requisite factual foundation. In paragraph four of his affidavit, Miller disputes Heritage's assertion that a person in his former position as a press operator must be able to rotate among the many different press positions. Paragraph four reads in relevant part as follows:

while the operators are required to have the knowledge to operate most of the machinery in the department, the actual operation of more than one machine is rare. The operators run the machine they are best at. There are a select few, of which I was one, who run certain highly specialized blanking presses, drive the forklift and operate the crane, any of which jobs I could do with my permanent restrictions.

***4** Based on Miller's experience as a press operator at Heritage, the court can infer that he has sufficient personal knowledge to testify to the frequency with which all press operators actually rotated responsibilities.

In paragraph eight, Miller asserts that he could perform the essential functions of his position prior to his surgery and with more stringent restrictions than the ones by which he must currently abide: "I could perform the necessary functions of certain jobs in the press department such as the 200-ton blanking press even under my original stricter pre-surgery restrictions."Miller has sufficiently raised a factual dispute as to whether rotation among all of the jobs within the press department was an essential function of the job. If that question is answered in the negative, Miller's capabilities in "certain jobs" in the press department are very much a relevant issue.

The court also sees no basis for disregarding paragraph fourteen, which states that Dave Lancaster's

testimony that the "hold" area was for only temporary employees was false:

The statement made by Dave Lancaster in his Affidavit that the "hold" area is for people with temporary restrictions is false. Usually the two or three people working in the "hold" area are workforce employees, who have no restrictions and when there are not enough of them to do the work, then other regular employees go to hold.

Miller worked in the facility and the court can reasonably infer that he knew who worked in which positions and whether all of them had medical restrictions on their working capacities.

Heritage contends that several statements in Miller's affidavit contradict Miller's deposition testimony. It is well settled that "a party may not attempt to survive a motion for summary judgment by manufacturing a factual dispute through the submission of an affidavit that contradicts prior deposition testimony."*Amadio v. Ford Motor Co.,* 238 F.3d 919, 926 (7th Cir.2001); *Cowan v. Prudential Ins. Co. of America,* 141 F.3d 751, 756 (7th Cir.1998) (parties may not defeat summary judgment by creating " 'sham' issues of fact with affidavits that contradict their prior depositions"). If a party were permitted "to create a genuine issue of material fact by changing his prior testimony: the very purpose of the summary judgment motion-to weed out unfounded claims, specious denials, and sham defenses-would be severely undercut."*United States v. Torres,* 142 F.3d 962, 968 (7th Cir.1998). Thus, where the contents of an affidavit conflict with the substance of earlier deposition testimony, the court should consider the deposition for summary judgment purposes, and the affidavit should be disregarded "unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy."*Amadio,* 238 F.3d at 926.

***5** To invoke this rule, however, the party objecting to the affidavit must show a direct and specific conflict between the affidavit and the deposition testimony, for which there is no plausible explanation such as confusion, ambiguity, refreshed recollection, or newly-discovered evidence. See, *e.g., Amadio,* 238 F.3d at 926 (affidavit contradicted specific answers to repeated and specific questions); *Bank of Illinois v. Allied Signal Safety Restraint Systems,* 75 F.3d 1162, 1170-72 (7th Cir.1996); *Russell v. Acme-Evans Co.,* 51 F.3d 64, 67-68 (7th Cir.1995).

Where deposition testimony did not exhaust a witness's memory about a meeting or conversation, for example, it is neither surprising nor unusual for a later affidavit to include additional details. Also, questioners during depositions sometimes interrupt answers or focus their follow-up questions on the topics of greatest interest and use to them. If the questioners fail to ensure that they have also extracted from the plaintiff-witness all of the plaintiff's knowledge that is useful for his own case, they cannot complain if new information emerges in an affidavit in opposition to summary judgment. While the courts are rightly concerned about the creation of "sham" factual issues, they must also be careful not to allow the deposition process to be used to silence later a witness who was not asked the right questions. The plaintiff-witness's obligation in the deposition is only to answer truthfully the questions that are asked, not to state every fact that he might want to offer as evidence at trial or in opposition to summary judgment.

