

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ANTHONY R. TUCHER,) CAUSE NO. 1:12-CV-1728 JMS-DML
)
Plaintiff,)
)
v.)
)
KEY BANK, a/k/a KEYBANK, N.A.)
)
Defendant.)

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Anthony R. Tucher, by Counsel, Michael E. Boring, respectfully responds to the Motion of Defendant Key Bank, a/k/a KEYBANK, N.A. for Summary Judgment filed herein on September 30, 2013 and requests that the Court deny the Motion on the grounds that there are multiple genuine issues in this case which establish that Defendant is not entitled to Summary Judgment as a matter of law.

I. INTRODUCTION

Defendant, KeyBank, N.A. (hereinafter referred to as “Defendant”) discriminated and retaliated against its former employee, Plaintiff, Anthony R. Tucher, (hereinafter referred to as “Plaintiff”). Defendant terminated Plaintiff’s employment, due to Plaintiff’s disability and age and further retaliated against him in response to filing of an internal complaint against two (2) of Plaintiff’s superiors.

Plaintiff denies that he failed to meet Defendant’s legitimate expectations. Plaintiff further denies that he engaged in inappropriate sexual misconduct, disrespected his staff and co-workers, failed to report to work on time, and interfered with the performance of other employees of

Defendant or that he violated Defendant's policies in any other manner. Plaintiff can provide evidence that his termination was related to his age, disability, and retaliation. Plaintiff requests that Defendant's Motion for Summary Judgment be denied in its entirety.

II. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

~~Anthony Tucher (hereinafter referred to as "Tony"), is 50 years old and suffers from severe heart disease. He spent over 27 years working in the banking industry. Tony loved his work and excelled at it generally exceeding performance goals wherever he was employed (Pl. Dep. p. 13:1-15). From 1985-2003, Tony was employed with Fifth Third Bank. While at Fifth-Third, he was a top performer and eventually~~ was promoted to Vice President and branch manager (Pl. Dep. p. 13:1-15). In 2003, Tony left voluntarily for a better opportunity at Greenfield Banking Company (Pl. Dep. p. 14:10-18). Tony was hired by Greenfield Banking to make changes in its lending process and develop new business (Pl. Dep. p. 15:10-16). After voluntarily leaving Greenfield Banking Company, Tony continued in the banking industry, working for JP Morgan Chase, Stock Yards Bank, Home Bank, and Wachovia (Pl. Dep. pp. 20-28). Tony left all of these positions voluntarily and was never terminated. *Id.* In early 2009 while at Wachovia, Tony experienced a life-changing event when he suffered a type of severe heart attack often referred to as a "widow-maker" (Pl. Dep. p. 51:11-20). Tony was already seeking alternative employment due to the stressful environment, and had already begun the application process with Key Bank; ~~however, based on his doctor's advice, he decided to pursue this new job more seriously. *Id.* After interviewing with Lisa Hampton and Nick Bontrager, Tony was offered the position, and~~ he began his employment with Defendant as a Key Center Manager on June 8, 2009 at its Beech Grove, Indiana branch (Pl. Dep. p. 55:12-15). The Beech Grove branch was referred to as a "de

novoo branch (Pl. Dep. p. 58:5-7). This meant that the branch was brand new, with no existing book of business (Pl. Dep. p. 58:8-10). In the beginning, Lisa Hampton (hereinafter referred to as oHamptono) was the Area Retail Leader for Plaintiffo branch and Nick Bontreger (hereinafter referred to as oBontregero) was the District Retail Leader over Plaintiffo branch. (Pl. Dep., p. 55:16-23; p. 59:3-14). Tony believed that his working relationship with Lisa Hampton was good at first (Pl. Dep., p. 60:14-17). ~~He worked extremely hard during the first six months of his employment, working six days a week, every hour that the branch was open(Pl. Dep. p.62:2-6). As stated before, Tony was under doctoro orders to lower his stress level due to his recent heart attack(Pl. Dep. p.51:11-18). So, in December after the branch was opened and running successfully, Tony approached Lisa to ask to take his vacation time. She declined his request in spite of his condition and the fact that there was adequate coverage in the branch(Pl. Dep. p.61:7-17).~~

