

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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CLERK

CHRISTOPHER A. ROLLER,

Plaintiff,

Vs.

GE MEDICAL SYSTEMS INFORMATION
TECHNOLOGIES, INC.,

Defendant.

Civ. 06-04098

**DEFENDANT'S BRIEF IN
RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND IN REPLY TO
ITS MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

In deciding the parties' motions for summary judgment, this Court should not consider Plaintiff Christopher Roller's affidavit. The assertions contained in it lack foundation, are hearsay, are conclusory and contradict his deposition testimony.

In any event, Roller's claim should be dismissed. He does not dispute any of the material facts related to: (1) the untimeliness of his complaint; (2) his failure to pursue administrative remedies; or (3) the severance agreement that he voluntarily signed. Roller admits that he failed to file the requisite complaint with the South Dakota Division of Human Rights within 180 days and signed a release of his claim. While Roller tries to avoid these undisputed facts by relying upon statutory provisions, he: (1) does not dispute those facts which establish that S.D. Codified Laws § 15-2-22 does not toll the time period by which Roller needed to file his claim; (2) cannot merely rely upon his pleadings at this stage in the proceedings to justify this failure to file his claim with the South Dakota Human Rights Division; and (3) has never been adjudicated to have any incapacity as required by S.D. Codified Laws § 20-11A-2. As a result, these statutes do not save his claim.

Even if Roller's claim was not barred, he cannot establish a claim of disability discrimination as a matter of law. Roller presents no admissible evidence that he is disabled. The only evidence provided by Roller is his own self-serving affidavit, most of which must be stricken from the record. However, at his deposition, Roller testified that his bipolar condition does not limit his ability to work or any other major life activity. Roller also is not a qualified individual with a disability. Indeed, he told the Social Security Administration that he is unable to work. Finally, Roller cannot establish a connection between his alleged disability and his termination.

Roller also claims for the first time in his summary judgment submissions that GEMS IT failed to accommodate him. However, GEMS IT had no duty to accommodate Roller because he was not "disabled" within the meaning of the law. And, even if Roller were disabled, Roller admits he never requested an accommodation and fails to present any evidence that the accommodations he now suggests would have allowed him to keep his job at GEMS IT.

Finally, Roller has failed to show that GEMS IT's legitimate, non-discriminatory reason for his termination is in any way pretextual. To the contrary, Roller readily admits that he engaged in the conduct for which he was terminated and that he has long believed he was terminated for attempting to run Kevin Impehoven off the road.

In short, Roller has not established a factual dispute on any essential elements of his claim. Accordingly, GEMS IT's motion for summary judgment should be granted. In addition, because Roller cannot establish his claim as a matter of law, his motion for summary judgment should be denied.

ARGUMENT

I. SUMMARY JUDGMENT STANDARDS.

Summary judgment in favor of GEMS IT is clearly appropriate in this case as Roller has failed to establish a factual dispute on an essential element of his case. Simpson v. Des Moines Water Works, 425 F.3d 538, 542 (8th Cir. 2005). While Roller's November 10, 2006 submissions make allegations (most of which should be not be considered by this Court as discussed *infra*), he has not established any genuine disputes on *material* issues of fact; Roller's "[a]llegations do not rise to an issue as to a material fact." Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000). Moreover, "[a] dispute about a material fact is 'genuine' only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Accordingly, GEMS IT's motion for summary judgment should be granted.

Similarly, Roller's motion for summary judgment on his claim should not be granted. Any facts Roller relies upon to support his own motion for summary judgment must be viewed in the light most favorable to GEMS IT. Fed. R. Civ. P. 56(c); Francisco v. Burlington N. Railroad Co., 204 F.3d 787, 788-89 (8th Cir. 2000). Based on that standard, Roller clearly is not entitled to summary judgment because he cannot establish as a matter of law essential elements of a *prima facie* case, nor that GEMS IT's legitimate, non-discriminatory reasons for his discharge are pretextual.

II. THE COURT SHOULD DISREGARD ROLLER'S AFFIDAVIT.

A. Paragraphs From Roller's Affidavit Lack Foundation.

Federal Rule of Civil Procedure 56(e) requires that affidavits be based on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify to the matters stated in the affidavit. Miller v. Solem, 728 F.2d 1020, 1023-

24 (8th Cir. 1984). When evaluating evidence related to motions for summary judgment, a court may not consider affidavits that do not fulfill the requirements of Fed. R. Civ. P. 56(e). Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1317 (8th Cir. 1996).