Miller's affidavit states that in the meeting where he was fired, he identified several jobs that he could perform with his restrictions, including working in welding and assembly, forklift operator, janitor, or permanent placement in the "hold" area. Miller Aff. ¶¶ 11, 13. In his deposition testimony, Miller mentioned only welding and assembly, but the cited pages did not purport to exhaust Miller's memory on what was said in the meeting.[FN1]

FN1. In any event, as discussed below, Heritage's argument that Miller was not specific enough in asking for reasonable

> accommodation is misplaced. It was not his sole responsibility to search out and identify a specific position which management would agree he could handle. To trigger Heritage's duty to consider possible accommodations, including transfers to other vacant positions, Miller needed only to ask them to consider continued employment or a possible transfer. After the interactive process with Heritage had begun, or should have begun, his responsibility would have been to exchange information with Heritage about how his abilities would fit with any available positions.

Second, Heritage points to Miller's affidavit at paragraph eleven as conflicting with his deposition testimony. Paragraph eleven reads:

On October 23, 2001, Heritage Products called me into a meeting with Rick Hawkins, Dave Lancaster and Brian Houmes and told me that because I now had permanent restrictions, they no longer had to accommodate my disability and that I was terminated. I asked why I couldn't go to welding/assembly, and they said I couldn't cross departments, and if I couldn't do press then there was nothing for me. No one told me that they had considered any jobs other than press, and I do not believe they did. I asked why I couldn't drive a forklift or go to welding. Rick Hawkins said they didn't have to look in any other department, if I couldn't do my original job, I was done. In their affidavits, they said they evaluated every job, but I don't believe them.

***6** In his deposition, Miller testified that he was told in the meeting with Hawkins, Lancaster and Houmes that Heritage "couldn't accommodate" his restrictions. Miller Dep. at 135. However, Miller further testified in his deposition that after he asked Hawkins why he could not move to a different department, Hawkins replied that "they were not required to accommodate my restrictions."*Id.* Miller's statements on these items are not inconsistent with one another and are not inconsistent with the affidavit.

Heritage also argues that, contrary to paragraph eleven of the affidavit, Miller testified in his deposition that neither Hawkins, Lancaster, nor Houmes ever told Miller they thought he was "disabled." Miller Dep. at 152. Throughout his deposition testimony, however, Miller made it clear that his physical restrictions resulting from the back injury were the focus of his discussion with the Heritage managers. When he was asked why he believed the company regarded him as having a disability, he answered:

Because I had restrictions given to me and they booted me out the door. They couldn't accommodate my restrictions, so with that, I would assume that they would say I was disabled for that company, or at least to work for that company.

Miller Dep. at 151. By trying to argue that Miller is somehow barred from using the words "disabled" or "disability" in describing the contents of the meeting, Heritage is trying to play word games with legal terms of art. It is true that there are important legal differences between having physical restrictions imposed by an injury and having a "disability" for purposes of the ADA. However, those are issues to resolve at trial based on all the evidence, rather than on efforts to attribute decisive legal significance to the particular words used in a conversation among laymen.

Finally, Heritage directs the court's attention to paragraph fifteen of Miller's affidavit, which states as follows:

The chronic back pain from my work injury has ... affected my everyday life style. This is a life-altering disability. I can no longer perform several of my chores at home; I can't run a sweeper; I can't do dishes. I used to go fishing, ride a motorcycle and hunt, but I can't do any of those like I could before due to the pain. I have no endurance to sit or stand for any length of time. I used to hunt a lot with a bow, but not anymore. I can't even pull the bow back at times.

In his deposition, Miller testified that his statement to the Social Security Administration that he does not "let the pain in my back affect the way in which I care for my personal needs" was accurate. Miller Dep. at 123-24. Miller went on to say that he tries to "govern how much pain I want to go through, so I live my life, I do what I can."*Id.* at 124.Heritage's claim that there is an irreconcilable conflict in these general statements is baseless.

II. *The Merits*

Miller claims that he is a qualified individual with a disability and that Heritage failed to accommodate him as required by the ADA. Under the ADA an employer has a duty to a disabled employee to make reasonable accommodations that will allow the employee to perform the essential functions of his or her job. 42 U.S.C. § 12112(b)(5)(A). A reasonable accommodation may include a "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). Miller sought to be reassigned to a vacant position within Heritage that could accommodate his permanent restrictions.