In April of 2010, Brian Earley(hereinafter referred to as oEarleyo), became the new Area Retail Leader over all ode novoö branches and Lisa took another position at KeyBank(Pl. Dep. p. 59:15-23). ~~It was also in or around this time, that Tonyo doctor recommended that he take leave from work given the stress that it was clearly causing him (Pl. Dep. p.96:7-9). Tony put in for leave and took from April 2010 June 2010 to attend to his health. Id. However, upon his return, it was clear that neither Earley nor Bontreger was willing to extend reasonable accommodations for Tonyo disability (Pl. Dep. p.118:17 p119: 14). Specifically, Tony came back from leave with a doctoro note saying he was limited to 40 hours per week. Id. However, they mad it clear to Tony that would refuse to accommodate this limitation and required Tony to continue working 50+hours per week(Pl. Dep. p114:10-19). It further appeared that Earley held Mr. Tucher to completely different standard than he did others similarly situated. Id. In addition, both Earley~~

~~and Bontreger created an atmosphere of intimidation in the office(Pl.Dep. p.72:4-14; p. 76:8-16). Earley issued Tony a Level One Performance Improvement Plan on November 7, 2011 (Earley Aff. pp. 14-15). Earley issued Plaintiff a Second Level Performance Improvement Plan subsequently. Tony disputes the issues raised in both PIPs(Pl.Dep. p.189:11-15 and Open Door Policy Resolution Form). Strangely, Earley issued the Second Level PIP on a day when Earley was to attend two meetings, along with Tony, with potentially lucrative clients(Open Door Policy Resolution Form). Early never showed for the first appointment and was late for the second, indicating he had only fifteen (15) minutes with the client, which potentially lost the branch money. *Id.* Also, on this same day, Tony was dealing with extreme fatigue from his heart disease which caused him to need to take breaks(Pl.Dep. p109:7-21). He made it very clear to Brian that he was dealing with these complications, was extremely weak, and needed to take his meds immediately. *Id.* However, Brian refused to allow him to leave. *Id.* When he was finally allowed, he was only given time to grab lunch and return, which did little to relieve the stress and risk to his heart (Pl.Dep. p.9-14). In April of 2011, after several similar issues with both Earley and Bontreger, Tony filed an internal complaint against both of them (Pl.Dep. p.69:18-23). In it, Tony disputed the substance of the Second Level PIP filed prior to this date by noting that his productivity was over 100% year to date and that his office was showing improvement and was near the top of the de novo offices in Indiana. (Open Door Policy Resolution Form). Tony also stated that he had identified a pattern of behavior that had been going on for quite some time and that there was clear favoritism and inconsistency in how employees are treated. *Id.* In his deposition, Tony stated that he believes that Brian and Nick used PIPs and created issues as pretext to get rid of him because of his disability and age(Pl.Dep. p.247:7-17). He expressed concern over retaliation against him as a result of filing the Open Door Policy Resolution filing.~~

~~Id. After the filing of the Open Door Dispute, the Second Level PIP was ultimately removed from Plaintiff's personnel file (Pl. Dep. p. 69:18-23). In Plaintiff's opinion the Second Level PIP was removed because his claims that Earley had a personal issue with him were substantiated. Id.~~

In September of 2011, Lisa Hampton, once again became ARL over the Beech Grove branch, replacing Brian Earley, who moved to another position (P. Dep. p. 67:21-25). Tony states that Lisa appeared to have little authority, and that more specifically, he had the impression that she was stuck between Tony and Nick Bontreger (p. 68:14-22). In her affidavit, Lisa Hampton sites reasons that she believes Tony was terminated. Among them is her claim that she told Tony he was not allowed to stay after-hours at the branch (Hampton Aff.). Tony disputes that Hampton told him he was not to stay late, instead, she merely discouraged the practice (Pl. Dep. p. 100:7-8). Furthermore, Tony's occasional late hours at the branch were due to the expectations that were placed on him and it was necessary in order to complete his work (Pl. Dep. p. 100:5-11). ~~As to the alleged issues with his performance, Tony disputes the performance goal numbers (Pl. Dep. p. 189:6-15). Regardless, judged in comparison with other branches, Tony and Beech Grove were doing well. (Pl. Dep. p. 79:8-21).~~

