UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RICHARD DUNCAN,	:	
Plaintiff,	:	
v.	:	Civil No. 3:98CV01919(AWT)
TOWN OF BROOKFIELD,	:	
Defendant.	:	

RULING ON SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

The remaining claims of plaintiff Richard Duncan ("Duncan") are that defendant Town of Brookfield (the "Town") harassed him and terminated his employment because of his age and disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (the "ADA"), and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. §§ 46a-58 et seq. ("CFEPA"). The plaintiff's ADA claim is set forth in Count One, the CFEPA disability discrimination claim in Count Two, and the CFEPA age discrimination claim in Count Three. In ruling on the initial motion for summary judgment, the court granted the defendant leave to file a supplemental motion for summary judgment on Counts One and Two limited in scope to the question of whether the plaintiff was disabled within the meaning of the term under the ADA and CFEPA, and on Count Three limited in scope to whether the minimum 40 year old age requirement under the Age

Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., also applies to CFEPA. For the reasons set forth below, the defendant's supplemental motion for summary judgment is being granted as to Count One, and the court declines to exercise supplemental jurisdiction over Counts Two and Three.

I. FACTUAL BACKGROUND

In July 1985, the plaintiff was hired as a custodian in the Brookfield public school system. Sometime thereafter, Duncan left the school system and began working as a Parks/Grounds Maintenance Worker for the Brookfield Parks and Recreation Department. He remained in that position until approximately July 1, 1997. At all relevant times, the plaintiff was a member of Local 136 of the International Federation of Professional and Technical Engineers, and the terms of his employment were governed by a collective bargaining agreement ("CBA") entered into by the Town and Local 136.

When Duncan began working for the Parks and Recreation Department, his supervisor was Frank Young ("Young"). Throughout the period during which Young supervised the plaintiff, Duncan did not receive any disciplinary warnings or actions. Young subsequently resigned and Mark D'Avola ("D'Avola") was hired by the Town as a Grounds Maintenance Supervisor in the Parks and Recreation Department on May 15, 1995, and in that position, D'Avola took over as Duncan's immediate supervisor.

During his period of employment with the Town, Duncan filed for workers' compensation benefits several times as a result of work-related injuries. In or about November 1994, Duncan injured his back while working when he lifted a bag of "ice melt" weighing approximately one hundred pounds. This injury and subsequent re-injuries of his back caused the plaintiff severe pain whereby the plaintiff has received medical treatment and physical therapy for his back problems since that time. As a result of this injury, Duncan's physician imposed bending and lifting restrictions on him, and Duncan was required to work light duty for a limited period of time.

On August 19, 1996, Duncan was involved in an automobile accident. As a result of this accident, Duncan experienced neck and back pain and headaches. His physician gave him a series of injections in his back, placed him on a beta-blocker, and prescribed physical therapy. In addition, his physician restricted him to not lifting more than 15 pounds and to light duty work only for a set period of time. Duncan did not report to work from August 19, 1996 through November 14, 1996. When he completed treatment for the injuries he sustained in the August 19, 1996 accident, in or about November or December 1996, Duncan's treating physician released him to work without any restrictions. From November 26, 1996 through January 31, 1997, Duncan took an additional 24 sick, vacation and personal days off

from work.

In or about March 1997, Duncan was diagnosed with pericarditis, an inflammation around his heart, and with a congenital heart defect manifesting itself as a hole in his heart. Duncan was also diagnosed with a ruptured ear drum in the spring of 1997. On May 5, 1997, Duncan was evaluated by Dr. Thomas Danyliw, who then wrote a letter to Heather Paton, the Town's Personnel Director at the time, informing her of his opinion that, based on his evaluation of Duncan and review of the records of testing performed at Danbury Hospital over the preceding two months, Duncan was "fit for duty for the job of grounds maintainer." (Defs.' Mem. Mot. Summ. J., Ex. P.)

On or about May 1, 1997, Heather Paton wrote a letter to Duncan informing him that his job was "in jeopardy" as a result of his repeated absences. The letter indicated that Duncan had exhausted all of his sick and vacation time as of April 28, 1997, and was considered absent without leave.

On or about May 20, 1997, the plaintiff received a letter from the Town informing him that his position had been eliminated effective July 1, 1997. The stated reason for the elimination of the position was budgetary cutbacks. At the time the decision was made to eliminate Duncan's position, Duncan was thirty-nine years old. As of July 1, 1997, the average age of the Town's employees was just over 45 years old, and 85 of the 121 people

employed by the Town were older than Duncan.

The CBA provides for a grievance procedure. Duncan did not file a grievance when his employment was terminated.

Duncan's position was the only one in the Parks and Recreation Department eliminated at that time. The other full-time, permanent Parks/Grounds Maintenance Worker at that time was Richard Alexander ("Alexander"), who was not laid off. Alexander had been hired by the Town in January 1984, so he had more seniority than Duncan. In 1997, Alexander was seventy years old; he had only one eye and had previously undergone major surgery removing part of one of his lungs.