Many of the factual assertions in Roller's affidavit lack foundation and consist of nothing more than bald assertions. The following paragraphs in Roller's affidavit are without foundation and should not be considered: 2 (how others responded to Roller's story); 3 (what Kristi Hensley found interesting); 4 (Jennifer Kinstad's response to Roller's story and whether the story "freaked out" other people); 8 (what Sioux Valley Mental Hospital "always does"); 10 (whether Noah Allard felt guilty); 11 (side effects of Zyprexa); 13 (what others thought about Roller's story); 16 (arguments are not rare anywhere); 17 (whether or not GEMS IT was communicating with others); 50 (knowledge Troy Wollman "should have" had); 55 (other people enjoying Roller's humor); 57 (what people would gossip about); 58 (what people gossiped about and/or thought of Roller); 60 (common to use certain e-mail addresses); 61 (response to Roller's humor); 62 (no one cared about certain behaviors); 63 (what Russ Knoepfel and Jen DeJong are doing at work); 64 (story scaring people at GEMS IT); 70 (defense keeps changing story); 74 (what GEMS IT could have done with certain medical records); 76 (management should talk to Roller or his doctor if too many jokes are being played); 77 (GEMS IT talking behind Roller's back); 79 (documentation for misconduct); 81 (could have been fired for misconduct years before); 83 (Noah Allard's statement regarding Impeccoven argument); and 85 (perceived as being Jesus false prophet guy).

B. Paragraphs From Roller's Affidavit Contain Inadmissible Hearsay.

In addition, Roller's affidavit contains inadmissible hearsay. An affidavit is inadmissible and the evidence contained in it must be excluded if it does not comply with the rules of evidence. See Brooks v. Tri-Systems, Inc., 425 F.3d 1109, 1111 (8th Cir. 2005) ("When an

affidavit contains an out-of-court statement offered to prove the truth of the statement that is inadmissible hearsay, the statement may not be used to support or defeat a motion for summary judgment.”); see, also Aucutt, 85 F.3d at 1317 (“[A] court may not consider affidavits that do not satisfy the requirements of Fed. R. Civ. P. 56(e)”). Hearsay is not admissible unless it comes within a recognized exception to the hearsay rule. Fed. R. Evid. 802.

The hearsay within Roller’s affidavit which should not be considered includes the following: 25 (statements from a doctor made in October 2004); 28 (David Copperfield’s statement); 52 (e-mail to Brian Stack); 60 (e-mail comments on Roller’s humor); 74 (doctor’s notes); and 83 (Noah Allard statements regarding Impehoven argument).

C. Paragraphs From Roller’s Affidavit Contain Conclusory Statements.

Conclusory statements are also insufficient to avoid summary judgment. See Miller, 728 F.2d at 1024 (“[C]onclusive assertions of ultimate fact are entitled to little weight when determining whether a nonmovant has shown a genuine issue of material fact sufficient to overcome a summary judgment motion supported by complying affidavits.”). Self-serving affidavits without factual support in the record will not defeat a motion for summary judgment. Conolly v. Clark, 457 F.3d 872, 876 (8th Cir. 2006) (“A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff’s favor.”) (internal citations omitted).

Roller’s affidavit includes conclusory statements which should not be considered in the following paragraphs: 16 (possibilities following diagnosis of mental illness); 19 (GEMS IT’s response to Roller’s diagnosis); 20 (decision to “throw [Roller] out into the streets”); 21 (knowing reason for dismissal); 25 (“actual reason” for dismissal at GEMS IT); 38 (accusing GEMS IT of forging documents); 46 (accusing GEMS IT of lying); 50 (knowledge Troy Wollman “should have” had about Roller’s problems); 57 (people gossiping when “fun Chris

Roller goes away”); 58 (what people wanted to happen to Roller); 61 (GEMS IT trying to make Roller look like a villain); 64 (Roller’s story scaring people at GEMS IT); 72 (GEMS IT did nothing about performance issues); 74 (GEMS IT could have looked at Great Plains records); 76 (management should talk to Roller or his doctor if Roller is playing too many jokes); 77 (effect of medications and GEMS IT’s response); 78 (suggested accommodations); 79 (documentation of misconduct); 81 (GEMS IT could have fired Roller years ago); 85 (cause of “perceived threat”); and 86 (condition limits ability to work).

D. Paragraphs From Roller’s Affidavit Contradict His Deposition Testimony.

Finally, when an affidavit contradicts sworn deposition testimony, it is inherently suspect and should be disregarded by the Court. City of St. Joseph, Miss. v. Southwestern Bell Tel., 439 F.3d 468, 475-76 (8th Cir. 2006) (“If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.”) (internal citations admitted); see also Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1363 (8th Cir. 1983) (holding an affidavit filed by the plaintiff in opposition to defendant’s motion for summary judgment that was in direct conflict with the plaintiff’s previous deposition testimony was insufficient to create a genuine issue of material fact for purposes of Fed. R. Civ. P. 56). Indeed, “if testimony under oath can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment.” City of St. Joseph, 439 F.3d at 476 (internal citations omitted). A plaintiff should not “be allowed to create issues of credibility by contradicting his own previous testimony.” Id.

