

violation of the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1995) (“ADA”). Following discovery in the case, Wal-Mart has moved for summary judgment in its favor. The essential facts of the case on the summary judgment record are as follows.

The plaintiff Crouse was diagnosed with adrenoleukodystrophy¹ in 1982 and by 1992 his condition had deteriorated to the point that he was unable to walk without crutches. Crouse was awarded Social Security disability benefits beginning in 1993, and did not work between 1992 and 1997.

On June 28, 1999, Crouse completed an application with Wal-Mart for a job at a retail store—called a “SuperCenter”—that Wal-Mart planned to open in Galax, Virginia. On July 13, 1999, Crouse reported to the Elks Lodge in Galax, along with numerous other applicants, for interviews. During Crouse’s interview, he discussed his qualifications for a cashier position with Pam Haley, a co-manager in Wal-Mart’s grocery department.

After the interview, Haley made a notation that she recommended Crouse for a “people greeter” position and placed her notes from the interview in a stack with others

¹ Adrenoleukodystrophy is a rare inherited disease occurring in young men in their twenties that damages the myelin sheath around nerve fibers. *See* The Merck Manual Home Edition, *Multiple Sclerosis and Related Disorders*, ch. 68, (1995), available at http://www.merck.com/pubs/mmanual_home/sec6/68.htm. When the myelin sheath is damaged, nerves are unable to conduct impulses properly, which may cause muscle spasms. *See id.*

whom she recommended for that position. However, Crouse denied in his deposition that he spoke with Haley about the people greeter position and further stated that he did not wish to be hired for that position.

Crouse testified in his deposition as follows concerning the people greeter position:

Q. At any point, did you and Ms. Haley discuss a people greeter position?

A. No.

Q. Never mentioned it?

A. Never mentioned it.

.....

Q. You have seen an interview comment sheet that Ms. Haley prepared?

A. Yes.

Q. There is a reference in there to the greeter position?

A. Yes.

Q. But, is it possible that you just don't remember or you know for sure that there was no discussion about the greeter position?

A. I know for sure that there wasn't nothing said about it because I didn't want that job.

....

Q. Did you tell the EEOC that you applied for the people greeter job?

A. No; I didn't apply for the people greeter.

Q. But, did you tell the EEOC that you applied for the people greeter job?

A. No. No. Beverly Taylor thought I would be good for that position and that is how it got in there.

Q. Did you tell Beverly Taylor that you applied for the people greeter job?

A. No; I didn't even want the people greeter. I don't know how it got in there.

(Crouse Dep. at 142, 144, 201-02.)

In response to the defendant's motion for summary judgment, Crouse submitted an affidavit in which he stated:

1. When I applied for a job at Wal-Mart in the summer of 1999, I was willing to take any position which might be offered to me.

2. I did not prefer the people greeter job, but I would have taken it if offered to me.

3. I told the EEOC I would have taken another kind of job, other than a cashier, if it was offered to me.

(Crouse Aff. at ¶¶ 1-3.)

Prior to submitting his application to Wal-Mart, Crouse had sought the aid of Virginia Department of Rehabilitation to find employment. Beverly Taylor served as his job placement counselor. After his initial interview with Wal-Mart, Crouse requested that Taylor provide Wal-Mart with a form that listed his physical limitations and that she offer to provide assistance with Crouse's salary in accordance with the department's "On the Job Training" ("OJT") program. In this instance, Taylor offered to provide half of Crouse's wages over a period of 320 hours, if Wal-Mart would hire him.²

Wal-Mart contacted Crouse in August to return for a second interview. Crouse was given an "Orion" test³ and told that he would be contacted if his services were needed. Wal-Mart never contacted Crouse again.

When it was apparent that Crouse would not be hired, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that Wal-Mart had

² Crouse contends that Taylor told him that he was not hired because of his disability. (Crouse Dep. at 111-12.) However, Taylor testified that she never spoke with anyone from Wal-Mart after she offered the OJT and that it was Crouse who had told her that he was not hired because of his disability. (Taylor Dep. at 25-26, 31-32.) Since Crouse would not be able to testify to this hearsay and Taylor denies it, I will not consider this remark for the purposes of this motion. *See* Fed. R. Evid. 802; Fed. R. Civ. P. 56(e); *Greensboro Prof. Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

³ Neither a description of the Orion test nor the plaintiff's results exist in the summary judgment record.

not hired him because of his disability. The EEOC found that Wal-Mart had discriminated against Crouse and this action was thereafter commenced.