A. *Actual Disability*

***7** A disability under the ADA is a physical or mental impairment that substantially limits one or more of plaintiff's major life activities, a record of such an impairment, or plaintiff's being regarded as having such an impairment. 42 U.S.C. § 12102(2)."Merely having an impairment does not make one disabled for purposes of the ADA."*Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). Rather, a claimant must demonstrate that the impairment poses a permanent or long-term limitation on a major life activity, meaning that the impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."*Id.* at 198.

"Substantially limits" means that the person is either unable to perform a major life activity or is significantly restricted in the duration, manner, or condition under which the individual can perform a particular major life activity, as compared to the average person in the general population. 29 C.F.R. § 1630.2(j); *Contreras v. Suncast Corp.,* 237 F.3d 756, 762 (7th Cir.2001).

"Major life activities" are those activities that are of central importance to daily life. *Williams,* 534 U.S. at 197. The EEOC's regulations treat self-care and working as major life activities. 29 C.F.R. § 1630.2(i). Although the use of working as a major life activity has been questioned, see *Williams,* 534 U.S. at 200, it has not been rejected, see *Moore v. J.B. Hunt Transport, Inc.,* 221 F.3d 944, 953 (7th Cir.2000). Similarly, the Seventh Circuit has questioned whether lifting restrictions alone are sufficient to render someone disabled, see *Mays v. Principi,* 301 F.3d 866, 869-70 (7th Cir.2002), but the court has not flatly rejected the theory, let alone taken the view that a lifting restriction, as a matter of law, can never amount to a disability, especially when it is part of a broader set of restrictions on an individual's ability to work. That determination calls for a more individualized inquiry, as explained below.

To be substantially limited in the major life activity of working, the individual must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3)(i); *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.,* 230 F.3d 991, 998 (7th Cir.2000). The ADA regulations define a class of jobs as "the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment."29 C.F.R. § 1630.2(j)(3)(ii). In the regulations, a broad range of jobs is the "job from which the individual has been disqualified because of an impairment, and the

number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment."*Id.*

***8** On this record, a jury could reasonably find that Miller's back injury imposed restrictions on him that disqualified him from a class of jobs and a broad range of jobs, including many that would otherwise have been consistent with his education, training, and experience before the injury. In *Mondzelewski v. Pathmark Stores, Inc.,* 162 F.3d 778 (3d Cir.1998), the Third Circuit reversed summary judgment in a similar case involving lifting restrictions that prevented an employee from doing the physically demanding work he had been doing throughout his career. The court explained:

In determining whether an individual is substantially limited in the ability to work, the proper inquiry, according to the relevant regulation, is whether the individual 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."*29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). This approach requires a court to consider the individual's training, skills, and abilities in order to evaluate "whether the particular impairment constitutes for the particular person a significant barrier to employment."*Webb v. Garelick Mfg. Co.,* 94 F.3d 484, 488 (8th Cir.1996) (citing *Forrisi v. Bowen,* 794 F.2d 931, 933 (4th Cir.1986)); accord *E .E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088, 1099 (D.Haw.1980) (explaining that "it is the impaired individual that must be examined, and not just the impairment in the abstract"); 29 C.F.R. Pt. 1630, App. § 1630.2(j) (stating that the determination of whether an individual is limited in working must be conducted on a case by case basis). Because a "person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled,"*Webb,* 94 F.3d at 487, the court must consider the effect of the impairment on the employment prospects of that individual with all of his or her relevant personal characteristics. *Forrisi,* 794 F.2d at 933. Thus, a substantially limiting impairment for one individual may not be substantially limiting for another individual with different characteristics. 29 C.F.R. Pt. 1630, App. § 1630.2(j); see also *McKay v. Toyota Motor Mfg. U.S.A., Inc.,* 110 F.3d 369 (6th Cir.1997) (finding plaintiff with carpal tunnel syndrome not disabled because, among other things, she had a college degree); *Smith v. Kitterman, Inc.,* 897 F.Supp. 423, 427 (W.D.Mo.1995) (finding plaintiff with carpal tunnel syndrome had raised material issue of fact because of her limited education, training, and employment background); *Heilweil v. Mount Sinai Hospital,* 32 F.3d 718, 724 (2d Cir.1994) (finding plaintiff not hindered in her ability to work because of her advanced educational degrees).

