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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOUGLAS K. DVORAK,)
)
Plaintiff,)
)
v.)
)
CLEAN WATER SERVICES, a public)
entity,)
)
Defendant.)
_____)

No. CV-04-1384-HU

FINDINGS & RECOMMENDATION

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Attorney for Defendant

HUBEL, Magistrate Judge:

Plaintiff Douglas Dvorak brings this disability discrimination case against his former employer, defendant Clean Water Services. In claims brought under state and federal law, plaintiff contends that defendant discriminated against him because of an actual

1 disability, a perceived disability, or a recorded disability, when
2 it terminated his employment in 2003. Plaintiff also alleges that
3 defendant failed to reasonably accommodate his disability.

4 Defendant moves for summary judgment on all claims. I
5 recommend that defendant's motion be granted.

6 BACKGROUND

7 Defendant is a wastewater treatment and storm water management
8 district that treats wastewater for users throughout the Tualatin
9 River basin. Plaintiff worked as a Field Construction and
10 Maintenance Technician (FCMT) for defendant from 1994 until 2003.
11 The FCMT is a safety-sensitive job. It involves the operation of
12 equipment, working in areas of heavy traffic, and working over open
13 manholes.

14 Defendant's Risk & Benefits Manager Victor Nolan states in his
15 declaration that FCMTs perform all of the manual labor involved in
16 maintaining, repairing, constructing, and cleaning defendant's
17 collection system, including storm water and sanitary sewer lines,
18 siphon structures, vaults, manholes, catch basins, and other
19 collection system facilities. Nolan Declr. at ¶ 2. Nolan further
20 states that employees in these positions operate a variety of heavy
21 mobile equipment including track-hoes, back-hoes, front end
22 loaders, high pressure cleaners, and vacuum trucks. Id. at ¶ 3.

23 The FCMT position is a physically demanding job that includes
24 exposure to all weather conditions, working in and adjacent to
25 traffic, working in and around permit-required confined spaces,
26 working over open manholes and hatches, and at times responding to
27 urgent situations. Id. The combination of environmental
28 conditions and the use of equipment, including high pressure

1 cleaners, high suction vacuum trucks, sensitive camera equipment,
2 commercial motor vehicles, or construction equipment creates a
3 position that is safety sensitive as a job class. Id. Any slight
4 lapse of attention or judgment or careless movement could result in
5 an injury or worse. Id.

6 On April 8, 2002, plaintiff met, at his request, with
7 defendant's Senior Human Resources Analyst Tricia Godfrey.
8 Plaintiff told Godfrey that his doctor had advised him that
9 medications he was taking were damaging his liver and kidneys, that
10 he wanted to use medical marijuana instead of those medications,
11 that he had been approved for a medical marijuana card, but that he
12 did not want to use medical marijuana unless defendant approved.

13 In response to plaintiff's request, Godfrey wrote a letter to
14 Dr. Phillip Leveque, who had prescribed the medical marijuana for
15 plaintiff, requesting an opinion as to whether plaintiff could
16 perform his job safely while using medical marijuana. Although a
17 copy of Dr. Leveque's response is not in the record, other
18 materials indicate that he opined that the medical marijuana would
19 cause no physical or psychological effect on plaintiff during the
20 day. Exh. 5 to Deft's CSF (Aug. 8, 2002 letter and questionnaire
21 to Dr. Antoniskis); Exh. B to Godfrey Declr. (Dec. 12, 2002 letter
22 from Dr. Antoniskis). Defendant then learned that Dr. Leveque's
23 medical license had been suspended, apparently for improper
24 issuance of medical marijuana prescriptions.

25 Given Dr. Leveque's suspended status, defendant requested an
26 opinion from another doctor, Dr. Thomas Anderson, who stated that
27 plaintiff could not perform his job safely using medical marijuana.
28 Defendant does not explain how it chose Dr. Anderson and does not

1 explain the basis for its assertion that it was not satisfied that
2 Dr. Anderson's opinion was an objective one. Godfrey Declr. at ¶
3 8. Godfrey states that she told plaintiff that defendant wanted to
4 obtain another opinion and plaintiff agreed to that. Id.
5 Defendant arranged for plaintiff to see Dr. Andris Antoniskis whose
6 practice included toxicology. Plaintiff agreed to this. Id.

7 Godfrey asserts that at this point in time she did not think,
8 and had no reason to think, that the medications plaintiff was
9 taking at the time caused him to be impaired on the job. Id.
10 Plaintiff asserts that defendant knew of his prescription narcotic
11 use at this time.

12 Defendant supplied Dr. Antoniskis with the prior medical
13 opinions from Dr. Leveque and Dr. Anderson, as well as plaintiff's
14 job description, a list of essential tasks, and a list of physical
15 requirements. Exh. 5 to Deft's CSF. In the letter to Dr.
16 Antoniskis, defendant explained that it understood that plaintiff
17 had been issued a medical marijuana card and that defendant's
18 concern was how the use of medical marijuana off-duty would impact
19 plaintiff's ability to perform his job without creating a direct
20 safety threat to himself or others. Id.

21 Dr. Antoniskis examined plaintiff on August 22, 2002, but
22 plaintiff would not allow the doctor to touch or examine his neck,
23 making the evaluation difficult. Exh. B to Godfrey Declr. (Dec. 5,
24 2002 Dr. Antoniskis report). In his December 5, 2002 report to
25 defendant, Dr. Antoniskis disapproved of the use of medical
26 marijuana. He noted that he had no "confirmatory collateral
27 evidence" of plaintiff's complaints because his attempts to obtain
28 collateral past and current medical history from the Veteran's

1 Administration (VA), where plaintiff had been a patient for many
2 years, met with no response. Having no "confirmatory collateral
3 evidence," Dr. Antoniskis stated that he had no indication that
4 plaintiff would qualify for a medical marijuana card at that time.
5 Id. at p. 3.

6 Dr. Antoniskis reported that at the time of his examination,
7 plaintiff's medications included a narcotic analgesic used to treat
8 pain, ibuprofen, and a muscle relaxant¹. Id. at p. 1. Plaintiff
9 reported to Dr. Antoniskis that the genesis of his neck pain was a
10 service-connected accident in 1976 for which he received a 70%
11 service-connected disability and ongoing care at the VA. Id. He
12 reported that he had been diagnosed with pinched nerves, bone
13 spurs, and arthritis, although he has never had surgery on his
14 neck. Id. He reported no radicular symptoms into his arm, but
15 complained of chronic neck pain and headaches. Id.

16 Dr. Antoniskis strongly disagreed with Dr. Leveque's statement
17 that there would be no physical or psychological effects during
18 work hours as a result of off-duty medical marijuana use. Id. at
19 p. 3. Dr. Antoniskis opined that "particularly with his other
20 medication use, there would be sedating effects, but also from the
21 marijuana slowing reflexes and impairing judgement." Id. Notably,
22 he stated that "[i]f he is working in a safety sensitive
23 position[,] that would be contraindicated for his marijuana use."
24 Id.

