

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

JAMES BAUCKMAN,	)	
	)	
Plaintiff,	)	Civil No. 10-1070
	)	
VS.	)	March 25, 2011
	)	
MASTER PRINT, INC.,	)	
	)	
Defendant.	)	

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REPORTER'S TRANSCRIPT  
MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: HOGAN & PRITCHARD PLLC  
BY: MARTIN P. HOGAN, ESQ.

FOR THE DEFENDANT: ISLER DARE RAY RADCLIFFE & CONNOLLY  
BY: RICHARD M. DARE, ESQ.

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OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR  
U.S. District Court  
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1 (Thereupon, the following was heard in open  
2 court at 10:29 a.m.)

3 THE CLERK: 1:10 civil 1070, James Bauckman  
4 versus Master Print, Incorporated.

5 MR. HOGAN: Good morning, Your Honor. Martin  
6 Hogan for the plaintiff.

7 THE COURT: Good morning.

8 MR. DARE: Good morning, Your Honor. Mark  
9 Dare representing defendant, Master Printing.

10 THE COURT: Good morning, Mr. Dare.

11 Mr. Dare, what is the issue?

12 MR. DARE: There are two issues. We have  
13 moved to dismiss their complaint. It's a complaint by  
14 Mr. Bauckman that he was terminated because of a  
15 disability, and there are two flaws, major flaws in his  
16 complaint that should lead to dismissal.

17 One is that there are no facts in -- alleged  
18 in the complaint from which one can infer the -- a  
19 discriminatory motive, that is, a motive based on the  
20 disability.

21 And remember, Your Honor, the standard is a  
22 plausible scenario. It's not simply a possibility. I  
23 don't think he's presented a plausible scenario that  
24 there is a situation where -- from which an inference of  
25 discrimination can be involved.

1           The other flaw in the complaint is that he  
2 hasn't pled a plausible case that he has a disability as  
3 it is defined under the ADA.

4           THE COURT: Are you saying that he had not  
5 set forth he had a disability at the time of the adverse  
6 action?

7           MR. DARE: That's correct. That's correct.

8           THE COURT: But, what about paragraph nine  
9 where he talks about all of these issues that he was  
10 experiencing, compromised circulation, and all these  
11 other things?

12          MR. DARE: Well, I understand and I -- the  
13 problem with paragraph nine is, Your Honor, it's just a  
14 list of conditions and some of which may be temporary.  
15 We don't know which are connected to disabilities.

16          Let me give you an example. In -- on the  
17 one, two, three, fourth line he says "difficulty sleeping  
18 because of pain, discomfort, and scar tissue".

19          Now, we don't know what the disability is  
20 that is -- he says is causing the pain and discomfort.  
21 That is not set forth here.

22          He doesn't tell us that that was going on at  
23 the time or about the time of the termination or was that  
24 pain that he had back in 2006 when he had a cystectomy.  
25 I think that was 2007, or was it that pain that he had in

1 2006 when he had bypass surgery.

2 Now, that's pain. There's no question about  
3 it, but it's temporary. And it does not qualify as a  
4 substantial -- it is not a disability and it is not a  
5 substantial impairment of major life activity.

6 So, as you go through paragraph nine and  
7 really analyze it, he lists a lot of imposing conditions,  
8 but he doesn't tell us in each case those that he's  
9 relying upon what is the impairment that caused it and  
10 did it exist at the time of the termination and enough to  
11 let us know that it's not a temporary condition. Again,  
12 pain is --

13 THE COURT: Does he have to link the  
14 disability to the adverse action? In terms of saying  
15 that he suffered an adverse employment action because of  
16 his disability, does he have to assert that?

17 MR. DARE: Yes, he does, Your Honor,  
18 otherwise, you simply could never terminate someone who  
19 has a disability.

20 If they don't -- if they don't present a  
21 plausible scenario from which an inference of  
22 discrimination could be drawn, then you simply could  
23 never terminate anyone who had a disability, ever.  
24 Because they could always -- they could just say, it  
25 would be a -- a per se case. I have a disability. They

1 fired me and that's enough to make out a case. And that  
2 clearly is not the law.

