

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION**

BETHANY KARR,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 00-578-L
)	
WAL-MART STORES, INC.)	
)	
)	
Defendant.)	

Memorandum of Law of United States as *Amicus Curiae*

The United States of America as amicus curiae hereby submits this brief to this Honorable Court. Based upon its review and analysis of the undisputed material facts in this action, and the application of the law to those facts, the United States urges this Court to deny the Motion for Summary Judgment of Defendant Wal-Mart Stores, Inc. (“Wal-Mart” or “Defendant”). Plaintiff Bethany Karr (“Karr” or “Plaintiff”) has presented sufficient evidence to demonstrate that a genuine issue of material fact exists as to whether she is a person with a disability within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 et seq., and its implementing regulations, 28 C.F.R. Part 36, and facts material to the claims and defenses in this action are genuinely in dispute.

I. INTEREST OF THE UNITED STATES

This case involves the interpretation of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 et seq. (“ADA”), which prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” offered by a place of public accommodation. 42 U.S.C. § 12182(a) et seq.; 28 C.F.R. § 36.201(a). The United States Department of Justice (the “Department”) is the federal agency with primary responsibility for the enforcement of Title III of the ADA, 42 U.S.C. § 12188(b); 28 C.F.R. §§ 36.502-504. In addition, the Department is the agency directed by Congress to promulgate Title III’s implementing regulations. 42 U.S.C. § 12186(b).

Because of its responsibility for enforcing Title III of the ADA, the federal government has an interest in ensuring that this statute and the regulations promulgated to implement it are properly and consistently applied and construed. This Court’s ruling on the correct interpretation of Title III and the relevant regulations in this case will have widespread impact for persons with Tourette Syndrome who wish to achieve equal opportunity to participate in mainstream society in the United States. Given the Department’s expertise with regard to the legal issues before this Court, the government believes its views regarding the provisions of Title III of the ADA will be of assistance.

II. STATEMENT OF THE ISSUE

In this brief, the United States will address the issue of whether Plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether she is a person with a disability within the meaning of Title III of the ADA.

III. STANDARD FOR SUMMARY JUDGMENT

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As the Supreme Court has explained the summary judgment standard:

[T]he plain language of Rule 56(c) 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. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (citing Fed.R.Civ.P. 56(c)). The United States submits that, as set forth below, Plaintiff has made a showing sufficient to demonstrate the existence of a genuine issue of material fact as to whether she is a person with a disability within the meaning of the ADA.

IV. APPLICABLE STATUTORY AND REGULATORY SCHEME

The ADA defines a "disability" as "(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 impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); 28 C.F.R. § 36.104. "Physical or mental impairment" is defined as "any mental or psychological disorder such as ... emotional or mental illness." 28 C.F.R. § 36.104. "Major life activities" include, but are not limited to, "functions such as caring for one's self, performing

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” Id. Furthermore, “[a] person is considered an individual with a disability ... when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” 28 C.F.R. Part 36, App. B. § 36.104.

V. FACTUAL BACKGROUND

Plaintiff Karr is a twenty-four (24) year old adult resident citizen of the State of Alabama. Complaint ¶ 4. Karr was diagnosed with a severe form of Tourette Syndrome (“TS”) and Obsessive Compulsive Disorder (“OCD”) when she was approximately twelve (12) years old. Plaintiff’s Exhibit (“Pl.’s Ex.”) No. 25 at 1, ¶ 2. TS is an inherited, neurological disorder characterized by repeated and involuntary body movements and uncontrollable vocal sounds. National Institute of Neurological Disorders and Stroke “Tourette Syndrome Fact Sheet” (“TS Fact Sheet”), http://www.ninds.nih.gov/health_and_medical/pubs/tourette_syndrome.htm. Karr also exhibits one of the most socially stigmatizing symptoms of TS called coprolalia, the involuntary outburst of obscene words or socially inappropriate and derogatory remarks. Id. Karr’s coprolalia manifests itself through her involuntary use of the words “fuck,” “nigger,” “shit,” and “bitch.” Deposition of Bethany Karr (“Karr Dep.”) at 28–29. Karr’s involuntary outbursts, such as the ones presented in this case, are especially pronounced because of her echolalia, which is characterized by a compulsive repetition of words. An ordinary observer might recognize that Karr’s vocal tics are unintentional and involuntary behavior because they are uttered in a louder tone and different vocal pitch than normal conversational speech. TS Fact Sheet, http://www.ninds.nih.gov/health_and_medical/pubs/tourette_syndrome.htm. In addition, Karr experiences other symptoms of TS such as exhopraxia, which causes her to repeat words

and phrases that she hears, innerpraxia, which occasionally causes her to make profane gestures with the middle fingers of her hands, and motor tics which cause marked extreme movements of her face, arms, and legs. Pl.'s Ex. No. 21 and No. 1 at 31, Ins. 34-36. Karr's vocal and motor tics are virtually constant. Id. at 2, ¶ 3 and ¶ 5.