25
26 ¹ Dr. Antoniskis's notes indicate plaintiff was taking (1)
27 "5/500" milligrams of hydrocodone, three to four times per day;
28 (2) 800 milligrams of ibuprofen, four times per day; and (3) 500
milligrams of Methocarbamol, four to five times per day. Exh. B
to Godfrey Declr. at p. 1.

1 He further explained:

2 My feelings are that his current medications, plus also
3 his use of marijuana, would impair his judgment,
4 reflexes, and thinking clearly, and creating a potential
5 hazard. The Hydrocodone, Vicodin and Methocarbamol are
6 sedating medications and could impair his judgement.
7 Since he works in somewhat of a sensitive position he
8 potentially creates a risk to himself or others that are
9 around him.

10 He states he has been on his meds for seven years by his
11 report and working without problems by his report, but I
12 have some concerns caused by either the Hydrocodone,
13 Methocarbamol, and also the potentials for marijuana
14 slowing [his] reflexes and judgement. . . . I feel that
15 it becomes an individual work-related issue about your
16 policies with having individuals work in certain
17 positions while using potentially sedating or mood-
18 altering medications.

19 Id. at pp. 3-4.

20 Defendant represents, and plaintiff does not dispute, that
21 before 2002, plaintiff took his prescribed pain medications three
22 times per day. Beginning in 2002, his dosage was increased to four
23 or five times per day, including at about 5:30 a.m., 10:00 a.m.,
24 2:00 or 3:00 p.m., and then after he returned home from work. Pltf
25 Depo. at pp. 94-95². Plaintiff admits that the medications caused
26 him to be impaired to such a degree that he could not safely
27 perform safety-sensitive duties such as operating heavy equipment
28 and operating the power hose used to clean pipes. Id. at pp. 93-
95. Plaintiff stated that he felt impaired for thirty to sixty
minutes after each dose of medication. Id. at p. 95. Thus, on
each shift, he was impaired for one to two hours by his own
admission.

29 ² All citations to plaintiff's deposition are to the copy
30 of the deposition attached to the December 21, 2005 Supplemental
31 Declaration of David Wilson.

1 During 2002, the pain medications plaintiff took were
2 prescribed by VA physician Dr. Leah Swetnam. Godfrey believed that
3 the concerns raised by Dr. Antoniskis in his December 5, 2002
4 letter, would be satisfied if Dr. Swetman would give an opinion
5 that plaintiff could work safely using his pain medications.
6 Godfrey then prepared a detailed letter to Swetnam explaining
7 plaintiff's job duties and requesting her opinion. In response,
8 Godfrey received a letter from the VA's general counsel refusing to
9 provide any information.

10 Godfrey explains that she was concerned that the VA was
11 unwilling to provide a statement that plaintiff could work safely
12 while using the medications prescribed by the VA. Godfrey Declr.
13 at ¶ 12. Because of those concerns, defendant placed plaintiff on
14 administrative leave in January 2003 to eliminate any potential
15 dangers on the worksite while defendant collected the information
16 needed to determine whether plaintiff could work safely. Id.
17 Plaintiff received the same pay and benefits as he did while
18 working.

19 Unable to obtain an opinion from the VA, Godfrey discussed
20 with plaintiff the possibility of obtaining another clarifying
21 opinion from Dr. Antoniskis or referring him to a new specialist.
22 Plaintiff chose to see Dr. Antoniskis again, although plaintiff
23 characterizes his decision to do so as acquiescing to defendant's
24 demand.

25 Dr. Antoniskis examined plaintiff a second time on February
26 12, 2003. At this time, he had also received VA medical records.
27 He provided two letter reports, one consisting of handwritten
28 responses, dated February 12, 2003, to questions posed by defendant

1 in a February 5, 2003 letter. Exh. F to Godfrey Declr. The other
2 is a typewritten letter to Godfrey dated February 12, 2003. Exh.
3 G to Godfrey Declr.

4 In the handwritten answers to defendant's questions, Dr.
5 Antoniskis stated that it appeared plaintiff was currently able to
6 safely perform all of the duties of his position because he has
7 been at the job for years while taking these medications and had no
8 problem. Exh. F to Godfrey Declr. at p. 2. Thus, he opined, there
9 was not a "significant" risk, but there was a potential one. Id.
10 He further opined that because of plaintiff's tolerance to the
11 medications, and his performance of the job for years without a
12 problem, the current medication regime did not create a direct
13 threat of harm, but nonetheless, plaintiff should not drive or
14 operate machinery. Id. He also stated that plaintiff's job duties
15 of climbing ladders or stairs increased the risk of falls as a
16 result of his medication use. Id. at p. 3.

17 In his February 12, 2003 typewritten report, Dr. Antoniskis
18 noted that plaintiff's situation was "complicated" because, on the
19 one hand, plaintiff likely had a "degree of tolerance" to the
20 medications given his years of using them, but on the other hand,
21 all the medications at issue raised concerns for the performance of
22 potentially hazardous tasks such as driving a motor vehicle or
23 operating machinery as a result of the possible impairment of
24 mental or physical abilities. Id. at pp. 2-3. Dr. Antoniskis
25 opined that the liability risk was difficult to ascertain. Id.

26 Defendant states that Dr. Antoniskis's February 2003 opinions
27 raised serious concerns without giving clear answers and thus, it
28 decided another opinion was needed. It arranged for plaintiff to

1 see Dr. Brent Burton, a specialist in medical toxicology and
2 occupational medicine.

3 Dr. Burton examined plaintiff sometime between February 12,
4 2003, and April 2, 2003. In his April 2, 2003 report, Dr. Burton
5 reviewed plaintiff's subjective history in some detail, including
6 his occupational history and past medical history, and also
7 reviewed his family and social history. Exh. I to Godfrey Declr.
8 at pp. 1-6. Dr. Burton then reviewed plaintiff's VA medical
9 records from 1991. Id. at pp. 6-10. He also reviewed plaintiff's
10 job description. Id. at p. 10.

11 Dr. Burton opined that it was "inappropriate to place Mr.
12 Dvorak into any safety-sensitive position. . . . Mr. Dvorak should
13 not be allowed to operate machinery, drive a commercial vehicle,
14 work on ladders or at heights or otherwise engage in activities
15 that might place others at risk." Id. at p. 13. He further opined
16 that plaintiff was not a candidate for medical marijuana and that
17 plaintiff's increasing use of narcotic analgesics placed him at
18 risk during the performance of any safety-sensitive job. Id. at
19 pp. 14-5. He explained that plaintiff's "impaired faculties [while
20 taking the narcotic medication,] undoubtedly present unacceptable
21 risk." Id.

22 Based on Dr. Burton's opinions, Godfrey scheduled a July 9,
23 2003 meeting with plaintiff and Greg Baxter, his union
24 representative. Defendant states that the purpose of the meeting
25 was to explore options for returning plaintiff to work in a safe
26 manner. Plaintiff states that it was to demand that he enter a
27 specific drug rehabilitation program and sign an agreement to do
28 so. Defendant states that during this meeting, it suggested a

1 treatment program along the lines recommended by Dr. Burton.
2 Defendant further states that neither plaintiff, nor Baxter
3 proposed any other alternatives.

