IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

TERRI DAVIS PLAINTIFF

v. Civil No. 05-5095

OZARKS ELECTRIC COOPERATIVE DEFENDANT

PLAINTIFFS' BRIEF IN SUPPORT OF RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, Terri Davis ("Davis"), by and through her undersigned attorneys for her Brief in Support of Response to Defendant's Motion for Summary Judgment and states as follows:

Facts.

Terri Davis began working for Defendant in 1997 as a meter reader. In October of 2000 she became a "Field Service Representative." (Deposition of Teri Davis, excerpts of which are attached as Exhibit 1, p. 19). A Field Service Representative's job is to collect delinquent accounts. (Davis Dep., p. 19). In her last Performance Appraisal that was completed prior to her diabetes diagnosis, Davis's supervisor complimented her abilities and stated, "I can rely on her to carry out just about any task [and] it will be completed in a reasonable amount of time, accurately [and] safely. She has good judgment [and] doesn't require much supervision [and] I never have to worry about her completing her work." (August 27, 2004 Performance Appraisal attached as Exhibit 2, p. 4).

The regular hours of work for Davis, as a Field Service Representative were 7:30 a.m. to 4:00 p.m. (Deposition of Patrick Noggle, excerpts of which are attached as Exhibit 3, p. 29). Neither Davis, nor any doctor who has examined her, has ever expressed any concern about her ability to work her regular shift. After she had been a Field Service Representative for some time, Davis was asked to participate in an "on call" list. Previously, the work of resetting meters after 4:00 p.m. was handled exclusively by the service department. (Davis Dep., p. 23). Then, Davis, the other Field Services Representatives, and various other employees shared a rotating call schedule. Each person on the list was typically on call for one week a month. Working "on call" to reset meters was not a part of Davis'ss written job description. (Davis Dep., p. 62; Job Description attached as Exhibit 4).

In addition to the Field Services Representatives, Defendant used heavy equipment operators, service department workers, and other employees to do meter resets. (Noggle Dep., p. 32; Deposition of Chris Coker, excerpts of which are attached as Exhibit 5, pp. 34-35; Deposition of Vonda Hart, excerpts of which are attached as Exhibit 6, p. 74). Defendant allowed anyone who was qualified to do meter resets to participate in the reset call list. (Hart Dep., p. 76). Defendant had numerous employees who could do meter resets. It is one of the first things that employees learn to do. (Coker Dep., pp. 34-35). An employee can be taught to do a meter reset in 2 to 3 hours. *Id.* Just because an employee's name appeared on the call list, he or she did not have to take call as shown on the list. Employees were free to trade with someone else. (Hart Dep., p. 75, l. 19).

In October of 2004, Davis was diagnosed with Type II diabetes. Her treating physician, Ronnie Lee, determined that she should work a regular schedule on a temporary basis so that she

could control her blood sugar levels with medication and diet. (Deposition of Ronnie Lee, M.D., excerpts of which are attached as Exhibit 7, p. 14). Dr. Lee sent a letter to Defendant asking that Davis be excused from after-hours call on a temporary basis. (The October 27, 2004 letter from Dr. Lee to Defendant is attached as Exhibit 8).

Upon hearing that Davis had been diagnosed with diabetes and had asked to be temporarily excused from after-hours call, Defendant made various assumptions about her limitations. Vonda Hart, the Human Resources Administrator, assumed that Davis might lose consciousness and have other unknown problems that posed safety risks. (Hart Dep., p. 19, 21, 31-32). She thought that Davis was not safe to drive at all and that she should not work alone. (Hart Dep. pp. 24, 34-35). Davis's immediate supervisor, Patrick Noggle, said that based on his "general knowledge" of diabetes, he felt that Davis might pass out at the wheel of a car, become unconscious, or experience blindness. (Noggle Dep. pp. 8-9, 10, 22). Defendant's Training and Safety Coordinator, felt that, since Davis was diagnosed with diabetes, she could not drive at all and that she might lose consciousness. (Coker Dep., pp 14, 27-28).

