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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