4 On August 5, 2003, plaintiff met with Michael Hollen, the
5 manager of a drug rehabilitation program associated with Providence
6 Hospital. Plaintiff does not dispute that he was told that the
7 program was designed to get plaintiff on some other type of pain
8 management. Plaintiff refused to enter the program because he
9 believed it was something that he had already tried unsuccessfully.

10 After plaintiff refused to enter the program, defendant
11 notified him that it was considering terminating his employment.
12 Defendant invited plaintiff to a due process meeting to respond to
13 defendant's concerns. The meeting occurred on August 21, 2003.
14 After the meeting, defendant let plaintiff know that his employment
15 would be terminated, but that he could avoid termination by
16 agreeing to enter the Providence program within one week.
17 Plaintiff chose to let his employment end instead of entering the
18 Providence program.

19 STANDARDS

20 Summary judgment is appropriate if there is no genuine issue
21 of material fact and the moving party is entitled to judgment as a
22 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
23 initial responsibility of informing the court of the basis of its
24 motion, and identifying those portions of "'pleadings, depositions,
25 answers to interrogatories, and admissions on file, together with
26 the affidavits, if any,' which it believes demonstrate the absence
27 of a genuine issue of material fact." Celotex Corp. v. Catrett,
28 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

1 "If the moving party meets its initial burden of showing 'the
2 absence of a material and triable issue of fact,' 'the burden then
3 moves to the opposing party, who must present significant probative
4 evidence tending to support its claim or defense.'" Intel Corp. v.
5 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
6 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
7 Cir. 1987)). The nonmoving party must go beyond the pleadings and
8 designate facts showing an issue for trial. Celotex, 477 U.S. at
9 322-23.

10 The substantive law governing a claim determines whether a
11 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
12 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
13 to the existence of a genuine issue of fact must be resolved
14 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
15 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
16 drawn from the facts in the light most favorable to the nonmoving
17 party. T.W. Elec. Serv., 809 F.2d at 630-31.

18 If the factual context makes the nonmoving party's claim as to
19 the existence of a material issue of fact implausible, that party
20 must come forward with more persuasive evidence to support his
21 claim than would otherwise be necessary. Id.; In re Agricultural
22 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
23 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
24 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

25 DISCUSSION

26 Plaintiff brings claims under the Americans with Disabilities
27 Act (ADA), 42 U.S.C. §§ 12101-12213, the Rehabilitation Act of
28 1973, 29 U.S.C. §§ 701-7961, and Oregon law. In support of his ADA

1 claim, plaintiff alleges that he was able to perform the essential
2 functions of his position with reasonable accommodation. Compl. at
3 ¶ 22. He contends that defendant terminated him in substantial
4 motivating part because of his disability, defendant's perception
5 that he was disabled, and/or because of his record of disability.
6 Id. at ¶ 23. He further alleges that defendant imposed an
7 unreasonable condition of employment that plaintiff enter a drug
8 treatment program and declined plaintiff's reasonable accommodation
9 that he take prescription medication while not at work. Id. at ¶
10 24.

11 In support of his claim under Oregon Revised Statute §
12 (O.R.S.) 659A.112, plaintiff incorporates the prior allegations and
13 further alleges that defendant's alleged failure to accommodate him
14 or enter into an interactive process in response to his requests
15 for accommodation, constitutes discrimination under Oregon law.
16 Id. at ¶ 31.

17 The Rehabilitation Act claim incorporates the allegations
18 raised in support of the ADA claim, and further alleges that
19 defendant is a direct recipient of federal financial assistance
20 within the meaning of Section 504 of the Rehabilitation Act. Id.
21 at ¶ 34.

22 For relief, plaintiff seeks (1) a declaration that defendant
23 is in violation of the ADA, the Rehabilitation Act, and state law;
24 (2) a permanent injunction enjoining defendant from engaging in
25 employment practices which violate rights under the ADA and the
26 Rehabilitation Act; (3) economic damages; (4) noneconomic damages;
27 and (5) attorney's fees and costs.

28 Defendant contends that it is entitled to summary judgment for

1 the following reasons: (1) plaintiff is not disabled; (2)
2 defendant had no knowledge of any disability; (3) plaintiff posed
3 a "direct threat"; (4) defendant satisfied any duty it had to
4 reasonably accommodate plaintiff's alleged disability; (5)
5 plaintiff cannot sustain his "perception/regarded as" or "record
6 of" claims; (6) plaintiff's Rehabilitation Act claims fail for the
7 same reason(s) as his ADA claim; and (7) plaintiff's Oregon claim
8 fails for the same reason(s) as his ADA claims.

9 Because I agree with defendant that plaintiff fails to create
10 an issue of fact on the issue of whether he is disabled under the
11 ADA, under any of the three prongs defined by the ADA as
12 constituting a disability, I do not consider any other arguments as
13 to the ADA claim. I further agree with defendant that plaintiff
14 fails to create an issue of fact as to his Rehabilitation Act or
15 state law disability claims.

16 I. ADA Claim - Disability

17 To prevail on a disability discrimination claim under the ADA,
18 plaintiff must initially establish that he is a qualified
19 individual with a disability. Humphrey v. Memorial Hosps Ass'n,
20 239 F.3d 1128, 1133 (9th Cir. 2001). Under the ADA, an individual
21 is disabled if that individual (1) has a physical or mental
22 impairment that substantially limits one or more of the
23 individual's major life activities; (2) has a record of such an
24 impairment; or (3) is regarded or perceived as having such an
25 impairment. 42 U.S.C. § 12102(2); Deppe v. United Airlines, 217
26 F.3d 1262, 1265 (9th Cir. 2000).

27 "Whether a person is disabled under the ADA is an
28 'individualized inquiry.'" Thornton v. McClatchy Newspapers, Inc.,

1 261 F.3d 789, 794 (9th Cir. 2001) (quoting Sutton v. United Air
2 Lines, Inc., 527 U.S. 471, 483 (1999)). In Sutton, the Supreme
3 Court clarified that "'substantially' suggests considerable or
4 specified to a large degree." Sutton, 527 U.S. at 491.

5 Under the pertinent regulation, "substantially limits" means:

6 (1) Unable to perform a major life activity that the
7 average person in the general population can perform; or

8 (2) Significantly restricted as to the condition, manner
9 or duration under which an individual can perform a
10 particular major life activity as compared to the
condition, manner, or duration under which the average
person in the general population can perform that same
major life activity.

11 29 C.F.R. § 1630.2(j)(1). "Affecting" a major life activity is not
12 enough; there must be a substantial limitation. See Albertson's,
13 Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (Ninth Circuit erred
14 when it transformed "significant restriction" into a "mere
15 difference"); Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1207 (8th
16 Cir. 1997) ("It is not enough that an impairment affect a major
17 life activity; the plaintiff must proffer evidence from which a
18 reasonable inference can be drawn that such activity is
19 substantially or materially limited").