~~In his deposition, Tony points to several instances of unequal treatment for others similarly situated. Specifically, Tony points to the preferential treatment received by Branch manager Kelly Gerling, Eric Vohls and a manager named Laurie who managed a branch in Hamilton County (Pl. Dep. p. 125-p127). Despite having number that were worse than Beech Grove's, consistent issues with attendance and tardiness, these managers received preferential treatment and, to Tony's knowledge, did not suffer consequences and were not terminated. None of these managers suffers from disability. (Pl. Dep. p. 124 p.127).~~ Key Bank also discriminated against Tony in pay as well. Specifically, everyone in the Beech Grove branch received a pay

increase in 2009 and 2010 which was related to the overall branch's performance, except Tony (Pl.Dep. p.145:5-12). ~~Tony observed discrimination against other individuals in his protected class as well.~~ He states that a branch manager named Gary Guevitz, who was ~~a disabled individual~~ in his 60s was treated unequally and eventually was forced out of his position(Pl.Dep. p.172-p.173).

On March 13, 2012, Plaintiff met with Lisa Hampton and she gave him another PIP, along with a severance agreement for his consideration and signature. Tony began to suffer from issues related to his heart disease, and on March 15, 2012, Tony provided Lisa Hampton with a doctor's note ~~indicating that he needed to be on medical leave effective immediately and until further notice(Pl.Dep. 116:16-23).~~ However, ~~he was denied this request for leave. *Id.* Soon after this, Tony was called into a meeting with Johnny Winston and Yolanda Jackson where he was placed on indefinite leave pending an investigation. (Pl.Dep.) Sometime after April 6, 2012, Mr. Tucher was informed that he had been terminated. Tony adamantly disputes the accusations raised by Key Bank regarding his violation of the company's code of professional conduct.~~ Specifically, he denies making any racially discriminatory or offensive comments(p. 198:16-25 and p.199:1-13). Finally, he denies any incident involving an employee's water bottle or making any sexually offensive comments or actions (Pl.Dep. p.196:3-25 and p.197:1-25).

III. ARGUMENT

A. Summary Judgment Standard

The purpose of summary judgment is to end litigation when no issue of material fact exists and when issues in the case may be determined as a matter of law. Art Country Squire,

L.L.C. v. Inland Mortgage Corp., 745 N.E.2d 885 (Ind. Ct. App. 2001); LeBrun v. Commer, 702 N.E.2d 754 (Ind. Ct. App. 1998). Courts must exercise caution to ensure parties of their right to a fair determination of genuine issues. Art Country Squire, L.L.C., 745 N.E.2d at 891. Summary judgment is inappropriate when there is a genuine issue of material fact, or when the moving party is not entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Greathouse v. Armstrong, 616 N.E.2d 364 (Ind. 1993). The burden is on the party seeking summary judgment to negate the existence of any genuine issue of material fact. Art Country Squire, L.L.C., 745 N.E.2d at 891; Time Warner Entertainment Company, L.P. v. Whiteman, 802 N.E.2d 886 (Ind. 2004); Winkler v. V.G Reed & Sons, 638 N.E.2d 1228, 1235 (Ind. 1994). All facts and reasonable inferences drawn from those facts are construed in the light most favorable to the nonmoving party. Butler v. City of Peru, 733 N.E.2d 912, 915 (Ind. 2000); Time Warner Entertainment, 802 N.E.2d at 895. In reviewing the nonmovant's response, the court must consider as true the facts set forth in the nonmovant's affidavits and liberally construe discovery in nonmovant's favor. Art Country Squire, L.L.C., 745 N.E.2d at 891.