Roller’s affidavit contains numerous statements contradicting his own deposition testimony. For instance, Roller testified that his only alleged disability was bipolar disorder, yet

in paragraph 57 of his affidavit, he now alleges his claim is also based on “Jesus-guy syndrome.” (Roller Dep. pp. 170-71.) When asked at his deposition which of his co-workers knew about his bipolar disorder and medications, Roller did not include Noah Allard or Troy Wollman. (Roller Dep. pp. 70-72, 235-36.) However, in his affidavit, he states Allard and Wollman both knew about his condition. (Roller Aff. ¶ 5.) Similarly, Roller testified that his bipolar condition did not hinder him in anyway. (Roller Dep. p. 181.) However, in paragraph 86 of his affidavit, he states that his condition severely limits the major life activity of working (of course without any foundation for this statement). Further examples of Roller's bald faced contradictions of his deposition testimony are cited to in GEMS IT's responses to Roller's Statements of Material Facts.

Roller was deposed on July 11, 2006, more than three months before summary judgment motions were filed in this matter. Nothing in his affidavit suggests he was confused during this deposition or that he needed to clarify statements he made in his deposition. And, during his deposition, Roller agreed that answering a question would create a presumption that he understood the question. (Roller Dep. p. 5.) He also agreed that he would speak up if he did not understand a question. (Id.)

Now that summary judgment has been filed, Roller has apparently realized that his deposition testimony leaves him without a claim against GEMS IT, and he has submitted a sham affidavit in a last minute attempt to save his claim. Indeed, the timing of Roller's affidavit – it was filed together with his response to GEMS IT's summary judgment motion and the materials apparently in support of his own motion for summary judgment – indicates Roller is engaged in an eleventh hour effort to prevent entry of summary judgment in favor of GEMS IT. This Court is “entitled to grant summary judgment where [Roller's] sudden and unexplained revision of

testimony created an issue of fact where none existed before.” City of St. Joseph, 439 F.3d at 476 (internal citations omitted).

E. The Court Should Strike Roller’s Affidavit Or Disregard The Paragraphs At Issue.

Based on the above, the Court should disregard Roller’s affidavit in its entirety. See, e.g., City of St. Joseph, 439 F.3d at 475-76 (finding no error where district court struck an affidavit from the record where the affidavit contradicted the affiant’s deposition testimony, the affiant never claimed to be confused in his deposition, and the timing of the affidavit indicated a last ditch effort to defeat the defendant’s motion for summary judgment). In the alternative, the Court should disregard the statements in Roller’s affidavit that are without foundation, hearsay, conclusory, speculative and/or in contradiction to Roller’s deposition testimony.

III. ROLLER’S CLAIM IS BARRED AS A MATTER OF LAW.

A. Roller's Failure To File A Timely Complaint With The South Dakota Division Of Human Rights Bars His Claim.

Roller does not dispute that: (1) he was required to file a complaint with the South Dakota Division of Human Rights within 180 days after his discharge; (2) or that he did not do so. Attempting to avoid his failure to pursue administrative remedies, Roller relies upon S.D. Codified Laws § 15-2-22. However, in support of his argument, Roller offers only his hearsay testimony and conclusory statement that, "As soon as doctors stop calling me mentally ill, then the 1 year clause takes affect." Roller, however, completely ignores his own testimony (which he does not even dispute in the self-serving affidavit he has filed with this Court) in which he admitted that he regularly handles his own financial and legal matters. Indeed, he has appeared before a number of courts, representing himself, during the time since he left GEMS IT and no court has found him incompetent. These are the exact factors which are to be considered by the Court in determining whether an individual can meaningfully comprehend his legal rights so as

to take advantage of Section 15-2-22. Merkwan v. Leckey, 376 N.W.2d 52 (S.D. 1985). These undisputed facts, as well as the other undisputed facts cited by GEMS IT in its initial brief (see pp. 11-12), establish that Roller can meaningfully comprehend his rights.¹ As a result, Roller cannot rely upon this statute to save his claim.

In addition, Roller's only response to his failure to file a claim with the South Dakota Division of Human Rights is to rely upon a paragraph in the Order regarding GEMS IT's motion to dismiss before Judge Davis when this action was venued in Minnesota. In that Order, Judge Davis indicated that because the Court determined that the claim was tolled by Roller's disability, Roller could not have discovered and acted on the discrimination within the 180 day statute of limitations. However, that decision was predicated upon the Court's finding that it would not look beyond the pleadings in making its decision since the motion was one to dismiss, not a motion for summary judgment. Now, however, the issue is whether summary judgment should be granted. Judge Davis was limited to consideration of the pleadings. However, on summary judgment motions, the Court considers matters *outside* of the pleadings. Evidence outside of the pleadings proves that Roller did not timely file a complaint.