20 The following factors are to be considered in determining
21 whether an individual is substantially limited in a major life
22 activity:

23 (i) The nature and severity of the impairment;

24 (ii) The duration or expected duration of the impairment;
25 and

26 (iii) The permanent or long term impact, or the expected
27 permanent or long term impact of or resulting from the
impairment.

28 29 C.F.R. § 1630.2(j)(2).

1 A. Actual Disability

2 Plaintiff contends that he is substantially limited in the
3 major life activities of walking, lifting, self-care, and working.

4 1. Walking

5 It is undisputed that plaintiff had surgery on his left knee
6 in 1980, 1983, and 1992, and wears a knee brace. In his
7 deposition, however, plaintiff stated that he was always able to
8 physically do his job with defendant, that the job involved
9 walking, and that he was able to do whatever walking he had to do.

10 Pltf Depo. at p. 134. Plaintiff also testified that he had no
11 problem keeping his balance and no problems with falling down. Id.
12 at pp. 134-35. He never sought treatment at the VA for any kind of
13 walking problem. Id. His VA medical records state, as of July
14 1999, that

15 [h]is gait is normal, both casual, heel and toe. He has
16 no trouble on tandem walking. I performed the EPS exam
17 including rapid alternating movements and a gait
18 examination, and it shows no difficulties.

19 Exh. B to Wilson Declr. at pp. 42-43.

20 Dr. Thomas, who is plaintiff's treating physician for his knee
21 problems, has never limited plaintiff's ability to walk, other than
22 to leave the amount of walking up to plaintiff's discretion. Pltf
23 Depo. at p. 135; see also Exh. A to Wilson Declr. (Dr. Thomas
24 medical records).

25 Dr. Burton noted in his April 2, 2003 opinion that although
26 plaintiff wore a brace on his left knee, plaintiff did not express
27 any symptoms regarding knee pain and that plaintiff told him that
28 he wore the brace because his physician told him to do so. Exh. C
to Wilson Declr. at p. 86. Dr. Burton also found plaintiff's gait

1 to be normal upon physical examination. Id. at p. 87.

2 Defendant contends that based on this evidence, plaintiff
3 cannot show that he was substantially limited in the major life
4 activity of walking. Defendant notes that plaintiff is able to
5 walk, has no restrictions on walking or history of any such
6 restrictions, and he was able to perform all walking required in
7 his job. Defendant contends that at most, the evidence indicates
8 that plaintiff has some difficulty in his ability to walk, but that
9 this falls short of a substantial limitation.

10 In response, plaintiff states in his declaration that he
11 suffers from "chronic instability of the left knee[.]" Pltf Declr.
12 at ¶ 1. He further states that "[a]lthough I can walk, doing so
13 causes an increase in my pain." Id. at ¶ 5. He then states that

14 I injured my left knee off the job in 1979. It has
15 been reconstructed three times due to anterior cruciate
16 ligament and other internal damage. I use a knee brace
17 at all times because my knee is not stable without it.
18 If I don't use it, my knee gives out and I am unable to
walk. I cannot keep from hyperextending my knee without
the brace; nor can I maintain lateral stability. When my
knee goes out on me, I suffer extreme pain for extended
periods.

19 I have trouble walking on uneven surfaces by losing
20 my balance, and after walking on uneven surfaces my back
21 and neck pain increases significantly, contributing to
22 the severe limitations I experience when my pain level
23 goes up tremendously. I can squat and stoop, but when I
do I have difficulty getting back up to a standing
position. Squatting and stooping also increase my pain
in a similar manner as walking on uneven surfaces.

24 Pltf Declr. at ¶¶ 7, 8.

25 Plaintiff also relies on a July 2004 letter written by a VA
26 vocational rehabilitation counselor which addressed plaintiff's
27 vocational outlook. Exh. C to Pltf Declr. The counselor stated
28 that "[t]he veteran has had a left knee reconstruction. The

1 residuals of this condition limit his ability to engage in
2 prolonged standing and walking, heaving lifting and carrying,
3 crouching, crawling and climbing." Id. at p. 2.

4 Plaintiff further relies on an August 2005 opinion letter from
5 VA physician Dr. Thomas Cooney in which Dr. Cooney stated that he
6 had reviewed plaintiff's chart and was familiar with plaintiff's
7 history and issues related to his chronic headaches. Exh. B to
8 Pltf Declr. at p. 6. He noted that plaintiff was working full-
9 time until approximately two years ago when he was terminated due
10 to his use of opioids for his chronic headaches, and that he had
11 been unable to find employment since that time. Id. He further
12 stated that

13 [plaintiff's] medical problems do not preclude the
14 ability to work in any capacity, as evidenced by his
15 gainful employment until 2+ years ago. Rather, his
16 medical treatment, associated medical history and current
17 skill set have rendered him unemployable, largely due to
18 employer's [sic] unwillingness to hire him. Hence we
19 have a paradox: he could work, but no one will hire him
20 with the limitations he has to perform work for which he
21 is currently qualified by education and experience.

18 Id.

19 I conclude that plaintiff fails to create a material issue of
20 fact regarding a substantial impairment in the major life activity
21 of walking, both because the evidence itself falls short and
22 because, at least under federal law, I consider the alleged
23 limitation as it exists with corrective devices, such as
24 plaintiff's knee brace.

25 First, as to the evidence itself. The VA vocational
26 rehabilitation counselor's opinion does not create an issue of fact
27 as to plaintiff's substantial limitation in his ability to walk.
28 Although the counselor opines that plaintiff is limited in his

1 abilities to engage in prolonged standing and walking, heavy
2 lifting and carrying, crouching, crawling, and climbing, she does
3 not state that he is substantially limited in these abilities.

4 Moreover, her opinion was rendered in July 2004, approximately
5 eleven months after plaintiff's employment was terminated. Her
6 opinion is phrased in the present tense and it is clear that her
7 assessment is of plaintiff's condition at that time. She renders
8 no opinion of plaintiff's status at the time of termination. If
9 there was no reason to believe that plaintiff's condition changed
10 from the time of termination until July 2004, the vocational
11 rehabilitation counselor's opinion would be relevant.

12 However, as defendant notes, plaintiff testified in his
13 deposition that at the time his employment ended in August 2003, he
14 was still able to work, but that he then became unable to work,
15 even with his medications, in 2004. Pltf Depo. at pp. 117-18.
16 Given this admission by plaintiff that his condition deteriorated
17 after his employment terminated, to the point where he could no
18 longer work at all, even with his medications, the vocational
19 rehabilitation counselor's assessment of plaintiff's condition as
20 of July 2004 is not relevant to his limitations as they may have
21 existed in August 2003, the time of termination.

22 Next, for the same reason, Dr. Cooney's opinion, dated August
23 2005, is not relevant to a determination of plaintiff's limitations
24 as of August 2003. And, while he offers an opinion about
25 plaintiff's apparent "paradox," he makes no reference to any
26 limitations in plaintiff's ability or inability to walk.