B. Plaintiff Tony Tucher Does Suffer From a Disability As Defined by the Americans with Disabilities Act.

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in employment. To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA and ADAAA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such

impairment, or a person who is perceived by others as having such impairment. The ADA does not specifically name all of the impairments that are covered. Title I of the ADA requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. *Americans with Disabilities Act of 1990 (ADA)*, 42 U.S.C. §§ 12101-12213

In *Powdertech, Inc. v. Joganic* that there are two (2) dispositive issues in determining whether a claimant has a cognizable claim of discrimination under the ADA: (1) whether s/he has a "disability" under the ADA; and (2) whether the employer's proffered, nondiscriminatory reason for terminating the claimant was a "pretext." *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1256 (In.Ct.App. 2002). Mr. Tucher's disease meets the criteria of "disability" under the ADA, and as amended by the ADAAA. ~~Specifically, he is a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment. Mr. Tucher testified, as set out above, that his heart condition required him to take medical leave, required open heart surgery, and was continuous and ongoing(Pl.Dep. p. 250:4-10). Further, Tony's heart condition is well documented(Pl.Dep. p.252-253).~~

C. Plaintiff Denies He Failed To Meet The Legitimate Expectations Of Defendant

Plaintiff wholly denies and disputes that he made any comments or acted in any way that would be deemed contrary to Defendant's Professional Conduct policy, Harassment policy or any other policy of Defendant. Plaintiff, in his deposition, specifically denies that he made any bigoted comments or that he spoke or acted in any way that could be construed as sexually harassing or inappropriate.

~~Further, Plaintiff disagrees with the numbers shown to represent his performance. Plaintiff is aware that some of the figures used are no longer utilized in measuring performance as they were shown to not provide an accurate measure. Plaintiff's branch performed as well or better than other branch under similarly situated KCMs. The only difference between Plaintiff and similarly situated KCMs is that Plaintiff was disabled.~~ Thus, given the Plaintiff's testimony and other related evidence, a genuine issue of material fact exists which precludes the granting of Summary Judgment.

D. Defendant Failed to Reasonably Accommodate Plaintiff

In a reasonable accommodation case, "the plaintiff 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 the employment position." [Basith v. Cook County, 241 F.3d 919, 927 \(7th Cir. 2001\)](#). If Plaintiff can establish that, he must then show that Defendant failed to reasonably accommodate his disability. *Id.* Plaintiff then survives summary judgment unless Defendant can demonstrate "that the accommodation would impose an undue hardship on the operation" of their business. [42 U.S.C. § 12112\(b\)\(5\)\(A\)](#).

As set out above, on or about June of 2010, Plaintiff provided Bontrager and Earley with a note from his treating physician which stated that he was available to work forty (40) hours per week due to Plaintiff's adverse side effects of his heart condition (Pl.Dep. p.118:17-p119: 14). . Defendant was aware previously aware of Plaintiff's heart condition, as his initial first interview was postponed due to his suffering a heart attack. Upon his return, it was clear that neither Earley nor Bontrager was willing to extend reasonable accommodations for Tony's disability (Pl.Dep. p.118:17-p119: 14). Moreover, Tony was required to continue working 50+hours per week(Pl.Dep. p114:10-19). ~~Further, both Earley and Bontrager failed to further discuss the reasonable accommodations requested by Plaintiff and ordered by his physician with Plaintiff, after she was provided the physicians order. Id.~~

The Seventh Circuit has made clear that "an employee's request for reasonable accommodation requires a great deal of communication between the employee and employer." [Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 \(7th Cir. 1996\)](#). "The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." [29 C.F.R. § 1630.9; Bultemeyer, 100 F.3d at 1285-86](#). While the breakdown in the interactive process itself is not enough for employer liability, a plaintiff can prevail if he can show that this breakdown led to the employer's failure to provide a reasonable accommodation.

In viewing the facts in the light most favorable to Plaintiff, it would be difficult to see how the accommodations his physician recommended would have been overly burdensome to the Defendant. Defendant has failed to establish that shorter shifts and occasional breaks would have created such a burden.