In particular, Judge Davis' decision was premised upon South Dakota Bd. Of Regents v. Heege, 428 N.W.2d 535 (1988), in which the court stated that a failure to exhaust did not bar a claim where a person through no fault of his own did not discover the purported wrong until after the time for application of administrative relief. 428 N.W.2d at 539. However, at his deposition, Roller admitted that he knew he had a potential claim within days of receiving the release GEMS IT provided him for review. (Roller Dep. pp. 149-51.) As a result, he consulted with attorneys regarding his legal rights. (Id.) In short, Roller's reliance upon the Court's statement in an order

¹ The decision by Judge Davis as to whether Roller pled sufficient facts in his Complaint to survive a motion to dismiss on his claim that mental disability tolled the statute of limitations is not dispositive of whether Roller has subsequently provided evidence which actually supports that claim.

regarding a motion to dismiss, which was only based upon the information contained in his Complaint, is insufficient to establish on a motion for summary judgment that his failure to exhaust remedies is excused.

B. GEMS IT Is Entitled To Judgment As A Matter Of Law Pursuant To The Separation Agreement & Release Entered Into By The Parties.

Roller does not dispute any facts material to enforcement of the Separation Agreement. In particular, he does not deny that he spoke with at least one lawyer regarding potential litigation against GEMS IT, nor does he deny executing the Agreement on April 24, 2002. (Roller's Responses to GEMS IT's Statement Of Undisputed Material Fact, ¶¶ 68-69.) Roller also admits that the Agreement includes a release of disability discrimination claims and that he understood he was potentially foreclosing any legal action against GEMS IT by signing the Agreement. (*Id.* at ¶¶ 70, 74.) Finally, Roller admits GEMS IT paid him his regular salary through July 26, 2002 in exchange for the release, that GEMS IT provided him with outplacement assistance until October 26, 2002 and that he has not returned any of the compensation he received pursuant to the Agreement. (*Id.* at ¶¶ 72-73, 75.)

Roller's only explanation for why the Separation Agreement he signed with GEMS IT does not bar his claim is based on SD Codified Laws § 20-11A-2, which provides as follows:

Power to contract denied person without understanding – Contract made before adjudication of incapacity subject to rescission. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in chapter 21-12.

However, Section 20-11A-2 only affects contracts signed by individuals who have been judicially found to be incapacitated and/or incompetent. Roller has never been adjudicated incompetent or incapacitated. (Roller Dep. pp. 226-30, 293-94; Roller's Responses to GEMS IT's Statement of Undisputed Material Fact, ¶ 94.) Accordingly, section 20-11A-2 does not void

the Agreement between Roller and GEMS IT. Therefore, GEMS IT is entitled to summary judgment on this basis as well.

IV. ROLLER HAS NOT CREATED A GENUINE ISSUE OF MATERIAL FACT REGARDING HIS SOLE CLAIM OF DISABILITY DISCRIMINATION.

In any event, Roller has failed to establish as a matter of law either a *prima facie* case of disability discrimination, or that GEMS IT's legitimate, non-discriminatory reason for its decision to discharge him is pretextual. As a result, his motion for summary judgment must be denied.

Roller has also failed to provide competent evidence disputing those facts material to GEMS IT's motion for summary judgment. As a result, GEMS IT's motion for summary judgment should be granted.

A. Roller Cannot Show He Is "Disabled" Within The Meaning Of The SDHRA.

1. Roller Is Not "Disabled" Because He Is Not Substantially Limited In The Major Life Activity Of Working.

In his summary judgment submissions, Roller for the first time claims that he is substantially limited in the major life activity of working. However, bald assertions that a plaintiff is substantially limited in a major life activity are not sufficient to withstand summary judgment. Heisler v. Metropolitan Council, 339 F.3d 622, 628 (8th Cir. 2003). Here, Roller provides no specific evidence regarding how his bipolar disorder affects his ability to work. For instance, Roller provides no medical documentation indicating any limitations on his ability to work, nor does he present any specific evidence -- such as vocational expert evidence -- about the kinds of jobs from which he is disqualified. See Duncan v. Washington Metro. Area Transit Auth., 201 F.3d 482, 488 (D.C. Cir. 2000) (finding plaintiff failed to present the specific evidence required to allow the factfinder to determine that plaintiff was substantially limited in his ability to work).

Moreover, an individual is substantially limited in the major life activity of working only if he is “significantly restricted in the ability to perform 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.” Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 949 (8th Cir. 1999). Indeed, Roller must do more than assert that his bipolar disorder makes it difficult to work if his claim is to survive summary judgment. Heisler, 339 F.3d at 629. Instead, he must show that his overall employment opportunities are limited. Fjellestad, 188 F.3d at 949. Roller cannot meet this burden.

In fact, the undisputed evidence shows Roller could perform his job. Roller testified that his bipolar disorder did not affect his ability to work. (Roller Dep. p. 185.) While on certain medications it might take Roller longer to perform certain tasks, Roller also testified that on his current medication he would “be fine” performing his work. (Id. pp. 183-85.) However, in determining whether Roller is disabled the Court must consider mitigating measures. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (“[I]t is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures — both positive and negative — must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the [ADA].”)