27 As to plaintiff's declaration, the description of his symptoms
28 and limitations is, like the VA vocational rehabilitation

1 counselor's July 2004 letter, phrased in the present tense, that
2 is, as of the date of the November 2005 declaration. While
3 plaintiff mentions certain historical incidents regarding his
4 injuries, his recitation of symptoms and functional ability is not
5 described as of the time of his termination with defendant, but is
6 stated in the present tense. Because of the admitted decline in
7 plaintiff's condition and functional limitations since his
8 termination, any testimony regarding his condition and limitations
9 as of any later date, is not relevant.

10 Alternatively, even if the statements in the declaration
11 regarding the alleged limitation in walking are credited, they do
12 not amount to a substantial limitation in walking. Relevant cases
13 from other jurisdictions indicate that while plaintiff may indeed
14 have difficulty walking, his impairment does not rise to the
15 required level of being a substantial impairment in the major life
16 activity of walking.

17 In Vass v. Riester & Thesmacher Co., 79 F. Supp. 2d 853 (N.D.
18 Ohio 2000), the court, in resolving the employer's motion for
19 summary judgment, described the plaintiff's allegations and
20 explained its reasoning as follows:

21 Mr. Vass claims he has a physical impairment which
22 substantially limits him in a number of major life
23 activities. Specifically, he states his ability to walk
24 is substantially limited. He often loses his balance and
25 wears a knee brace. Walking up and down stairs is
26 painful and elicits a popping noise from his knee.
27 Because of his condition, he mainly stays on the first
28 floor of his split level home. He has trouble with
repetitive bending, has discomfort with kneeling or
squatting and is only able to stand for approximately 30
minutes [sic] intervals before experiencing discomfort.
. . . He further notes his doctor has restricted him from
carrying weights of more than twenty-five pounds, . . . ,
and he suggests he is substantially limited in his
ability to work because he cannot operate a mechanical

1 press brake.

2 These facts suggest Mr. Vass has physical
3 limitations, but they do not cause him to fall within the
4 narrow definition of "disabled" set forth in the ADA
5 regulations or in the courts' interpretation of them. He
6 can, for instance, walk without a wheelchair or a cane,
7 using only a knee brace while at work. . . . He can
8 negotiate the eight stairs in his split-level home
9 without assistance. He works outside in his garden and
10 performs the family's yardwork on his own. . . . He can
11 still lift objects under twenty-five pounds.

12 Id. at 860-61 (citations, internal quotation, and ellipses
13 omitted); see also Kelly v. Drexel Univ., 94 F.3d 102, 106 (3d Cir.
14 1996) (employee who could not jog, had trouble climbing stairs, and
15 could not walk more than a mile was not substantially limited in
16 walking under the ADA); Puoci v. City of Chicago, 81 F. Supp. 2d
17 893, 896-97 (N.D. Ill. 2000) (employee who walked with a limp,
18 experienced numbness in legs, and could not walk more than one and
19 one-half miles without pain was not substantially limited in
20 ability to walk under the ADA).

21 Second, in Sutton, the Supreme Court held that the existence
22 of a disability is determined in light of mitigating or corrective
23 measures. Sutton, 527 U.S. at 482-83, 493-94. Thus, here, at
24 least as to the federal ADA claim³, I must consider the level of
25 impairment in light of plaintiff's use of a knee brace. His own
26 declaration statements indicate that his problems occur without the
27 knee brace:

28 I use a knee brace at all times because my knee is not
stable without it. If I don't use it, my knee gives out
and I am unable to walk. I cannot keep from
hyperextending my knee without the brace; nor can I
maintain lateral stability. When my knee goes out on me,

³ Plaintiff's Oregon claim is discussed in a separate section.

1 I suffer extreme pain for extended periods.
2 Pltf Declr. at ¶ 7. The clear impact of this evidence is that if
3 plaintiff uses his brace, his knee is stable and not subject to
4 hyperextension or giving out.

5 In summary, even without considering the corrective measure of
6 the knee brace, plaintiff fails to create a material issue of fact
7 on the issue of a substantial limitation in the major life activity
8 of walking. Plaintiff establishes that he has some limitations in
9 walking, but he fails on the question of a substantial limitation.
10 As other courts have noted, a limitation, without more, is not
11 enough. Consideration of the knee brace only strengthens this
12 conclusion because using it appears to reduce or eliminate the
13 limitations plaintiff describes.

14 2. Lifting

15 At least one court has concluded that lifting is a major life
16 activity. Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 21
17 (1st Cir. 2002). For the purposes of this decision, I assume that
18 lifting is a major life activity under the ADA.

19 In deposition, plaintiff stated that he had no medical
20 limitations on his ability to lift and that no doctor had ever told
21 defendant that plaintiff's lifting was limited in any way. Pltf
22 Depo. at p. 138. None of his medical records contain any
23 limitation on his ability to lift. Exhs. A, B, C to Wilson Declr.
24 Plaintiff conceded that his job involved lifting and that he was
25 able to do all of the lifting the job required. Pltf Depo. at p.
26 138. The lifting at work included ninety-pound trash grates that
27 plaintiff and his partner lifted together. Id. at pp. 138-39. He
28 did state that lifting hurt his neck. Id. at p. 138.

1 In his declaration, plaintiff states that due to his severe
2 neck pain, which limits "all my motion," he can "perform functions
3 required of me, [but] when I do so I pay for it by debilitating
4 pain following lifting, carrying, or repetitive movements or any
5 jostling of my head." Pltf Declr. at ¶ 4. He further states that
6 he "cannot lift or carry anything above my shoulders due to the
7 pain it causes at the time, and if I were to do it I would suffer
8 increased migraine headaches (which I have experienced when I have
9 tried to use my neck.)." Id. at ¶ 9.

10 In addition to the statements in his declaration, plaintiff
11 also relies on the July 2004 letter by the VA vocational
12 rehabilitation counselor who states that plaintiff "cannot lift and
13 carry objects over the shoulder level[.]" Exh. C to Pltf Declr.

14 Plaintiff's evidence fails to create an issue of fact
15 regarding a substantial limitation in the major life activity of
16 lifting. For the reasons articulated above, the VA vocational
17 rehabilitation counselor's July 2004 opinion about plaintiff's
18 abilities and limitations in July 2004 is not relevant given
19 plaintiff's admitted decline in condition following his termination
20 in August 2003. And, for the reasons discussed above, plaintiff's
21 own declaration statements are not entitled to any weight given
22 that they address his condition as of November 2005, more than two
23 years after his termination and after the admitted decline in his
24 condition.

25 Additionally, even if plaintiff's declaration statements are
26 accepted, the limitations he describes are not disabling within the
27 meaning of the ADA because they are not substantially limiting.
28 E.g., Thompson v. Holy Family Hosp., 121 F.3d 537, 540 (9th Cir.