Wal-Mart's motion for summary judgment has been briefed and argued and is ripe for decision.

II

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an

important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

In opposing summary judgment, the nonmoving party must “set forth such facts as would be admissible in evidence.” Fed. R. Civ. P. 56(e). Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass’n v. City of Greensboro*, 64 F.3d at 967.

Moreover, the court may disregard an affidavit that is inherently inconsistent with the witness’ deposition testimony. *See Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 975-76 (4th Cir. 1990); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) (“A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff’s testimony is correct.”).

The ADA prohibits discrimination by an employer “against a qualified individual with a disability because of the disability of such individual in regard to . . . hiring.” 42 U.S.C.A. § 12112(a). A “qualified individual with a disability” is a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual . . . desires.” 42 U.S.C.A. § 12111(8). The court may consider the employer’s judgment and a written description of the job as evidence of its essential functions. *See id.*

In order to make a prima facie case under the ADA for discrimination in hiring, a plaintiff must show:

(1) that he has a disability under the ADA; (2) that he sought or applied for one or more positions; (3) that he was otherwise qualified for the position(s) in question; and (4) that he was denied the position(s) about which he complains under circumstances giving rise to an inference of disability discrimination.

Ihekwe v. City of Durham, 129 F. Supp. 2d 870, 878 (M.D.N.C. 2000).

The defendant does not dispute that Crouse suffers from a covered disability and that he sought a job at the new store in Galax. However, Wal-Mart contends that summary judgment should be granted in its favor because Crouse is not a “qualified individual” within the meaning of the ADA.

Based on the uncontroverted evidence provided by Wal-Mart, I find that Crouse is not a qualified individual and therefore has failed to establish a prima facie case of discrimination.

Wal-Mart has submitted affidavits from its employees as well as a document entitled “Wal-Mart Stores Matrix of Essential Job Functions” (the “Matrix”) that specify the job requirements of the cashier position. The job requires lifting of fifty pounds maximum with frequent lifting and carrying of objects weighting up to twenty-five pounds, as well as bending and squatting. According to Ramona Helton, Wal-Mart’s training coordinator, all cashiers at Wal-Mart, regardless of their assigned

department, are required to meet this criteria because a customer may bring any item to any register in the store.

Cindy Bodenheimer, a physical therapist working under the direction of David Meyer, M.D., evaluated Crouse's physical capacity on December 1, 1998. She determined that Crouse could lift between ten and twenty pounds and he had unlimited ability to stand or sit. She also stated that Crouse could not squat, carry any objects or crawl, and could only stoop occasionally. She concluded that Crouse was limited to light work, which entails lifting twenty pounds occasionally and ten pounds frequently.

Douglas P. Williams, M.D., a neurologist, performed an independent medical examination of Crouse on behalf of Wal-Mart on March 14, 2002. Based on a review of the plaintiff's medical records as well as a physical examination, Dr. Williams was of the opinion that Crouse's lifting ability was limited to five pounds or less and that he was unable to stand without risk of falling, could not pick up objects without becoming unstable, and could not stoop or squat. Dr. Williams concluded that because of these limitations, Crouse was unable to perform the duties of a cashier at Wal-Mart.

Under the ADA, the employer's determination and written description of the essential functions of the job are entitled to consideration. In this case, Wal-Mart submitted in detail the essential functions for the cashier position, including medium range lifting, bending and squatting. The medical reports clearly establish that Crouse

is unable to perform these tasks. Consequently, because he cannot perform the essential functions of the job, Crouse is not a qualified individual unless he can perform these functions with a reasonable accommodation.