Karr also suffers from Obsessive Compulsive Disorder ("OCD"), which is an associated behavior of TS which causes Karr to feel that something must be done over and over again and in a particular way. Karr Dep. at 32. For instance, her OCD causes Karr to do things like count money or lock doors over and over again. Id., Ins. 10-14. In addition, Karr's OCD causes her to experience repetitive unwanted and bothersome thoughts. Combined with TS, OCD has led to her decreased ability to concentrate for sustained periods of time, as well as her inability to maintain normal sleep patterns. Physicians have attempted to treat Karr's TS and OCD with numerous medications without success. Pl.'s Ex. No. 21 at 1, ¶ 6; Pl.'s Ex. No. 23 at 1, ¶ 1; Pl.'s Ex. No. 25 at 1, ¶ 4. In fact, as she's grown older her symptoms have only worsened. Pl.'s Ex. No. 21 at 1 ¶ 2; Karr Dep. at 31, ln. 4.

VI. ARGUMENT

Plaintiff has produced evidence sufficient to create a genuine question of material fact as to whether, as a result of her TS and OCD, she is a person with a disability who is substantially limited in the major life activities of interacting with others and working.¹ The term "disability"

¹ Although Karr alleges that she is substantially limited in several major life activities, see Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Br.") at 15-16 and 21-23, a plaintiff need only demonstrate that his or her disability affects one major life activity. 42 U.S.C. § 12102(2)(A). Therefore, instead of addressing each major life activity that is substantially limited by Plaintiff's TS, the United States chooses to focus its brief on the major life activities of interacting with others and working.

with respect to an individual is defined under the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2)(a); 28 C.F.R. § 36.104.² The Supreme Court has articulated a three-step inquiry for determining whether an impairment substantially limits a major life activity so as to constitute a disability under the ADA. See Bragdon v. Abbott, 524 U.S. 624, 631, 118 S. Ct. 2196, 2202, 141 L.Ed.2d 540 (1998). First, the court must ascertain whether plaintiff has a physical or mental “impairment.” Next, the court must identify whether any “major life activities” are impacted by that impairment. Finally, the court must determine whether the impairment “substantially limits” any major life activity. Id.

Applying this standard to Plaintiff’s TS and OCD, Plaintiff has an impairment that substantially limits a major life activity. The phrase “physical or mental impairment” includes any “physiological disorder or condition” that affects the neurological system or “any mental or psychological disorder such as ... emotional or mental illness.” 28 C.F.R. § 36.104. Tourette Syndrome is a neurological impairment characterized by motor and verbal tics and coprolalia. Purcell v. Pennsylvania Dep’t of Corrs., 1998 WL 10236 (E.D. Pa. 1998). It is undisputed that Plaintiff’s TS and OCD are impairments within the meaning of the ADA. See Defendant’s Brief in Support of Motion for Summary Judgment (“Def.’s Br.”) at 9.

The next inquiry is whether Plaintiff’s impairment substantially limits a major life activity. Although not exhaustive, Title III’s implementing regulations describe “major life

² The United States will only address whether Plaintiff has an actual disability under 42 U.S.C. § 12102(2)(A), even though Plaintiff has presented evidence on which a jury could reasonably find that Defendant “regarded” her as a person with a disability, and that she has a “record of” disability under 42 U.S.C. § 12102(2)(B) and (C). See Pl.’s Br. at 19-20 and 23-24.

activities” as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 28 C.F.R. § 36.104. In addition, the Equal Employment Opportunity Commission’s Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 5 (March 25, 1997) lists “interacting with others” as a major life activity. Plaintiff alleges that, among other things, she is substantially limited in the major life activities of interacting with others and working. Courts addressing the issue of whether a person who has TS and OCD should be considered a person with a disability within the meaning of the ADA have held that a trier of fact could reasonably conclude that an individual who has these conditions is in fact disabled. For instance, in Purcell, 1998 WL 10236 at *8, the court held that the plaintiff who, like Karr, had TS and OCD, was substantially limited in the major life activity of interacting with others as a result of his inability to communicate with others for extended periods of time.³ In light of the evidence presented in this case of the extreme symptoms and uncontrollable nature of Karr’s TS and OCD, a genuine issue of material fact exists as to whether she is a person with a disability.