1 1997) (twenty-five pound lifting restriction is not a substantial
2 limitation on ability to lift); see also Dutcher v. Ingalls
3 Shipbuilding, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (affirming
4 district court's grant of summary judgment to defendant on issue of
5 substantial limitation on lifting when plaintiff was limited in
6 heavy lifting, repetitive rotational movements, picking things up
7 off the floor, and in holding things up high or tight); Gordon v.
8 MCG Health, Inc., 301 F. Supp. 2d 1333, 1340-41 (S.D. Ga. 2003)
9 (finding nurse not disabled when she was restricted from lifting
10 more than ten pounds, engaging in repetitive bending, stooping,
11 squatting, and overhead or shoulder-level work).

12 I recommend concluding that plaintiff fails to create an issue
13 of fact regarding a substantial limitation in the major life
14 activity of lifting.

15 3. Self-Care

16 In his administrative complaint to the Bureau of Labor &
17 Industries (BOLI), plaintiff did not identify self-care as a major
18 life activity substantially limited by an impairment. He also did
19 not identify it in the Complaint filed in this Court. Defendant
20 contends that plaintiff's failures to assert self-care in his BOLI
21 Complaint or his court Complaint preclude him from raising it in
22 response to defendant's motion for summary judgment. I need not
23 resolve this issue because I conclude that even if self-care were
24 properly raised, plaintiff fails to create an issue of fact
25 regarding a substantial limitation in the major life activity of
26 self-care.

27 In deposition, plaintiff testified that he can perform all
28 "around the house" activities such as eating, bathing, grooming,

1 toileting, and dressing, although some of these activities can
2 become increasingly tough if they involve repetitive movement with
3 his upper arms. Pltf Depo. at p. 139. He can sleep most of the
4 time. Id. He has no trouble breathing. Id. at p. 140. He is
5 able to mow his lawn and care for his five-year old daughter by
6 himself. Id. at 140-41.

7 In his declaration, plaintiff states:

8 I have severe pain in my neck that limits all my motion,
9 and it turns into headaches such that I have to just go
10 to bed. The headaches keep me from participating in
11 family activities and anything else that requires any
12 kind of physical exertion. Occasionally, I get numbness
13 down my entire right arm. Although I can perform
14 functions required of me, when I do I so I pay for it by
15 debilitating pain following lifting, carrying, or
16 repetitive movements or any jostling of my head.

17 . . . I can engage in daily self care activities, such as
18 eating, bathing, grooming, toileting, and dressing, but
19 doing so also causes an increase in pain, such that I
20 often can do no more than just go to bed.

21 . . . I have migraine headaches virtually every day.
22 When those headaches come, I must find a dark room, lie
23 down, and shut the door. On those occasions, I am unable
24 to interact with my family or engage in other activities.

25 Pltf Declr. at ¶¶ 4, 5, 6.

26 For the reasons previously discussed, plaintiff's declaration
27 fails to create an issue of fact regarding self-care because it
28 describes his limitations as of November 2005, not as of the time
of termination. Alternatively, as with the major life activities
of walking and lifting, even accepting his statements, they do not
show a substantial limitation in his ability to care for himself.
While plaintiff describes pain affecting his ability to interact
with his family or engage in other activities, he also attests that
he can nonetheless engage in daily self-care activities such as
eating, bathing, grooming, toileting, and dressing. Therefore, I

1 recommend concluding that plaintiff fails to create an issue of
2 fact regarding a substantial limitation in the major life activity
3 of self-care.

4 4. Working

5 Although the EEOC regulations define working as a major life
6 activity, 29 C.F.R. § 1630.2(i), the Supreme Court has left the
7 question open. Sutton, 527 U.S. at 492 (assuming without deciding
8 that working is a major life activity and noting certain conceptual
9 difficulties in defining "major life activities" to include work).

10 The Court did opine however, that assuming working is a major
11 life activity, being substantially limited in that activity means
12 being substantially limited in the performance of a broad class of
13 jobs, not just the plaintiff's job. Sutton, 527 U.S. at 491. An
14 "inability to perform a single, particular job does not constitute
15 a substantial limitation in the major life activity of working."
16 Thornton, 261 F.3d at 795; see also Sutton, 527 U.S. at 492 ("[t]o
17 be substantially limited in the major life activity of working, .
18 . . one must be precluded from more than one type of job, a
19 specialized job, or a particular job of choice.").

20 In support of his argument that he is substantially limited in
21 the major life activity of working, plaintiff principally relies on
22 the VA vocational rehabilitation counselor's report, and his
23 declaration. For the reasons discussed above, neither the report
24 nor the declaration create a material issue of fact regarding
25 plaintiff's limitation in his ability to work because neither
26 address his limitations at the time of his termination. Moreover,
27 Dr. Cooney's August 2005 letter, describing plaintiff's "paradox,"
28 expressly states that "[plaintiff's] medical problems do not

1 preclude the ability to work in any capacity." Exh. B to Pltff
2 Declr. at p. 6.

3 In addition, plaintiff concedes that at the time of his
4 termination, he was still capable of performing his job. Pltff
5 Depo. at pp. 124-26. Thus, at that relevant time, his
6 impairment(s) did not create a substantial limitation in his
7 ability to work. E.g., Mahon v. Crowell, 295 F.3d 585, 591-92 (6th
8 Cir. 2002) (plaintiff who claimed that he was qualified for his job
9 as a steamfitter was not substantially limited in working); Rivera-
10 Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 23 (1st Cir.
11 2001) (plaintiff's asthma and lymphoma did not substantially limit
12 the major life activity of working where plaintiff admitted he
13 could perform all of his tasks without assistance); Standard v.
14 ABEL Servs., Inc., 161 F.3d 1318, 1327 (11th Cir. 1998) (plaintiff
15 who admitted that he could do his job was not substantially limited
16 in working).

17 I recommend concluding that plaintiff has failed to create an
18 issue of fact regarding a substantial limitation in the major life
19 activity of working.

20 Because plaintiff fails to create an issue of fact regarding
21 a substantial limitation in any major life activity at the time of
22 termination, I recommend that defendant's motion as to plaintiff's
23 "actual disability" claim be granted.

24 B. Regarded/Perceived Disability

25 As noted above, under the ADA, an individual is disabled if
26 that individual has a physical impairment that substantially limits
27 one or more of the individual's major life activities (an actual
28 disability), or has a record of such impairment, or is regarded or

1 perceived as having such an impairment. 42 U.S.C. § 12102(2);
2 Deppe, 217 F.3d at 1265.

3 A person is regarded as being disabled if "(1) a covered
4 entity mistakenly believes that a person has a physical impairment
5 that substantially limits one or more major life activities, or (2)
6 a covered entity mistakenly believes that an actual, nonlimiting
7 impairment substantially limits one or more major life activities."
8 Sutton, 527 U.S. at 489; see also 29 C.F.R. § 1630.2(1) (defining
9 "regarded as"); Deppe, 217 F.3d at 1265 ("In 'regarded as' cases,
10 the employer must perceive the individual as having an actual
11 disability under the ADA."). Thus, plaintiff needs to show that
12 defendant believed that plaintiff was substantially limited in one
13 or more major life activities, through either the mistaken belief
14 that plaintiff had an impairment causing such a limitation or the
15 mistaken belief that an impairment which was not so limiting,
16 caused such a limitation.