Under Rule 56, the party opposing summary judgment must submit affidavits that are based upon “personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to them matters stated therein.” Fed. R. Civ. P. 56(e). Crouse has submitted an affidavit in which he contends that Wal-Mart could have reasonably accommodated him.

I believe that Wal-Mart could have accommodated my physical disabilities and allowed me to work as a cashier by letting me work in electronics, at the cigarette counter, or in the automotive department. In these areas, the number of customers would be fewer, and I could have used the scanner gun rather than lift heavy items.

(Crouse Aff. at ¶ 5.)

In response, Wal-Mart submitted a supplemental affidavit from Helton that all cashiers have the same essential functions, regardless of the department to which they are assigned. In her affidavit, Helton stated as follows:

Customers may bring all of their purchases in the SuperCenter to a cashier in any department, including automotive or electronics. In addition, there are items which weigh 25 lbs. or more in virtually every department where there are cash registers. Accordingly, a cashier must be able to satisfy lifting and other physical requirement set forth in the Matrix, regardless where the cashier is located because it is the cashier’s obligation to scan and bag each item of purchase, many of which weigh

25 lbs. or more. Cashiers are also often required to lift items of merchandise out of customers [sic] shopping carts, regardless of the department in which the Cashier is located, and bending and squatting are essential functions of the job, regardless of the location of the cashier.

(Helton Supp. Aff. at ¶ 10.)

I find that Crouse is not a qualified individual, because he has not shown that he could perform the essential functions of the cashier position with or without reasonable accommodation. The existence of the reasonable accommodation relied upon by Crouse is supported only by his affidavit.⁴ Under Rule 56, affidavits based merely upon personal belief are inadmissible. *See* Fed. R. Civ. P. 56(e); *Saunders v. Sumner*, 366 F. Supp. 217, 219 (W.D. Va. 1973) (“statements in affidavits as to opinion or belief are of no effect.”). Wal-Mart’s affidavits provide uncontested evidence that no reasonable accommodation exists that would allow Crouse to perform the essential functions of the cashier position.

⁴ Crouse also submitted an affidavit from Paulette Hatfield in which she states that she saw a man working as a cashier at Wal-Mart in Galax “sometime in the winter months of 2001-2002,” who used crutches. (Hatfield Aff. at ¶ 1.) This affidavit does not provide any information concerning the limitations of the individual on crutches—in other words, whether he could perform the essential functions of the cashier position. Wal-Mart does not contend that Crouse is not a qualified individual because he uses crutches, but because he cannot lift the appropriate weight, bend or squat. Consequently, this affidavit does not create a genuine issue of material fact.

Crouse also argues that Wal-Mart could have reasonably accommodated him by placing him in the people greeter position. However, because Crouse did not apply for the people greeter position, this argument is untenable.

Reassignment is a reasonable accommodation under the ADA. *See* 42 U.S.C.A. § 12111(9)(B) (West 1995). However, this alternative is only available to current employees. *See* 20 C.F.R. pt. 1630, app. § 1630.2(o) (2001). Applicants must be qualified for the job for which they have applied. *See id.* For this reason, Crouse's argument that he could have been "reassigned" to the people greeter position fails.

Moreover, to be protected by the provisions of the ADA, the applicant must have actually applied for the position that is the basis of his discrimination claim. A qualified individual must be able to perform the essential functions of the position that "such individual . . . desires." 42 U.S.C.A. § 12111(8). *See also Sieberns v. Wal-Mart*, 125 F.3d 1019, 1022-23 (7th Cir. 1997) (holding that an applicant is not a qualified individual unless he can perform the essential functions of the position for which he actually applied.).

Crouse unequivocally stated at his deposition that he neither applied for nor wanted to be hired as a people greeter at Wal-Mart. Although Crouse has submitted an affidavit that he would have accepted the people greeter position if it had been offered to him, this claim plainly contradicts his deposition testimony. As a result, his

affidavit is insufficient to allow his case to survive summary judgment. *See Barwick v. Celotex Corp.*, 736 F.2d at 960.

III

For the foregoing reasons, summary judgment will be granted in favor of Wal-Mart. A separate judgment consistent with this opinion will be entered.

DATED: May 23, 2002

United States District Judge