³ Although not addressing the major life activities of interacting with others or working, Lanci v. Arthur Andersen, LLP, 2000 WL 329226, *4 (S.D.N.Y. 2000), is another case in which the court held that a plaintiff with TS and OCD could be considered a person with a disability within the meaning of the ADA. In Lanci, the court determined that the plaintiff’s “intrusive thoughts,” combined with the effects of his TS and OCD, “significantly restricted his ability to *think* and *concentrate*.” (emphasis in original). The court reasoned that plaintiff’s acute symptoms, although not regular, could be expected to reoccur and lasted long enough to fall within the ADA’s definition of disability. Id. at *5.

A. A genuine issue of material fact exists as to whether Plaintiff is substantially limited in the major life activity of interacting with others

Interacting with others is a major life activity within the meaning of the ADA. For instance, in McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. Sept. 16, 1999, amended Jan. 18, 2000), cert. denied, ___ U. S. ___, 120 S. Ct. 2689, 147 L. Ed. 2d 961 (2000), the plaintiff had been diagnosed with anxiety, panic, and somatoform disorders that caused him to withdraw from family members and public places. The Ninth Circuit reasoned that “because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity.’” The court qualified its holding, explaining that “[r]ecognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation.” Id. The factors that the court considered to be determinative of McAlindin’s limitation were clinical findings indicating a pattern of withdrawal from public places and social settings, as well as the severity of the limitation “when compared to the ability of ‘the average person in the general population.’” Id. (citations omitted).⁴ Furthermore, the court held that “a plaintiff must show that

⁴ Other courts have held that interacting with others is a major life activity. See Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (assumed that interacting with others is a major life activity on specific facts, but held that particular effects of plaintiff’s impairment did substantially limit his ability to interact with others); Steele v. Thiokol Corp., 241 F.3d 1248, 1255 (10th Cir. 2001) (same); Garvey v. Jefferson Smurfit Corp., 2000 WL 1586077, *3 (E.D. Pa. 2000) (finding that a jury could conclude that plaintiff with severe form of hypertension was substantially limited in major life activity of interacting with others); Zale v. Sikorsky Aircraft Corp., 2000 WL 306943 (D. Conn. 2000) (recognizing the major life activity of interaction with others); Purcell, 1998 WL 10236, * 8 (ability to communicate for extended period of time affected major life activity of interacting with others); Sherback v. Wright Automotive Group, 987 F. Supp. 433, 438 (W.D. Penn. 1997) (recognizing major life activity of interaction with

his ‘relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.’” Id. quoting EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 5 (March 25, 1997).

The effects of Karr’s TS and OCD on her ability to interact with others are more severe than those found in McAlindin. Karr’s TS and OCD are debilitating conditions with respect to their constant effects on her ability to interact with others. As discussed in Part V., supra, Plaintiff has uncontrollable and nearly constant motor tics and vocalizations, including profanity, racial slurs, obscene gestures, and other involuntary actions involving her hands and face. These symptoms result in a “failure to communicate when necessary,” and severely inhibit her ability to enter into public or social settings. Pl.’s Ex. No. 16 at ¶ 2. Karr experiences severe anxiety in public places stemming from her fear of the way in which she will be perceived. Id. People who encounter Karr openly mock her, stare at her, and misperceive her coprolalia and motor tics as a sign of disrespect or hatred. Pl.’s Ex. No. 16 at ¶ 20, No. 17 at ¶ 15, and No. 13 at 9.