Moreover, Roller argues that he is substantially limited in the major life activity of working because he has not been able to find employment since his employment with GEMS IT ended - apparently not because of his condition, but because of the simple lack of jobs in his profession. However, Roller has provided no competent, medical evidence that his condition prevents him from working in any job. Indeed, Roller has interviewed for jobs since the end of his employment with GEMS IT and has even obtained at least three callback interviews. (Roller Dep. pp. 263-66.) For one of these jobs, Roller actually worked for a two-week time period. (Id.

pp. 265-66.) While Roller was not hired for that position, there is no evidence that this was because of his bipolar condition, just as there is no evidence that he has not been offered any other job because of his condition. (Id. p. 266.) In fact, Roller admits that he does not know why he was not hired for these jobs. (Id.)

Roller spent only about six months applying for jobs. (Id. p. 264.) He ended his job search voluntarily after he got tired of trying to explain why he was no longer working for GEMS IT. (Id. pp. 268-69.) Other than posting a resume on MinnesotaJobs.com, Roller has done nothing to find employment since October 15, 2002. (Id. pp. 269-70.) In fact, Roller was contacted by a prospective employer in early 2006. (Tr. p. 271.) The prospective employer asked Roller for an updated resume, but Roller did not follow-up. (Id.) Roller's job search may be frustrating. However, there is no evidence that Roller is restricted from a broad class of prospective jobs. He has simply chosen to stop looking for employment.

Roller also suggests he is substantially limited in the major life activity of working because some of the medications he has taken in the past to control his bipolar disorder slow down his creative process. Roller is not a medical doctor and, therefore, is not qualified to opine on how his medications affect him. In any event, Roller must do more than claim that his bipolar disorder causes him to perform some work activities more slowly to survive summary judgment. Heisler, 339 F.3d at 629 (finding employee was not substantially limited in her ability to concentrate, learn or work because her depression caused her to take twice as much time to perform a task and made it difficult to make decisions). Finally, Roller presents no evidence that the slowing down of his creative process precludes him from working in a broad range of jobs.

There is simply no evidence that Roller is significantly restricted in his ability to work as compared to the general population. Roller cannot, therefore, establish the first element of his *prima facie* case; he is not disabled as a matter of law.

2. **Roller Is Not Disabled By Virtue Of A Record Of Impairment.**

Roller also argues for the first time in his summary judgment submissions that he is disabled within the meaning of the SDHRA because he has a record of a qualifying impairment.² See S.D. Codified Laws § 20-13-1(4). While the SDHRA does not define record of impairment, under the ADA (to which the South Dakota Division of Human Rights looks in considering SDHRA disability claims) to establish a record of impairment, an individual must “have a history of a mental or physical impairment that substantially limits one or more major life activities.” Heisler, 339 F.3d at 630 (quoting 29 C.F.R. § 1630.2(k)).

As previously explained, Roller has not proven – and cannot prove – that his alleged impairment substantially limits or has ever substantially limited a major life activity. Therefore, he also cannot establish a record of an impairment.

Moreover, taking medications, receiving treatment and being hospitalized are not, on their own, sufficient to establish a record of impairment for purposes of the SDHRA. See Heisler, 339 F.3d at 630 (“Being hospitalized on four occasions for short periods of time, taking medications, and receiving shock therapy treatments do not in and of themselves establish that Heisler’s depression has ever substantially limited the major life activities she has asserted in this litigation.”) As a result, here, Roller’s history of bipolar disorder does not make him disabled under the law. Id. In fact, Roller has lived and worked independently throughout the years he has suffered from bipolar disorder.

² Roller has effectively attempted to amend his pleadings by raising new issues - disability by virtue of a record of impairment and failure to reasonably accommodate his alleged disability - in his summary judgment filing. These allegations should not be considered because Roller never provided GEMS IT with adequate notice of these claims. See Pickern v. Pier 1 Imports, Inc., 457 F.3d 963 (9th Cir. 2006) (upholding a district court's decision that plaintiff failed to provide defendant with adequate notice of ADA violations raised for the first time in plaintiff's opposition to summary judgment); Hurlbert v. St. Mary's Health Care Sys. Inc., 439 F.3d 1286, 1297 (11th Cir. 2006) (“A plaintiff may not amend his complaint through argument in a brief opposing summary judgment.”) (internal citations omitted).

The only "evidence" Roller points to in support of this assertion is a note in GEMS IT's file from his early employment in which Kelly Drake made the statement that Roller "might be" covered under the ADA. That statement, however, does not establish a "record of an impairment." It merely shows that GEMS IT was cognizant of its obligations under the ADA. Indeed, it clearly does not establish a record of impairment in the only life activity identified by Roller - working - because after Drake made this notation, GEMS IT continued to employ Roller for several years.

In short, Roller has not proven that he has a record of an impairment that substantially limits one or more major life activities. Accordingly, he cannot be considered "disabled" under South Dakota law on this basis.