3 THE COURT: Is he required to set forth some  
4 facts that would link the adverse employment action to  
5 discriminatory motive or behavior like references to a  
6 disability or statements or some discussion of it prior  
7 preceding the termination?

8 MR. DARE: Well, I don't think he -- he  
9 doesn't have to list specific things, but something, yes.

10 And one example would be a comment by  
11 somebody about his disability that was linked to the  
12 decision process.

13 Yes, that would be an example of a fact that  
14 might help create an inference. But we don't have  
15 anything like that here. All we have here is that he  
16 claims that he had a disability and there was a  
17 termination.

18 But if I may go a little bit deeper into  
19 that, Your Honor, another major flaw in this complaint is  
20 that here's the causal connection that he makes. This is  
21 what he says the inference is to be drawn from.

22 Mr. Bauckman told Master Print in, he  
23 alleges, September, October of 2008, I need to have  
24 surgery to have some scar tissue removed. And then he  
25 says several weeks later, he was terminated.

1           Now, having scar tissue removed is not a  
2           disability. It is not an impairment. It is not a  
3           substantial limitation of a major activity -- major life  
4           activity. It is simply surgery which is temporary, a  
5           temporary condition. You go in, you have the surgery,  
6           the scar tissue is removed and it's over. And it is like  
7           a kidney stone in that sense. It is like an abscessed  
8           tooth. It is like appendicitis. It's a temporary  
9           condition and it's not a disability.

10           So, that is what he said to us based upon the  
11           allegations. I'm going to have surgery sometime later  
12           this year or early next year to have this scar tissue --

13           THE COURT: Thirteen weeks later he was  
14           terminated; is that right?

15           MR. DARE: Pardon me.

16           THE COURT: Thirteen weeks later he was RIF?

17           MR. DARE: Several weeks later. He can't say  
18           exactly because he's not sure.

19           THE COURT: All right.

20           MR. DARE: But he did not give notice of a  
21           disability at that time. All he said was I need to have  
22           surgery.

23           And another factor, Your Honor, that we think  
24           cuts against drawing an inference of discrimination from  
25           that scenario there is his history there.

1           Based upon his allegations, he had a heart  
2 attack through -- from 1996 to --

3           THE COURT: I think what you're stating now  
4 is certainly matters that are in the complaint. I  
5 think -- I've asked you the questions that I have. I'd  
6 like to hear from Mr. Hogan, and I'll give you a chance  
7 to respond.

8           MR. DARE: All right, thank you, Your Honor.

9           MR. HOGAN: Good morning, Your Honor.

10          THE COURT: Good morning.

11          MR. HOGAN: With respect to the two major  
12 arguments that defense counsel has alleged, with respect  
13 to the timing of the termination, if it's a period of  
14 seven weeks, we know the rough time of notification and  
15 then he was terminated shortly thereafter.

16          Both in the *Hodgens* case and the *Oliver* case,  
17 the *Hodgens* case mentions a close proximity. The *Oliver*  
18 case mentions soon after.

19          The defense counsel has not cited any cases  
20 that say that the period in question here as alleged in  
21 the complaint is too long. There are no cases cited by  
22 defendant on that basis.

23          With respect to --

24          THE COURT: What is the substantially  
25 impairing disability here? What is it that you contend?

1 I have paragraph nine in front of me.

2 MR. HOGAN: Yes. Your Honor, with respect to  
3 paragraphs eight and nine and I'll break them down, the  
4 plaintiff had a heart condition which led to multiple  
5 heart attacks as alleged in the complaint, 2002 and 2004.  
6 He had a quadruple bypass in 2004. He suffered and  
7 suffers from compromised circulation along with --

8 THE COURT: Apparently he recovered from the  
9 heart attack. He was fired what, two years later, three  
10 years later?

11 MR. HOGAN: Well, the termination was in '08,  
12 but with these conditions in terms of continuing  
13 treatment for them, he had that. His compromised  
14 circulation didn't go away even though he had a heart  
15 attack in the past. That also doesn't mean --

16 THE COURT: My original question, what  
17 substantially impairing life -- major life activity do  
18 you say he suffered from that was still rendering him  
19 qualified to do his job.