The facts of this case are illustrative of the difficulties Karr faces as a result of her TS and OCD any time that she attempts to interact with others who do not understand her disability. Often, people Karr encounters in public are offended by the symptoms of her disability. Pl.’s Ex. Nos. 16 at ¶ 20, 17 at ¶ 15, and 13 at ¶¶ 8-9. As a result, Plaintiff’s interactions with others are “characterized on a regular basis by severe problems” such as “a pattern of withdrawal from

others). Krocka v. Bransfield, 969 F. Supp. 1073, 1084 (N.D. Ill. 1997), aff’d on other grounds sub nom., Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (plaintiff could establish disability under ADA by demonstrating that abilities to function generally and to interact with others, and therefore to work, were substantially limited).

public places.” McAlindin, 192 F.3d at 1235. Karr only socializes with her roommate and her family because, in her words, “they accept [her] Tourette’s Syndrome without berating [her].” Application for Disability Benefits, Daily Activities Questionnaire, Dec. 1995, Pl.’s Ex. No. 20 at 2, ¶ 16; Pl.’s Ex. No. 16. As in McAlindin, clinical findings indicate that Karr’s TS and OCD cause her pattern of withdrawal from public places and social settings. One doctor who evaluated Plaintiff explained that she has “near constant coprolalia and vocal tics, and [that] it is fairly obvious as to why [Plaintiff] is not only disabled, but unable to be in public.” Pl.’s Ex. No. 21 at 2, ¶ 11. Thus, the severity of the limitations on Karr’s ability to interact with others as compared with the average person in the general population is evident.

Furthermore, Karr’s limitations with respect to interacting with others are also more severe than those experienced by the plaintiff in Purcell. In Purcell, the court held that a jury could reasonably find that plaintiff’s TS and OCD substantially limited the major life activity of interacting with others even though Purcell had the ability to temporarily suppress his verbal and motor tics while interacting with others. In contrast, Karr’s TS and OCD are so extreme that she is unable to exercise any similar degree of control over her vocal and motor tics. Pl.’s Ex. No. 25 at 1, ¶¶ 2-3. Defendant asserts that because people can “understand what Karr is saying,” she can therefore communicate effectively. However, the court in Purcell made clear that the plaintiff’s ability to suppress his verbal and motor tics while interacting with others, and as a result, communicate with others on discrete occasions, did not disprove the fact that Purcell’s TS substantially limited the major life activity of interacting with others. Id. at *7. Further evidence of the severity of Karr’s coprolalia is found in her deposition transcript which is marked throughout by her use of profanity. The deposition transcript does not portray the extent to

which Karr's motor tics affect her ability to interact with others. Karr's use of profane and nonsensical words and sounds, as well as her profound body tics, are generally viewed as socially unacceptable behavior, thus severely impairing her ability to interact with others in any public setting. Therefore, Plaintiff has presented sufficient evidence to demonstrate a genuine issue of material fact as to whether she is substantially limited in the major life activity of interacting with others.

B. A genuine issue of material fact exists as to whether Plaintiff is substantially limited in the major life activity of working

In addition to interacting with others, Plaintiff has presented sufficient evidence of her substantial limitation in the major life activity of working to survive summary judgment. To be considered substantially limited in the major life activity of working a person must be precluded from performing “either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” Williamson v. Int'l Paper Co., 85, F. Supp. 2d 1184, 1194 (11th Cir. 2000) (quoting 29 C.F.R. § 1630.2(j)(3)(i)). “[W]hether a plaintiff is substantially limited in the major life activity of working is determined by comparing his ability to perform jobs with the ability of a person without physical limitations who has a comparable education, job skills, and talent.” Mullins v. Crowell, 228 F.3d 1305, 1314 (11th Cir. 2000). An analysis of whether an individual is substantially limited in the major life activity of working may include consideration of:

the geographical area to which the individual has reasonable access, the job from which the individual has been disqualified because of an impairment, and the number and types of jobs using and not using similar training, knowledge, skills, or abilities within that geographical area, from which the individual is also disqualified because of the impairment.

Id. at 1315. Expert vocational evidence is not necessary to establish that a person is substantially limited in the major life activity of working. A plaintiff can testify from his or her own job search experience whether other jobs that he or she could perform were available in the geographical area. Mullins, 228 F.3d at 1314 n.8. Furthermore, a plaintiff presents sufficient evidence to survive a motion for summary judgment on the issue of being substantially limited in the major life activity of working if he or she presents medical evidence, such as a physician's opinion, of his or her inability to work in either a class of jobs or a broad range of jobs in various classes. Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1134 (11th Cir. 1996).