17 As with the self-care issue discussed above, defendant first
18 contends that plaintiff's "regarded as" claim fails because
19 plaintiff did not raise such a claim in his BOLI Complaint. Again,
20 I need not resolve that issue because even if it were properly
21 raised in the administrative complaint, I conclude that plaintiff
22 fails to create an issue of fact as to his "regarded as" claim.

23 Defendant notes that in deposition, plaintiff expressly stated
24 that he had no reason to believe that either Godfrey or Nolan, or
25 anyone else in defendant's management, wanted his employment to end
26 because he or she thought plaintiff was disabled. Pltf Depo. at
27 pp. 148-51. Defendant argues that this concession is a sufficient
28 basis upon which to grant defendant's motion on the "regarded as"

1 claim.

2 In response to defendant's motion, plaintiff makes two
3 arguments. First, plaintiff argues that Godfrey considered him to
4 "disabled from a broad range of occupations." Pltf Mem. at p. 11.
5 Although not expressly presented as such, I understand plaintiff's
6 argument to be that defendant regarded him as substantially limited
7 in the major life activity of working.

8 Second, plaintiff asserts that defendant regarded him as
9 disabled because it "over-focused" on his intended use of marijuana
10 and concluded that plaintiff was a drug user or had a drug problem.

11 As to the first argument, plaintiff must show not only that
12 defendant thought that he was impaired in his ability to do the job
13 that he held, but also that the employer regarded him as
14 substantially impaired in "either a class of jobs or a broad range
15 of jobs in various classes as compared with the average person
16 having comparable training, skills, and abilities." Sullivan v.
17 Neiman Marcus Group, Inc., 358 F.3d 110, 117 (1st Cir. 2004)
18 (citing Murphy v. United Parcel Service, Inc., 527 U.S. 516, 523
19 (1999)).

20 In support of his position, plaintiff alleges that during a
21 discussion about plaintiff's ability to work in a van with the
22 sewer television crew, monitoring sewer and storm lines with a
23 television camera, Godfrey stated "I won't even put you behind a
24 computer." Pltf Declr. at ¶ 20. Although Godfrey denies making
25 the comment or any words to that effect, Godfrey Declr. at ¶ 7, for
26 the purposes of this motion I assume that she did.

27 Plaintiff contends that Godfrey's comment shows that she
28 considered him to be unfit "for even the most sedentary positions

1 within defendant." Pltf Mem. at p. 11. Thus, plaintiff argues
2 that Godfrey concluded that plaintiff was disabled from performing
3 a broad range of occupations.

4 I disagree. Godfrey's alleged comment is best understood as
5 suggesting that she considered plaintiff unfit for computer jobs.
6 At such, her comment shows she perceived plaintiff as limited in
7 one subset of one type of job (computer jobs as a subset of
8 sedentary jobs). This is not a perception of a substantial
9 limitation in the performance of a broad class of jobs.

10 Even if her comment is taken to mean, as plaintiff suggests,
11 that Godfrey believed that plaintiff was disabled from all
12 sedentary jobs with defendant, that is not enough. Plaintiff does
13 not contend that Godfrey thought plaintiff unable to perform all
14 sedentary jobs in the national or regional economy, or that Godfrey
15 thought plaintiff unable to perform any job with defendant.
16 Rather, the assertion is that Godfrey believed plaintiff to be
17 disabled from performing sedentary jobs with defendant.

18 As Magistrate Judge Stewart noted in a recent decision, when
19 proving an actual disability claim in the Ninth Circuit, "'a
20 plaintiff must present specific evidence about relevant lost labor
21 markets to defeat summary judgment on a claim of substantial
22 limitation of "working.'" Walz v. Marquis Corp., No. CV-03-1468-
23 ST, 2005 WL 758253, at *11 (D. Or. Apr. 4, 2005) (quoting Thornton
24 v. McClatchy Newspapers, Inc., 261 F.3d 789, 795 (9th Cir. 2001)).
25 Judge Stewart applied this same evidentiary showing in a "regarded
26 as" claim. Id.

27 She concluded that the plaintiff had failed to create a
28 genuine issue of material fact as to whether his employer had

1 regarded him as substantially limited in working in a class or
2 broad range of jobs because the plaintiff failed to present
3 evidence about the various types of jobs in the relevant labor
4 market from which he would be restricted if, as he alleged, the
5 employer perceived him as unable to use power tools. Id. at *12.
6 Judge Stewart noted that the record showed only that the defendant
7 saw the plaintiff as unfit to perform safety-sensitive jobs in its
8 facility. Id. Because the plaintiff presented no evidence that
9 the category of jobs the defendant regarded the plaintiff as unable
10 to perform at its facility was "roughly equivalent to a class or
11 broad range of manufacturing jobs that represent a significant
12 portion of the jobs locally available to [the plaintiff], given his
13 training, knowledge, and abilities[,]" the plaintiff did not show
14 that the employer perceived him to be unfit to perform a broad
15 class of jobs. Id.

16 Similarly, in a District of Connecticut case, the court found
17 that an alleged perception by the employer that the plaintiff could
18 not perform any position with the employer with a certain physical
19 demand rating, was not sufficient to establish a perception of a
20 substantial limitation in the major life activity of working.
21 Beason v. United Techs. Corp., 213 F. Supp. 2d 103, 112-14 (D.
22 Conn. 2002), aff'd, 357 F.3d 271 (2d Cir. 2003). Without more, the
23 employee did not show that the employer perceived him to be limited
24 in "a wide range of employment options within the employee's
25 field." Id. at 113 (internal quotation omitted). Because the
26 employee did not present "sufficient evidence that the defendant
27 perceived [the employee's] impairment to substantially limit his
28 ability to perform a number of jobs utilizing similar training,

1 knowledge, skills or abilities, within the geographical area to
2 which he has reasonable access," and presented no evidence of "the
3 general employment demographics and/or of recognized occupational
4 classifications to indicate that he was perceived as precluded from
5 performing a broad range or class of jobs in the geographic area to
6 which he had access and which required similar abilities and
7 qualifications[,] " the court granted summary judgment to the
8 employer on the plaintiff's "regarded as" claim. Id. at 114-15
9 (internal quotation and brackets omitted).

10 As in Beason and in Walz, plaintiff here simply relies on his
11 assertion that Godfrey perceived him as unfit to perform sedentary
12 jobs with defendant. He presents no evidence as to the relevant
13 labor market in the relevant geographic area. He presents no
14 evidence regarding jobs with similar training, knowledge, or
15 skills, or evidence of employment demographics and occupational
16 classifications. Thus, he fails to create a genuine issue of fact
17 as to defendant's perception that he was substantially limited in
18 the major life activity of working.