On December 30, 1997, Lynn Beardsley, Heather Paton's successor as the Town's Personnel Director, wrote to Duncan to offer him a position as a Part-Time Parks Maintenance Worker position with the Town. Three such positions had been created by the Town. The requirements for the position were listed as a high school diploma or the equivalent, the ability to lift 90 pounds, the ability to drive heavy equipment, knowledge of landscaping, basic carpentry skills and basic math skills. Duncan declined this offer of employment; his stated reason for declining the offer was that he could not lift 90 pounds and did not have a high school diploma.

On June 2, 1998, Lynn Beardsley wrote to Duncan to offer him a position, this time one of three Full Time Parks Maintenance

Worker positions that had been created. This position was equivalent to the position Duncan had previously held with the Town. Duncan declined this offer; his stated reason for declining the offer was that he could no longer lift 90 pounds. On June 26, 1998, Lynn Beardsley wrote to Duncan again to inform him that in light of Duncan's documented history of restrictions on his ability to work, the Town would "employ a Workplace Evaluator, to complete a Workplace Analysis, to determine whether there are reasonable accommodations which would enable [Duncan] to perform the essential functions" of the position. (Defs.' Mem. Mot. Summ. J., Ex. U.) Enclosed with this letter was a report which indicated that the plaintiff could fulfill the requirements of the job with a 55 pound lifting restriction, which the Town was able to accommodate. Duncan declined this offer.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). Rule 56 (c) "mandates the entry of summary judgment... 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." See Celotex Corp., 477 U.S. at 322.

When ruling a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248

(internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Id. As the Court observed in Anderson: "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. Thus, only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgement, the court must "assess the record in the light most favorable to the non-movant and... draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant's evidence must be supported by the evidence. "[M]ere speculation and conjecture"

is insufficient to defeat a motion for summary judgment. Stern v. Trs. of Columbia Univ., 131 F.\3d 305, 315 (2d Cir. 1997) (quoting W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993) (quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be granted. The question then becomes whether there is sufficient evidence to

reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

III. DISCUSSION

Three counts remain in the plaintiff's complaint. Count One alleges that the Town harassed Duncan and terminated his employment on account of his disability, in violation of the ADA. Count Two alleges that the Town harassed Duncan and terminated his employment on account of his disability in violation of CFEPA. Count Three alleges that the Town terminated Duncan's employment on account of his age in violation of CFEPA.

A. Count One: Disability Discrimination under the ADA

The ADA prohibits covered employers from discriminating against an otherwise qualified employee "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.A. § 12112(a)(West 1995). See also Stone v. City of Mount Vernon, 118 F.3d 92, 96 (2d Cir. 1997). The statute defines "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. at 96.

> To make out a prima facie case under the ADA, a plaintiff must establish that: (1) his employer is

> subject to the ADA; (2) he was *disabled* within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability.

Giordano v. City of New York, 274 F.3d 740, 747 (2d Cir. 2001)(emphasis added). The court granted the defendant leave to file a supplemental motion for summary judgment on the issue of whether the plaintiff was disabled, within the meaning of that term under the ADA.

Under the ADA, the term "disability" means "(A) a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. § 12102(2)(A),(B),(C)(West 1995)(emphasis added). In turn, the EEOC has defined "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular 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.

29 CFR § 1630.2(j)(1)(2002). The EEOC regulations provide that the following factors should be considered in determining whether an individual is "substantially limited" in a major life activity:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the

> impairment; and
> (iii) The *permanent* or *long term* impact, or the expected *permanent* or *long term* impact of or resulting from the impairment.

29 CFR § 1630.2(j)(2)(2002)(emphasis added); see also Toyota Motor Mfg., Kentucky, Inc. V. Williams, 534 U.S. 184, 196 (2002).

Here, Duncan has failed to show that there is a genuine issue as to whether he is disabled under the ADA. First, by virtue of his own admissions, Duncan fails to create a genuine issue as to whether he was substantially limited in any of his major life activities. Second, he fails to create a genuine issue as to whether he was regarded as having such an impairment. Consequently, because there is no evidence that he had a record of such impairment, Duncan cannot establish the second element of a claim under the ADA.