E. Plaintiff Was Not, In Fact, Discharged for Policy Violations

It should be for the finder of fact to determine the truthfulness of a particular witness or witnesses. ~~In the case at hand, it appears that other motivations may have lead to certain witnesses creating a false complaint in order to compromise Plaintiff's employment. Specifically, it's clear, by reading his statement to Yolanda Jackson, that Tod Higbee didn't like Plaintiff. Likewise, Ms. Morales and Mr. Salazar also made negative statements about Plaintiff's character and their feelings toward Plaintiff. Each of the three (3) of them site specific instances where Plaintiff had made them upset or angry. Additionally, according to each of their respective statements given to Yolanda Jackson, these three (3) individuals spoke privately, on more than one occasion, regarding the alleged incident where they claim Plaintiff put his penis into another employee's water bottle. It is Plaintiff's belief that Morales, Higbee and Salazar concocted a lie in order compromise Plaintiff's position with Defendant and therefore potentially put Higbee and Salazar in line to be promoted. Salazar specifically states that he was seeking to move up within the company, in fact, Plaintiff refers to suggesting Salazar for a CSM position. Plaintiff does not believe there was a thorough investigation into the alleged incident and further believes that had there been, the claims would have been found to be unsubstantiated. This alleged incident was a pretext to terminating Plaintiff due to his disability and age.~~

F. Defendant's Reliance on the Same Actor Defense is Misplaced and not Applicable to the Facts of this Case.

Plaintiff's circumstances are different than those in Defendant's cited case ~~given that Plaintiff's condition turned out to be far worse than previously thought. That Plaintiff was~~

~~required to take two (2) months of medical leave between April 2010 and June 2010.~~

~~Plaintiff believes that he came to be viewed as a liability to Defendant.~~ Defendant not only terminated Plaintiff's employment but failed to give him reasonable accommodations throughout the time he was employed there. This is not simply an issue of the "same actor" carrying out the hiring and firing, Plaintiff has alleged other types of adverse employment action than simply termination.

G. Plaintiff Was Also Discriminated Against Due to His Age

Plaintiff has submitted sufficient evidence to establish that there is a genuine issue of material fact regarding his age discrimination claim. While Plaintiff acknowledges that there was no direct evidence of age discrimination in his case, he has submitted sufficient evidence to establish it by the indirect method. In order to establish a discrimination claim by the indirect method, Plaintiff must first make a prima facie case that 1) he is a member of a protected class, 2) he performed reasonably on the job in accord with his employer's legitimate expectations, 3) despite his reasonable performance, he was subjected to an adverse employment action, and 4) similarly situated employees outside the protected class were treated more favorably by the employer. *Wade v. Lerner New York, Inc.*, 243 F.3d 319, 322(7th Cir. 2001). If Plaintiff's evidence is sufficient to make a prima facie case of discrimination, then the burden shifts to the defendant to rebut by articulating a legitimate, nondiscriminatory reason for terminating him. *Id.* The burden then shifts back to plaintiff to demonstrate that the stated reason for termination was pretextual. ~~Mr. Tucher has submitted evidence that disputes Key Bank's claims that he was not meeting its legitimate expectations. He has also submitted evidence that Key Bank's expectations were not, in fact, legitimate. Furthermore, the statement of facts set out above~~

~~demonstrate that he suffered an adverse employment action and that a similarly situated younger person was treated more fairly.~~ Given that a genuine issue of material fact exists, the Court cannot grant Summary Judgment.

IV. CONCLUSION

Defendant has wholly failed in its burden to prove that there is no genuine issue of material fact in this matter. Specifically, plaintiff has provided sufficient evidence that Defendant discriminated against him and that his termination was retaliatory in nature and not a result of his violation of Defendant's policies. Because of his condition and the medications he was taking for such condition, his ability to function normally was compromised as was his ability to control his mood. He was often felt lethargic and generally ill. Plaintiff felt that his condition caused him to be looked upon as a liability. As is clear from the facts above, there was a pattern of conduct by his managers that became more severe as Plaintiff requested additional accommodations. Furthermore, Plaintiff cited several examples of instances when he was refused accommodations for his conditions. Plaintiff would respectfully request that Defendant's Motion for Summary Judgment be denied in its entirety and that Defendant take nothing by way of filing such Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on this ___ day of November 2013. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's filing system.

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