Defendant's contention that working is not a major life activity within the meaning of the ADA is unfounded. See Def.'s Br. at 11. The Eleventh Circuit has specifically addressed this issue, explaining, "the Supreme Court did not hold [in Sutton v. United Air Lines, Inc., 572 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999),] that working was not a 'major life activity.' Accordingly, our precedent treating working as a 'major life activity' is still valid, and the district court erred by interpreting the [ADA] contrary to our precedent." Mullins, 228 F.3d at 1313. See also Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000) ("A physical or mental impairment qualifies as a disability under the ADA if it substantially limits a major life activity, such as working."). Therefore, working is a major life activity within the meaning of the ADA.

Plaintiff can demonstrate that she is substantially limited in a broad range of jobs, such as any that require frequent interaction with the public, and a class of jobs, such as jobs in the service industry. As Defendant points out in its brief, Plaintiff is a well educated and intelligent individual who graduated from her high school at the top of her class and who has completed courses to become a certified nursing assistant ("CNA"). Def.'s Br. at 18; Karr Dep. at 14, ln. 19

and at 8, lns. 15-16. Most individuals with Plaintiff's level of education and training could be expected to have a record of consistent and ongoing employment. However, despite her education, Plaintiff has been unemployed and receiving social security disability benefits since 1997. Furthermore, Karr has held only three (3) jobs since her high school graduation, none of which she held for more than one (1) year. Karr Dep. at 15-25. Plaintiff was "let go" from her last job where she worked as a CNA because of the effects of her TS and OCD. Pl.'s Ex. No. 25 at 1, ¶ 2; Karr Dep. at 22, ln. 8; Pl.'s Ex. No. 20 at 3, ¶ 26-27. Plaintiff stated in her application for social security disability benefits that the pressures of work make her TS and OCD more severe. Pl.'s Ex. No. 20 at 3, ¶ 26-27.

Karr's physicians' description of her diagnosis and the employment difficulties that she experienced as a result of her diagnosis is sufficient evidence to survive a motion for summary judgment on the issue of whether her impairment substantially limited the major life activity of working. For instance, in Pritchard, the plaintiff, who was diagnosed with depression and dysautonomia, had symptoms of profound fatigue, lack of interest and energy, difficulty sleeping, communicating, and concentrating, among other things. 92 F.3d at 1132. The Eleventh Circuit stated that this evidence "present[ed] a case for a jury to determine whether [plaintiff] suffered from those symptoms ... and whether those symptoms substantially limited a major life activity." Id. at 1134. Karr's physician recommended that she discontinue working because of her "inability to control her symptoms" and "due to unacceptable side effects" of her medications. Pl.'s Ex. No. 23. This physician also explained that Plaintiff's motor and vocal tics are "severe enough to significantly interfere with her daily activities, including employment." Id. Her physicians' attempts at controlling the TS and OCD symptoms through various

medications have been unsuccessful. Id.; Pl.’s Ex. No. 21 at 1, ¶ 6.⁵ In fact, her symptoms have only worsened. Id. at 1, ¶ 2. As one doctor put it, Karr is incapable of working or of “self support” because of her “mental and physical incapacity that has existed on a continuous basis since before her 21st birthday and will not be resolved in the foreseeable future.” Pl.’s Ex. No. 25 at 2, ¶ 8. In light of Karr’s record of unemployment, as well as her physicians’ description of the limitations of her conditions upon her ability to work, Plaintiff has submitted sufficient evidence to demonstrate that there is a genuine issue of material fact as to whether she is substantially limited in the major life activity of working.

VII. CONCLUSION

Based on the above, it is clear that a genuine issue of material fact exists as to whether Plaintiff is a person with a disability within the meaning of the ADA. Therefore, the United States respectfully requests that this Honorable Court deny Defendant’s Motion for Summary Judgment.

⁵ The record is replete with evidence of Karr’s physician’s failed attempts at treating or even alleviating her TS and OCD symptoms. Pl.’s Ex. No. 21 at 1, ¶ 6 and ¶ 11; Pl.’s Ex. No. 23; Pl.’s Ex. No. 25 at 1, ¶ 4 and ¶ 5. In addition, Karr’s medical records indicate that much of the treatment she received has had negative side effects. Karr Dep. at 52, lns. 7-8; Pl.’s Ex. No. 18; Pl.’s Ex. No. 16. This evidence clearly contradicts Defendant’s assertion that Karr’s medications and her smoking habit should be considered “mitigating measures that bolster Wal-Mart’s argument that Karr is not substantially limited in any major life activity.” Def.’s Br. at 13.

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