B. Roller Is Not A Qualified Individual With A Disability.³

To satisfy the second element of his *prima facie* case, Roller must show that he is a "qualified individual with a disability." Canny v. Dr. Pepper/Seven-Up Bottling Group, 439 F.3d 894, 900 (8th Cir. 2006). A "qualified individual" is "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." 42 U.S.C. § 12111(8). To analyze whether a person is a qualified individual, courts generally use a two-step process: (1) does the individual possess the requisite skills for the job; and (2) can the individual perform the essential functions of the job, with or without reasonable accommodation. Canny, 439 F.3d at 900.

Roller fails the second step of this process because, according to him, he could not perform the essential functions of his software engineer job, or any other job, at the time of his

³ GEMS IT did not move for summary judgment on the grounds that Roller is not a qualified individual with a disability. This argument is provided only in response to Roller's claims, not as an additional ground for GEMS IT's motion.

termination in April 2002.⁴ In his statement to the Social Security Disability Agency, dated July 24, 2003, Roller asserted he became unable to work because of his condition on February 18, 2002 - the last day he worked for GEMS IT. (Roller Dep. pp. 194-97; Roller's Responses to GEMS IT's First Set of Requests for Admission & Second Set of Interrogatories, Ex. A.)

However, "where an employee has sworn in an application for disability benefits that he is unable to work at any job, he must proffer a sufficient explanation to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of his job, with or without reasonable accommodation." Cleveland v. Policy Mgmt. Sys., 526 U.S. 795, 807 (1999); Lane v. BFI Waste Syst. of N. Am., 257 F.3d 766, 769 (8th Cir. 2001). Roller has not -- and cannot -- explain how he could have performed his job given his statement in his application for Social Security Disability benefits. Accordingly, he cannot prove he is a qualified individual with a disability.

In essence, Roller wants it both ways. He uses his failure to perform any work based on his Social Security papers as evidence he is substantially limited in the major life activity of working, but then completely disclaims that assertion by arguing that he was qualified to perform his job and was still doing a good job at the time of his discharge. Either Roller could or could not perform his job. If he could perform his job, he is not disabled because he was not substantially limited in the life activity of working. If he could not perform his job or any other job as stated in his social security benefits papers, then he is not a qualified individual with a disability. In any event, he cannot establish that he was disabled as a matter of law.

⁴ Roller has provided no evidence that he could not work in a broad class of jobs other than his self-serving statement to the Social Security Administration. See Williams-Killackey Aff. Ex. D.

C. **Roller Fails To Establish A Causal Connection Between His Termination And His Alleged Disability.**

It is also Roller's burden to establish the final prong of his *prima facie* case: that he was terminated *because of* his disability. Simpson v. Des Moines Water Works, 425 F.3d 538, 542 (8th Cir. 2005). Roller has not – and cannot – meet this burden. To the contrary, Roller admits he engaged in the behavior that led to his termination, including the incidents involving Kevin Impehoven. (Roller Dep. pp. 127, 132.)

There is simply no evidence leading to an inference that GEMS IT acted with discriminatory animus towards individuals with disabilities or that similarly situated employees *without* disabilities received more favorable treatment. It is clearly Roller's burden to provide this evidence. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740 (7th Cir. 2006) ("It was up to [plaintiff] to find others who were directly comparable in all material respects."); Sellars v. City of Gary, 453 F.3d 848, 851 (7th Cir. 2006) ("Without evidence of at least one similarly situated employee, [plaintiff] has failed to show that any disparate treatment he may have suffered was improper.") However, Roller provides nothing more than his bald allegations that GEMS IT was trying to hurt him and/or was out to get him and his speculation regarding the motives and beliefs of GEMS IT's management. These "allegations and speculation[s] are insufficient to survive summary judgment without facts to support them." Simpson, 425 F.3d at 543.

In addition, it is Roller's burden, not GEMS IT's, "to produce specific, tangible evidence showing a disparity in the treatment of similarly situated employees." Logan v. Liberty Healthcare Corp., 416 F.3d 877, 882 (8th Cir. 2005). Roller has not satisfied this burden. And, without evidence of at least one similarly situated employee, Roller cannot show that he was terminated because of his disability.

Roller has failed to make out a *prima facie* case of disability discrimination. Simply failing to establish one element of the *prima facie* case would be enough to deny his motion, as well as to grant GEMS IT's motion for summary judgment. See Allen v. Interior Const. Servs. Ltd., 214 F.3d 978, 982 (8th Cir. 2000). However, Roller has not managed to establish even one element of his *prima facie* case. Accordingly, his summary judgment motion should be dismissed. Moreover, because the undisputed facts establish that he cannot establish these elements as a matter of law, GEMS IT's motion for summary judgment should be granted.