The plaintiff's November 2001 affidavit (Pl.'s Opp'n to Defs.' Mot. Summ. J., Ex. B) is inconsistent with Duncan's March 1999 deposition testimony (Defs.' Mem. Mot. Summ. J., Ex. C.), and "a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that ... contradicts the affiant's previous deposition testimony." Hayes v. New York City Dep't of Corrections, 84 F.3d 614, 619 (2d Cir.1996)(citations omitted). Duncan claims in his affidavit that from the time of his initial injury on the job in November 1994, which involved his lifting the 100 pounds of ice melt, up

to the time the Town eliminated his position he "suffered from a number of serious physical impairments which were chronic, recurring, disabling, and which substantially limited [his] ability to bend, lift, squat, and stand." (Pl.'s Opp'n to Defs.' Mot. Summ. J., Ex. B, ¶ 10.) However, in the March 1999 deposition in a state court lawsuit arising out of his August 1996 car accident, when Duncan was asked whether his doctor had awarded him a disability rating in connection with the November 1994 injury, Duncan responded "No. I was fully recovered." (Defs.' Mem. Mot. Summ. J., Ex. C, p. 32.) According to Duncan, the doctor released him at that time to return to work with no restrictions. Id. at 28. He also stated that Dr. Cohen discharged him from treatment for the 1994 injury, and it had been to "[f]ull duty, full recovery." Id. Duncan's statements at his March 1999 deposition clearly demonstrate that the plaintiff's injuries resulting from the 1994 incident were not permanent and were not long term in their impact. Moreover, when Duncan was asked whether, aside from his injuries in 1994, 1995, and 1998, he was generally a healthy man, he responded in the affirmative.

Even after Duncan was diagnosed with pericarditis, congenital heart defect, and a ruptured ear drum, Dr. Danyliw, after an evaluation of Duncan and a review of the testing at Danbury Hospital, concluded that the plaintiff was fit for duty

at his job with the Town. Based on the foregoing, the court concludes that the plaintiff has failed to create a genuine issue as to whether he was substantially limited in one or more major life activities.

Nor has the plaintiff created a genuine issue as to whether the Town regarded him as having a disability within the meaning of the ADA. The pertinent portion of the applicable EEOC regulations define "is regarded as having such an impairment" to mean "[h]as a physical ... impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation...." 29 CFR § 1630.2(l)(1)(2002). Here, there is no evidence that the Town treated Duncan during the relevant time period as having an impairment that substantially limited his major life activities.

Duncan relies upon a statement allegedly made by D'Avola to Don Joray ("Joray"), a seasonal employee the Town hired in August 1996, during Joray's job interview. Joray testified at his deposition that while he was with D'Avola discussing his interest in a full-time position, D'Avola told him that "there was [sic] people possibly leaving...." (Pl.'s Opp'n to Defs.' Mot. Summ. J., Ex. L, p. 16.) Joray testified further that D'Avola had stated "that one of the guys was getting up in age and another guy had physical problems." Id. at 16. Assuming D'Avola made this statement referring to Duncan, the fact that D'Avola

perceived Duncan as having "physical problems" is not sufficient to support a conclusion that the plaintiff was treated by the Town as having an impairment that substantially limited a major life activity. On the other hand, it is undisputed that the Town was informed by Dr. Danyliw, during the very month the Town decided to eliminate the plaintiff's position, that the plaintiff was fit for duty. Based on the foregoing, the court concludes that the plaintiff has failed to create a genuine issue as to whether he was treated by the Town as having an impairment that substantially limited a major life activity.

Because there is no evidence that the plaintiff has a record of such impairment, the court concludes that the defendant has satisfied its burden of showing that there is no genuine issue as to whether the plaintiff was disabled within the meaning of the ADA at the time he suffered the adverse employment action, and that the evidence shows that he was not so disabled. The Town is therefore entitled to judgment as a matter of law on the plaintiff's claim under the ADA.

B. Counts Two and Three: CFEPA Violations

The remaining claims are Counts Two and Three under CFEPA. As the plaintiff notes, the definition of the term "disability" under CFEPA is broader than the definition under the ADA. See Beason v. United Technologies Corp., 337 F.3d 271 (2d Cir. 2003)("the case law ... uniformly confirms our belief that the

CFEPA's definition of physical disability is broader than the ADA's."). Thus, the court's ruling on Count One is not dispositive of Count Two.

The Supreme Court has counseled that a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, *as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain*, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (emphasis added). See also Lanza v. Merrill Lynch & Co., 154 F.3d 56, 61 (2d Cir.1998) (there are "notions of judicial economy and comity which militate against supplemental jurisdiction when the federal claims have been dismissed pre-trial."). This is particularly so where both of the remaining state law claims involve issues under CFEPA where the law is not yet well-developed in the state courts. Accordingly, the court declines to exercise supplemental jurisdiction over the CFEPA claims in Counts Two and Three.

III. CONCLUSION

For the reasons stated above, the defendant's Supplemental Motion for Summary Judgment [Doc. # 67] is hereby GRANTED as to Count One, and the CFEPA claims in Counts Two and Three are hereby DISMISSED, without prejudice.

The Clerk shall close this case.

It is so ordered.

Dated this 22nd day of August, 2003, at Hartford, Connecticut.

Alvin W. Thompson
United States District Court