20 MR. HOGAN: Right. With respect to the other  
21 condition that happened shortly before he was terminated,  
22 the bladder cancer. He had these two major conditions.  
23 The bladder cancer was diagnosed in 2006. He was  
24 operated on in 2007, and he had a total cystectomy. That  
25 required the removal of his bladder, prostate, appendix

1 and all surrounding lymph nodes.

2 Defense counsel in its opposition, I mean in  
3 its motion to dismiss just focuses on some medical  
4 research about an appendix in very narrow fashion.

5 In this case, he had four different items  
6 removed from his body. Connected to that, he had  
7 difficulty urinating. He has to have catheterization,  
8 impotency, scar tissue, kidney stones. The impotency  
9 required a penile implant which itself caused  
10 difficulty --

11 THE COURT: I read all those things. I'm  
12 still trying to figure out what you're claiming was the  
13 disability that he suffered at the time of his  
14 termination.

15 The heart attack he had it, you said, in '04,  
16 and he --

17 MR. HOGAN: He still had compromised  
18 circulation tied to that condition. The conditions  
19 related his heart condition and bladder cancer, the  
20 complications resulting from those --

21 THE COURT: I understand he had surgery on  
22 the bladder cancer and that the reason for the surgery in  
23 '08 was to remove scar tissue. Did I misunderstand you?

24 MR. HOGAN: Yes, Your Honor, and --

25 THE COURT: So, once the scar tissue -- is

1 scar tissue a substantially disabling condition,  
2 Mr. Hogan?

3 MR. HOGAN: The scar tissue itself, perhaps  
4 not. But the constellation and complications from the  
5 total cystectomy were still there. He still had  
6 difficulty urinating. He still had the --

7 THE COURT: What does that have to do with  
8 him doing his job?

9 MR. HOGAN: With respect to his job, at times  
10 he had missed work and at times he was delayed getting to  
11 work because of these conditions. He was still able to  
12 perform his functions --

13 THE COURT: Let's focus on that for a second.  
14 What do you say links his termination to disability from  
15 the standpoint of what you've alleged here about what the  
16 employer said or did to him?

17 MR. HOGAN: All right. With respect to that,  
18 Mr. Bauckman informs the company, human resources, I need  
19 to have surgery about his condition. A short period  
20 after that, he is RIF. He is told about a RIF. This is  
21 a person who worked at --

22 THE COURT: Is that it?

23 MR. HOGAN: That's --

24 THE COURT: I'm asking you a very important  
25 question. My question is what information do you assert

1 in your complaint that Mr. Bauckman was told by his  
2 employer that related to his disability preceding his  
3 termination?

4 MR. HOGAN: Oh, what was he told by the  
5 employer that we're firing you because of your  
6 disability?

7 I'm sorry, Judge.

8 THE COURT: I'm asking whether anyone in the  
9 work place said to him, you know, you're really a burden  
10 here because you're not pulling your weight because  
11 you're sick or someone said to him, you know, I'm really  
12 tired of you missing work because you're going to the  
13 doctors all the time.

14 Is there any allegation of that kind in this  
15 complaint?

16 MR. HOGAN: With respect to verbal comments  
17 about his disability, no.

18 THE COURT: Is there any indication in your  
19 pleading of anything that links disability to  
20 termination? I understand there's several weeks between  
21 him telling them that --

22 MR. HOGAN: He can --

23 THE COURT: You didn't let me finish my  
24 question.

25 MR. HOGAN: I'm sorry, Judge.

1 THE COURT: Let me start over. What you have  
2 at best here is an allegation that this gentleman suffers  
3 from some very serious medical conditions.

4 What I'm trying to determine is whether under  
5 *Ashcroft versus Iqbal* you set forth facts demonstrating  
6 that he suffers from a disability within the meaning of  
7 the ADA that substantially impaired a major life  
8 activity.

9 And what you've told me is because he had a  
10 heart attack in '04, he had some complications and  
11 because he had surgery in '07, he still suffered from  
12 complications.

13 That does not link it, to me, to his job or  
14 his ability to do his job. That's the first thing.

15 Can you address that?

16 MR. HOGAN: Yes, those conditions led to --  
17 they were severe conditions and they led to limiting --  
18 substantially limiting major life activities as outlined  
19 in paragraph nine. He had difficulty urinating.