We accept this approach-under which an individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working-because we owe "substantial deference" to the EEOC regulation in which it is set out, see *Deane,* 142 F.3d at 143 n. 4, and because it is entirely reasonable. Indeed, because the effect that a particular impairment will have on a person's ability to work varies depending on that person's background and skills, it is not easy to envision how any other approach could be taken.

***9** 162 F.3d at 784. Thus, the same impairment might amount to a disability for one person but not another. A lifting restriction or other impairment limiting a person's ability to do physically demanding labor might be a disability under the ADA for a person who has done such work most of his life, while the same impairment would not be disabling for a lawyer or office worker. On this record, a jury could reasonably find that Miller was substantially impaired in the major life activity of working, under the terms of the EEOC regulations.[FN2]

FN2. Miller contends in his brief and sup-

porting affidavit that he was substantially limited in his ability to engage in the recreational activities of fishing, hunting and cycling. These are not activities of central importance to everyday life and therefore do not qualify as major life activities. Even if these recreational activities were major life activities, Miller testified in his deposition that he had been fishing twice in 2003, and had not been fishing on more occasions because of work and the weather, not because of his back injury. He also testified that he had been hunting every weekend during season depending on the weather and his family responsibilities. Miller Dep. at 12-13.

B. *"Regarded as Having a Disability"*

Under the third test for disability as defined in the ADA, a person may be protected under the ADA if the person is "regarded as" having a physical or mental impairment that substantially limits one or more of the major life activities of the person. 42 U.S.C. § 12102(2)(C). The EEOC regulations implementing the employment provisions of the ADA define the phrase "regarded as having an impairment" to mean:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(*l*).

To survive summary judgment on this theory, plaintiff must come forward with evidence that Heritage regarded him as substantially limited in his ability to perform not merely one particular job but a class or broad range of jobs. See *Sutton,* 527 U.S. at 493-94 (plaintiffs with vision impairment were not "regarded as" substantially limited in major life activity of working because they failed to show employer regarded their impairment as precluding them from a substantial class of jobs); *Davidson v. Midelfort Clinic, Ltd.,* 133 F.3d 499, 511 (7th Cir.1998) (under "regarded as" disabled theory, "the employer's perception of the plaintiff's inability to work" must have a breadth comparable to ADA's requirements for actual disability).

Miller has submitted evidence that would allow a reasonable jury to find that Heritage believed he had an impairment that substantially limited him in the major life activity of working. The restrictions that resulted from Miller's back injury disqualified him from many jobs that he had otherwise been qualified to perform and that were similar to the past work he had done consistent with his education, training, and experience. Although the employer's principal focus was no doubt on whether Miller could do his particular job, a jury could find from circumstantial evidence that Heritage management viewed him as disabled from performing broad classes of jobs. See *Orme v. Swifty Oil Co.,* 2000 WL 682678, at *7 (S.D.Ind. Mar.28, 2000) (employer's subjective perception of whether plaintiff's impairment barred him from a broad class of jobs could be addressed through circumstantial evidence).

***10** Heritage has argued that even if a jury finds that it regarded Miller as disabled, there is no duty for an employer to accommodate in "regarded as" cases, citing, *e.g., Kaplan v. City of North Las Vegas,* 323 F.3d 1226, 1232 (9th Cir.2003), *Weber v. Strippit, Inc.,* 186 F.3d 907, 916-17 (8th Cir.1999), and other cases. The court finds more persuasive the reasoning of Judge Block in *Jacques v. DiMarzio, Inc.,* 200 F.Supp.2d 151, 163 (E.D.N.Y.2002) (discussing *Weber* and concluding that employers

have a duty to accommodate in "regarded as" cases), and the First Circuit's opinion in *Katz v. City Metal Co.,* 87 F.3d 26, 33 (1st Cir.1996). In any event, Miller's case is not limited to a failure to accommodate. The ADA prohibits disparate treatment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). That prohibition includes all three definitions disability in 42 U.S .C. § 12102(2), including being regarded as having a disability. Where an employee is regarded as disabled, firing that employee *because of that perceived disability* amounts to unlawful discrimination on the basis of disability, in violation of the plain meaning of the ADA, at least so long as the person is a "qualified individual with a disability," meaning that he or she is able to perform essential job functions with or without reasonable accommodations.

For the foregoing reasons, Heritage is not entitled to summary judgment on the theory that Miller does not have a disability within the meaning of the ADA.