D. GEMS IT Did Not Refuse To Reasonably Accommodate Roller's Alleged Disability.

In his summary judgment filing, Roller argues – once again for the first time – that GEMS IT unreasonably failed to accommodate his alleged disability. See, supra, n. 2. This claim was not pled in Roller's Complaint. Moreover, Roller testified that his only claim in the current litigation was that he was terminated because of his mental illness. (Roller Dep. p. 231.) Roller never asserted that GEMS IT failed to accommodate him. (Id. pp. 101, 231.) As a result, this claim should not be considered.

Even if the claim is considered, it must fail. GEMS IT was not required to accommodate Roller, and in any case, Roller never properly requested any accommodations, nor has he provided any evidence suggesting that the accommodations he proposes now – more than 4 years after the end of his employment with GEMS IT – would have effectively resolved his steadily declining performance and inappropriate workplace behavior. For these reasons, this assertion also does not require summary judgment in Roller's favor or denial of GEMS IT's motion for summary judgment.

1. GEMS IT Had No Duty To Accommodate Roller.

Under the SDHRA, an employer must make good faith efforts to reasonably accommodate an individual with a disability. SD Codified Laws § 20-13-23.7 (“For purposes of

employment, public accommodation, public service, and education or housing, good faith efforts shall be made to reasonably accommodate the disabled person unless the accommodation would impose undue hardship.”); 42 U.S.C. § 12112(b)(5)(A).

As discussed in detail in section IV.A, Roller is not “disabled” within the meaning of South Dakota law. Accordingly, GEMS IT had no duty to accommodate Roller. SD Codified Laws § 20-13-23.7. As a result, Roller’s failure to accommodate claim should not be considered.

2. Roller Never Requested An Accommodation.

Even if Roller had proven that he was a qualified individual with a disability and, therefore, entitled to accommodation, Roller has presented no evidence showing that he requested accommodations from GEMS IT and was refused. To be entitled to an accommodation, an employee must notify his employer that he is in need of an accommodation. Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 727 (8th Cir. 1999); Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1217 (8th Cir. 1999). Roller’s summary judgment filing contains Roller’s first and only request for accommodation relating to his behavior.⁵ At his deposition, Roller testified that he never told Adcock he needed assistance with his job. (Roller Dep. p. 101.) Only Roller could accurately identify accommodations specific to his job and workplace. Roller cannot “expect [GEMS IT] to read [his] mind and know [he] secretly wanted a particular accommodation and then sue [GEMS IT] for not providing it.” Mole, 165 F.3d at 1218 (internal citations omitted). Roller admits that individuals spoke with him regarding his behavior, but nowhere alleges that he ever stated his medical condition caused his behavior or that he needed an accommodation regarding it. There is simply no evidence that GEMS IT had

⁵ Roller did have one conversation with Moore, which Moore initiated, regarding Roller’s problems arriving at work in a timely manner. However, Roller’s punctuality problems had nothing to do with his discharge, and Moore never spoke with Roller about punctuality again. (Roller Dep. pp. 125-26.)

any idea that Roller needed an accommodation to perform the essential functions of his job. Roller's failure to accommodate claim must be dismissed.

3. Roller Has No Evidence That His Requested Accommodation Would Have Been Effective.

It is also Roller's burden to show that accommodations not provided by GEMS IT would have made him qualified to perform the essential functions of his job.⁶ Cannice, 189 F.3d at 728. However, Roller offers no evidence that the accommodations he now suggests would have resulted in his ability to perform the essential functions of his job. Mole, 165 F.3d at 1218. In other words, Roller lacks proof that accommodation of his disability would have allowed him to keep his job. Cannice, 189 F.3d at 727-28 (finding an employer's failure to provide a private phone line as an accommodation for an employee with depression did not impair the employee's ability to work or aggravate his disability).

Roller's difficulties at GEMS IT were not due to GEMS IT's alleged failure to accommodate Roller's bipolar disorder. First, while some of Roller's suggested accommodations may have saved him from some frustration and/or aggravation in the workplace, GEMS IT is not obligated to provide an aggravation-free work environment as a reasonable accommodation. Cannice, 189 F.3d at 728. Further, only Roller's self-serving affidavit and the conclusory statements found therein support his assertions regarding accommodations. No other evidence suggests these accommodations would prevent Roller from acting inappropriately in the workplace. See, e.g., Reed v. LePage Bakeries, Inc., 244 F.3d 254, 262 (1st Cir. 2001) ("The ADA is not a license for insubordination in the workplace.")

In addition, some of these "accommodations" actually occurred. For instance, Roller was spoken with before his dismissal regarding his behavior. Further, Roller acknowledges that he

was already generally on a different schedule than Impecoven; he was arriving at work at the same time as Impecoven on the day of the driving incident because of a special meeting. (Roller Aff. ¶ 78.) So, there is no reason to believe that moving Roller to a different schedule would have prevented the February 2002 driving incident. There is also no evidence that working next to Impecoven or being on the same schedule as Impecoven impaired Roller's ability to work and/or aggravated his alleged disability. Roller simply does not demonstrate that he would not have been terminated if GEMS IT had provided him with the accommodations he now suggests.