20 He had to be delayed at times getting to work  
21 because of catheterization. He also missed work at times  
22 because of that. He still was able to perform the major  
23 functions of his job.

24 THE COURT: You said Mr. Bauckman was able to  
25 and did perform the major functions of his job.

1 MR. HOGAN: With or without reasonable  
2 accommodation. And so --

3 THE COURT: So, it didn't limit him if  
4 according to your complaint he was doing his job.

5 And also the other concern I have is what we  
6 have -- looking at the bare bones we have here is an  
7 allegation that he requested leave for surgery for a  
8 temporary condition and thereafter he was terminated  
9 without any link, to me, between the condition and the  
10 termination.

11 Is there more that you have to plead on that  
12 score?

13 MR. HOGAN: Yes, Your Honor. In terms of the  
14 contact with human resources, he informed human resources  
15 because of his bladder surgery of these complications,  
16 one of which was scar tissue, and he's still having pain  
17 and discomfort because of that. That was conveyed to  
18 management, and he had to go out.

19 THE COURT: You just said human resources.  
20 You didn't say his supervisor terminated him. You said  
21 human resources.

22 MR. HOGAN: That's the person who he notified  
23 in the company about his condition.

24 THE COURT: All right. What did his  
25 supervisor say?

1 MR. HOGAN: Right now, in terms of what his  
2 supervisor said, all that happened to him on December 9th  
3 is he was told there's a RIF. You're going.

4 About --

5 THE COURT: So, his supervisor -- his own  
6 personal supervisor didn't say anything about your  
7 disability or time and attendance as a reason for the  
8 termination?

9 MR. HOGAN: Not to him directly.

10 THE COURT: Well, who did the supervisor say  
11 it to?

12 MR. HOGAN: With -- well, with respect to the  
13 RIF, the supervisor just said you're being RIF. But in  
14 terms --

15 THE COURT: So, there's no reference to --

16 MR. HOGAN: At this time --

17 THE COURT: You didn't let me finish my  
18 question.

19 MR. HOGAN: Sorry, Judge.

20 THE COURT: So what you're saying is the  
21 supervisor didn't say, well, you know, Mr. Bauckman, your  
22 time and attendance is a problem for us. We're going to  
23 let you go as a part of this RIF.

24 That didn't happen, right?

25 MR. HOGAN: The full context of that

1 conversation, Your Honor, I don't have all the details of  
2 that conversation because it was not recorded.

3 THE COURT: But you talked to your client.  
4 Your client was there, wasn't he?

5 MR. HOGAN: Yes, he was, Your Honor.

6 THE COURT: Okay. I think I've asked you the  
7 questions that I have, Mr. Hogan.

8 MR. HOGAN: With -- just one last thing about  
9 the RIF and just itself, he had been there 35 years and  
10 had been promoted and had good evaluations.

11 THE COURT: The company downsized. At least  
12 that's what they're asserting. And I don't -- and I  
13 agree with you that I'm not going to make a judgment  
14 about the quality of the complaint based on the  
15 employee's assertion of a RIF, because that -- that's  
16 premature. That's premature.

17 Maybe he can demonstrate pretext in that he  
18 was stuck in this RIF because he is disabled.

19 What I'm focused on is what facts you've pled  
20 here.

21 MR. HOGAN: Well, in the alternative, Judge,  
22 we request to move for leave to amend however the Court  
23 rules today. So --

24 THE COURT: Well, Mr. Hogan, one of the  
25 things that helps the Court is if you make motion for

1 leave to amend, you have to attach a proposed complaint  
2 so we can see just what you're asking to do. That would  
3 be helpful. If I grant the motion, that's what you'll  
4 need to do before you file the motion.

5 MR. HOGAN: Yes, Your Honor.

6 THE COURT: Okay, thank you.

7 Anything further, Mr. Dare?

8 MR. DARE: No, Your Honor.

9 THE COURT: All right. Let the record  
10 reflect this matter is before the Court on the  
11 defendant's motion to dismiss the complaint.