C. *Reasonable Accommodation Claim*

An employer also violates the ADA by failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."42 U.S.C. § 12112(b)(5)(A).

To establish a reasonable accommodation claim under the ADA, Miller must first show that: (1) he was disabled; (2) his employer was aware of his disability; and (3) he was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of his position. *Basith v. Cook County,* 241 F.3d 919, 927 (7th Cir.2001). The employee must then show that the employer failed to provide a reasonable accommodation that he needed to perform the essential functions of his position. If the employee was unable to perform his job, with or without accommodation, the employer should consider reassignment to a vacant position as one form of accommodation. See 42 U.S.C. § 12111(9)(B).

Heritage devotes much of its brief to an argument that Miller did not identify with sufficient specificity any available positions that he would be able to fulfill with his permanent restrictions. The argument is misguided. The cases cited by Heritage make clear that an employee who wants some form of accommodation must make known to the employer the fact that some accommodation is needed. *E.g., Jovanovic v. Emerson Electric Co.,* 201 F.3d 894, 899 (7th Cir.2000); *Beck v. University of Wisconsin Bd. of Regents,* 75 F.3d 1130, 1134-35 (7th Cir.1996). Those cases do not impose on the employee the responsibility for requesting a particular form of accommodation. A request as simple and straightforward as asking for continued employment is a sufficient request for accommodation. *See Miller v. Illinois Dep't of Corrections,* 107 F.3d 483, 486-87 (7th Cir.1997) (if disabled employee simply says to the employer: 'I want to keep working for you-do you have any suggestions?', employer has a duty under the ADA to ascertain whether there is a job the employee might be able to fill). Such a request is sufficient to trigger the employer's duty to engage in good faith in an interactive process, in which the employer and employee consider both the employee's abilities and impairments and the employer's available positions and needs. See *Beck,* 75 F.3d at 1135-36. The issue of specificity is relevant at this later, interactive, stage of the inquiry. Miller has come forward with evidence that he asked Heritage executives for some other position with Heritage. A reasonable jury could find that Heritage failed to engage in any meaningful interactive process and that the management had unilaterally decided to fire Miller based on their evaluation of his impairments. A refusal to engage in an interactive process to discuss reasonable accommodations is not in itself a violation of the ADA; the burden remains on the employee to show that a reasonable accommodation was possible. *Rehling v. City of Chicago,* 207 F.3d 1009, 1015-16 (7th

Cir.2000); *Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 563-64 (7th Cir.1996). Where the employer has refused to participate in the process in good faith, however, the practical result may be to make it easier for the employee to prove a failure to accommodate. *Massey v. Rumsfeld,* 2001 WL 1397309, *9 (S.D.Ind. Nov.5, 2001).

***11** The principal dispute here is over Heritage's assertion that the essential functions of Miller's position as Press Operator "A" required him to be able to rotate among different presses. Heritage managers have testified in their affidavits about the advantages to Heritage of having all press operators perform the functions of many different positions. Lancaster Aff. ¶ 4; Houmes Aff. ¶¶ 3-5. It is not clear, however, and certainly not as a matter of law, that this rotation requirement must be treated as an "essential function" of the job. The whole point of the ADA's reasonable accommodation requirement is that employers must consider possible modifications of jobs that would allow an employee with a disability to perform them. "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."*Vande Zande v. State of Wisconsin Dep't of Admin.,* 44 F.3d 538, 542 (7th Cir.1995). Heritage's position in this lawsuit is that if Miller cannot perform *every* job it might want a press operator to perform, then he cannot perform *any* job as a press operator. At best, that theory presents a genuine issue of fact as to whether the requirement is an essential function of the job or whether it could be modified to save an employee's job without imposing an undue hardship on the employer.

Finally, the court believes that, at least under plaintiff's version of the facts, a reasonable jury could find that Heritage acted with callous or reckless indifference to Miller's federal rights, so that an award of punitive damages cannot be ruled out as a matter of law at least at this stage of the case. See generally *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999); 42 U.S.C. § 1981a(b)(1).

Conclusion

For the foregoing reasons, defendant's motion for summary judgement is denied. The case remains scheduled for trial on May 17, 2004.

So ordered.

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Not Reported in F.Supp.2d, 2004 WL 1087370 (S.D.Ind.)

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