19 Plaintiff's alternative argument regarding defendant's
20 perception of plaintiff being a drug user or having a drug problem,
21 is also unavailing. Even if plaintiff accurately describes
22 defendant as being "over-focused" on his intended use of medical
23 marijuana and thus perceived him as possessing a drug problem, this
24 does not, without more, create an issue of fact as to whether
25 defendant perceived plaintiff as being substantially limited in the
26 performance of a broad class of jobs and thus, substantially
27 limited in the major life activity of working. Plaintiff's
28 assertion in this regard also, by itself, does not show that

1 defendant perceived plaintiff to be substantially limited in any
2 other major life activity on which plaintiff relies. Thus, I
3 recommend concluding that plaintiff fails to create a material
4 issue of fact as to his "regarded as" claim. I further recommend
5 that defendant's motion as to this claim be granted.

6 C. Record of Disability

7 To have a record of an impairment that substantially limits a
8 major life activity means to have "a history of, or [have] been
9 misclassified as having, a mental or physical impairment that
10 substantially limits one or more major life activities." 29 C.F.R.
11 § 1630.2(k); see also Heisler v. Metropolitan Council, 339 F.3d
12 622, 630 (8th Cir. 2003) ("[T]he record must be of an impairment
13 that substantially limits a major life activity.").

14 Defendant first argues that because, prior to the initiation
15 of litigation, it had no medical records of plaintiff's, it cannot
16 have terminated plaintiff because of a record of disability.
17 Relevant EEOC comments eliminate this argument. At the time the
18 EEOC adopted rules for interpretation of the ADA, it provided
19 explanations for certain rules in the Federal Register. In
20 explaining 29 C.F.R. Part 1630, and in particular 29 C.F.R. §
21 1630.2(k), the EEOC stated, in relevant part, that "[t]here are
22 many types of records that could potentially contain this
23 information, including but not limited to, education, medical, or
24 employment records." 56 Fed. Reg. 35726, 35742 (1991) (found at
25 1991 WL 304269). That defendant had no actual medical records does
26 not, in and of itself, entitle defendant to summary judgment on
27 plaintiff's "record of" claim.

28 As defendant notes, a record of an impairment is not a record

1 of a disability unless the record shows that the impairment
2 substantially limits a major life activity. E.g., Dupre v. Charter
3 Behavioral Health Sys. of Lafayette, 242 F.3d 610, 615 (5th Cir.
4 2001) ("not only must Dupre demonstrate that she has a record of an
5 injury or impairment, but the evidence must show that her
6 impairment limited a major life activity. . . . The screening form
7 made only vague mention of the existence and treatment of Dupre's
8 back problem and did not indicate whether or how this problem
9 substantially limited any major life activity. . . . Dupre did not
10 have a record of a disability within the meaning of 42 U.S.C. §
11 12102(2)(B).") (citations omitted).

12 I agree with defendant that no record of any kind available to
13 defendant prior to its termination decision showed that plaintiff
14 was ever disabled within the meaning of the statute because no
15 record suggests that plaintiff was substantially limited in any
16 major life activity. While the records indicate that plaintiff had
17 certain knee and neck impairments for which he required narcotic
18 pain medication, they do not indicate that those impairments caused
19 a substantial limitation in any major life activity. I recommend
20 concluding that plaintiff fails to create a material issue of fact
21 regarding defendant terminating him because of a "record of
22 disability." I further recommend that defendant's motion on this
23 claim be granted.

24 Because I conclude that plaintiff fails to create an issue of
25 fact on his actual disability, regarded as, and record of claims,
26 I recommend that all of his ADA claims be dismissed. As noted
27 earlier, plaintiff must first establish that he is a qualified
28 individual with a disability to prevail on an unlawful discharge

1 claim under the ADA. Humphrey, 239 F.3d at 1133. This is also
2 required of plaintiff to prevail on an ADA reasonable accommodation
3 claim. See 42 U.S.C. § 12112(b)(5)(A) (employers have duty to
4 provide reasonable accommodation to an otherwise qualified
5 individual with a disability); see also Morton v. United Parcel
6 Serv., 272 F.3d 1249, 1261 (9th Cir. 2001) (threshold requirement
7 in ADA claims is that the employee is a qualified individual with
8 a disability).

9 II. Rehabilitation Act and Oregon Claims

10 A. Rehabilitation Act Claim

11 Constructions of the ADA that limit its definition of
12 "disability" apply with equal force to the Rehabilitation Act and
13 the standards used to determine whether an act of discrimination
14 violated the Rehabilitation Act are the same standards applied
15 under the ADA. See 42 U.S.C. § 12201(a) ("Except as otherwise
16 provided in this chapter, nothing in this chapter shall be
17 construed to apply a lesser standard than the standards applied
18 under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et
19 seq.) or the regulations issued by Federal agencies pursuant to
20 such title"); 29 U.S.C. § 794(d) ("The standards used to determine
21 whether this section has been violated in a complaint alleging
22 employment discrimination under this section shall be the standards
23 applied under [the ADA]"); Toyota Motor Mfg. v. Williams, 534 U.S.
24 184, 193-94 (2002) (noting that "Congress drew the ADA's definition
25 of disability almost verbatim from the definition of 'handicapped
26 individual' in the Rehabilitation Act"); McLean v. Runyon, 222 F.3d
27 1150, 1153 (9th Cir. 2000) ("In determining whether a federal
28 agency has violated the Rehabilitation Act, the standards under

1 [the ADA] apply.").

2 Given my conclusion regarding plaintiff's ADA claims, I
3 recommend that defendant's motion as to the Rehabilitation Act
4 claim be granted.

5 B. Oregon Claim

6 Generally, claims under Oregon's disability discrimination
7 statutes are subject to the same analysis as that used in ADA
8 claims. E.g., Spicer v. Cascade Health Servs., Inc., No. CV-03-
9 6377-TC, 2005 WL 2211097, at *5 (D. Or. Sept. 9. 2005) ("Oregon
10 laws on disability discrimination are to be construed in a manner
11 consistent with the federal ADA.").

12 Plaintiff correctly notes, however, that the Oregon Court of
13 Appeals, in a case issued in 2005, held that the Oregon statute's
14 definition of "disability" does not take into account mitigating or
15 corrective measures, contrary to what Sutton held for the ADA.
16 Washburn v. Columbia Forest Prdts., 197 Or. App. 104, 110-11, 104
17 P.3d 609, 613, rev. allowed, 339 Or. 156, 119 P.3d 224 (2005).
18 Thus, to the extent any of my conclusions regarding plaintiff's
19 allegations of substantial limitations in a major life activity are
20 based on plaintiff's use of corrective or mitigating measures, they
21 may not control the outcome of plaintiff's Oregon claim.

22 While I agree with plaintiff regarding the current state of
23 Oregon law as interpreted by the Oregon Court of Appeals, my
24 reliance on Sutton's holding regarding mitigating or corrective
25 measures is limited only to the knee brace in the context of
26 plaintiff's alleged walking limitation. More importantly, as
27 explained in my discussion of that issue, I clearly considered this
28 corrective measure only an alternative basis for rejecting