12 The question here is whether the plaintiff  
13 has set forth sufficient facts under *Ashcroft versus*  
14 *Iqbal* to demonstrates that he was an individual qualified  
15 with a disability and whether or not he has set forth  
16 sufficient facts which raise an inference of --  
17 reasonable inference of unlawful discrimination.

18 This is a case that certainly has a lot of  
19 empathy for the employee, Mr. Bauckman, who apparently  
20 worked for this company for 35 years until he was  
21 discharged in December 9, 2008.

22 The employer, a privately-held commercial  
23 printing company, and these are all allegations from his  
24 complaint, apparently contends that it went through a  
25 downsize because of changes in the way the whole printing

1 business operates.

2           Needless to say in paragraph nine of the  
3 complaint, and again I can only reply upon the facts that  
4 are pleaded and that are set forth to allow me to assess  
5 plausibility of the claim, Mr. Bauckman sets forth a  
6 number of medical conditions that he contends  
7 substantially limited major life activities.

8           The difficulty with this long list is it's  
9 not clear to me what he contends is the major life  
10 activity that's been substantially limited by these  
11 medical conditions.

12           And, a couple of them that were referred to  
13 by counsel, the '04 heart attack, certainly a very  
14 traumatic event for any one, apparently, he has been  
15 working after '08 for four years and people have heart  
16 attacks and they go back to work. So that doesn't  
17 necessarily amount to a disability, at least as pled.

18           I don't know what the situation is. It could  
19 be like poor Elizabeth Taylor suffering from congestive  
20 heart failure. I don't know. It's not pled.

21           And as it relates to the issue of whether or  
22 not he has set forth facts linking the disability to his  
23 adverse employment action, he's not required to set forth  
24 a motive that the company might have to terminate him.

25           Under the case law, he's required to show

1 he's a member of the protected class, that he suffered an  
2 adverse employment action, that he was performing his job  
3 at a level that met his employer's expectations at the  
4 time of the adverse action, and the position remained  
5 open or was filled by similarly qualified applicants  
6 outside the protected class under *Hill versus Lockheed*  
7 *Martin*.

8 In this case, where we have an ADA claim, he  
9 must set forth that there were some facts surrounding the  
10 discharge that raise a reasonable inference of unlawful  
11 discrimination in *Haulbrook versus Mitchelin North*  
12 *America* is one of the cases that addresses that.

13 It seems to me that what I have at best is  
14 that he, Mr. Bauckman, suffers from some medical  
15 conditions. He asked for leave to have scar tissue  
16 removed and then he was fired.

17 I think that this is insufficient to state a  
18 claim under the ADA. And perhaps there is more, but it  
19 has not been pled.

20 And similarly it seems to me that the issue  
21 of a link between the discharge and the disability is  
22 missing for me as pled.

23 The allegations seems to be conclusory and do  
24 not set forth more than, you know, he asked for leave and  
25 he was granted leave and then he was terminated.

1           So I think under these circumstances the  
2 motion to dismiss will be granted without prejudice.

3           I will deny without prejudice the plaintiff's  
4 alternative motion for leave to file an the amended  
5 complaint because the plaintiff has not attached a copy  
6 of the proposed amendment.

7           Certainly Rule 15 would say that leave should  
8 be liberally granted for leave to amend, particularly in  
9 this early stage in the case. But it is helpful and I  
10 think in this court, it ought to be required -- if it's  
11 not required, I'm requiring it, that you provide us a  
12 copy of the amended complaint so the Court can make an  
13 assessment of futility and other matters before it is  
14 filed in this case.

15           So, the motion for leave to amend is denied  
16 without prejudice to -- subject to plaintiff filing a  
17 motion with a proposed amended complaint.

18           Thank you. You all are excused.

19           MR. DARE: Your Honor, I believe counsel did  
20 file a motion for leave to file an amended complaint.

21           THE COURT: He did, but he didn't -- he  
22 didn't attach a copy of the proposed complaint, did he?

23           MR. DARE: I believe he did, yes.

24           THE COURT: Did you?

25           MR. DARE: But I'm thinking in view of the

1 Court's comments he may want to file a different --

2 MR. HOGAN: Yes, Your Honor. We'll revisit  
3 that.

4 Thank you, Judge.

5 THE COURT: Thank you.

6 (Proceeding concluded at 10:51 a.m.)

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