Roller has not met his burden of proof on his newly minted failure to accommodate claim. This claim must also be dismissed.

E. Roller Has Failed To Show That GEMS IT's Legitimate, Non-Discriminatory Reason For Roller's Discharge Was Pretextual.

Even if Roller had managed to make out a *prima facie* case of disability discrimination – and he has not – he must still show that GEMS IT's legitimate business reason for his discharge was pretextual. To prove pretext, Roller must do more than show that GEMS IT's decision to terminate him was ill-advised; he must show that GEMS IT has offered a “phony excuse.” Henderson v. Ford Motor Co., 403 F.3d 1026, 1034 (8th Cir. 2005). Roller has presented no evidence to satisfy this burden. To the contrary, Roller admits that GEMS IT's proffered reasons are true; he admits he engaged in the conduct leading up to his termination. (Roller Dep. p. 132.) In fact, in his most recent filing, he states he has long believed that his employment with GEMS IT ended because of the incident in which he attempted to run Impecoven off the road. (Roller Aff. ¶ 70.)

Roller has not submitted any evidence of conduct or statements allowing an inference that disability discrimination was the motivating factor in GEMS IT's decision to terminate

⁶ Roller suggests the following accommodations: (1) that he be told there was a problem before dismissal; (2) that he be moved away from Impecoven since Impecoven was scared; and (3) that schedules be changed so that

Roller's employment, as opposed to his conduct and performance. The only comment Roller could potentially point to is a statement by Moore in which Moore asked Roller to call Moore if Roller ever planned to bring a shotgun to work so that Moore could stay home. (Roller Dep. p. 162; Supplemental Affidavit of Robert Moore ("Moore Supp. Aff.") ¶ 4.) Moore made the statement as a joke, and Roller acknowledges that Moore said the statement jokingly and that Moore made the statement during a time when Roller and Moore joked around at work. (Roller Dep. pp. 162-63; Roller Aff. ¶ 68; Moore Supp. Aff. ¶ 4.) Further, this statement was motivated by Roller's former military status, and Moore was not aware of Roller's alleged disability at the time. (Moore Supp. Aff. ¶ 4.) Moore was also not the decision-maker; Adcock made the decision to terminate Roller months after Moore's statement and there is no evidence Adcock even knew of this statement. (Adcock Aff. ¶ 18.)

Roller also appears to argue that his conduct in early 2002 was not sufficient to justify termination and that the reasons for his termination should have been documented in a different manner. However, these arguments merely question GEMS IT; there is no evidence presented that is sufficient to demonstrate a pretext for unlawful discrimination. Mole, 165 F.3d at 1218. More importantly, there is no evidence to suggest that GEMS IT did not believe its reasons for terminating Roller. GEMS IT made a legitimate business judgment and decided to end Roller's employment. Roller may question this judgment, but that does not make GEMS IT's decision discriminatory. Roller's attempts to question GEMS IT's legitimate judgment are of no consequence in this proceeding, as courts will not "sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers" Henderson, 403 F.3d at 1034; see also Jeserilz v. Potter, 282 F.3d 542, 547 (8th Cir. 2002) ("[Plaintiff's] own

Impecoven and Roller would not have to drive to work at the same time. (Roller Aff. ¶ 78.)

conclusory allegations that [Defendant] was out to get him because of his disability will not suffice.").

Indeed, while stating that he should have been provided an accommodation, Roller faults GEMS IT for allowing him the opportunity to go on leave and seek counseling prior to notifying him of the termination decision. The fact of the matter is that GEMS IT knew of Roller's bipolar condition for years. Despite his pranks and other performance issues, it tried to keep him as an employee. It was only when Impehoven reported that Roller had tried to run him off the road -- a perception that Roller acknowledges Impehoven may have had -- that GEMS IT took action and discharged him. This is not evidence of any bias by GEMS IT against Roller because of his condition.

In sum, although Roller claims that GEMS IT's legitimate, non-discriminatory reasons were actually pretext for discrimination, he fails to point to any facts indicating that his termination was based on anything other than GEMS IT's stated reasons. Simpson, 425 F.3d at 543. The record simply does not support an inference that Roller was discharged because of a disability. Rather, the undisputed facts show that Roller was terminated because of declining performance and inappropriate behavior, appropriate factors to consider when making a decision regarding an employee's job status. Mole, 165 F.3d at 1219 n.3 ("Firing an employee because of the job performance consequences of a disability ... rather than the disability itself is not actionable under the ADA.") Roller has failed to prove that his alleged disability led to his termination from GEMS IT. Accordingly, GEMS IT's motion for summary judgment must be granted and Roller's motion must be denied.

CONCLUSION

For all of the foregoing reasons, and for all of the reasons contained in GEMS IT's initial brief, GEMS IT requests that Roller's motion for summary judgment be denied and, instead, that

his complaint be dismissed with prejudice, costs and any other relief the Court deems appropriate.

Respectfully submitted this 30th day of November, 2006.

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