Based on their fears about Davis's diabetes, Defendant sent Davis to its "company doctor", Dr. Moffit. (Coker Dep., p. 17). Based in part on a recommendation from its workers' compensation insurance carrier, Defendant has sent many employees to Dr. Moffit for examinations. (See Defendant's Answer to Interrogatory No. 13, attached as Exhibit 9; Hart Dep., pp. 25-26). Dr. Moffit has never contradicted any of Defendant's conclusions about whether or not one of its employees can perform his job duties. (Coker Dep., p. 22). Before Dr. Moffit examined Davis, Defendant sent him a statement from Chris Coker expressing his concerns about Davis's ability to drive and work around electricity and a statement from Vonda

Hart explaining that Defendant does not create "light duty" positions. (The October 28, 2004 letter from Chris Coker is attached as Exhibit 10 and the October 28, 2004 letter from Vonda Hart is attached as Exhibit 11).

Additionally, Defendant sent Dr. Moffit a job description for Davis's position that was identical to the job description given to Davis except that someone added the sentence: "Work of resetting meters is performed after 4 p.m., overtime will be required." (The Job Description with the additional language is attached as Exhibit 12). This "job requirement" was not on the only version of the written description given to Davis, and none of Defendant's witnesses can explain who authorized the change, who added it, or when it was done. (Davis Dep., p. 62; Hart Dep., pp. 36, 41; Noggle Dep., pp. 19-20; Deposition of Paul Dougan, excerpts of which are attached as Exhibit 13, pp. 23-24).

Dr. Moffit was asked to provide his own opinion as to Davis's ability to perform her job, independent of Dr. Lee's assessment. (Deposition of Gary Moffit, M.D., excerpts of which are attached as Exhibit 14, pp. 11, 14). In his judgment, independent of Dr. Lee's assessment, Dr. Moffit determined that Davis was fully capable of performing all of her essential job duties without any limitations. (Moffit Dep., p. 24). However, when he reported his findings to Defendant, he stated that Davis could not perform her job functions because Dr. Lee had stated she was "unable to drive for six months." (The October 29, 2004 letter from Dr. Moffit to Vonda Hart is attached as Exhibit 15). After talking to Dr. Moffit, Coker, the Training and Safety Coordinator, was of the opinion that Davis could perform all of her job duties. (Coker, Dep., p. 24). Noggle, Davis's immediate supervisor, also felt that Davis could return to her full duties. (Noggle Dep., p. 23).

Dr. Lee then wrote a letter to Defendant to clear up any misunderstandings that Defendant had about Davis's condition. (The November 1, 2004 letter from Dr. Lee to Defendant is attached as Exhibit 16). He explained to Defendant that erratic work schedules and eating patterns, and stress, caused by the unpredictable call work, could affect Davis's blood sugar levels, which is why he recommended that she be excused from after-hours call. (Exhibit 16). In his letter, Dr. Lee informed Defendant that "[t]here is no doubt that [Davis's] day time sugars during regular business hours are well-controlled and she can drive without restrictions during those times." (Exhibit 16, p. 2).

Hart, Dougan, Coker, and Noggle reviewed Dr. Lee's November 1, 2004 letter and decided to terminate Davis. (Hart Dep., pp. 65-66). They had decided to terminate her based on Dr. Moffit's October 29, 2004 letter and the letter from Dr. Lee could not "change the course of events that were going on." *Id.* Defendant decided to terminate Davis immediately, even though she had expressed that she wanted to work and would have taken her call if required to do so. (Davis Dep., pp. 46, 48). At the time of her termination, Davis had not missed any of her "on call" duties. (Noggle Dep., pp. 35-36). Defendant did not even check to see if any volunteers would take Davis's call and it did not allow her to attempt to trade call with any other employees, which was its usual practice. (Noggle Dep., p. 26; Hart Dep. p. 75). Defendant decided to terminate Davis immediately even if she only needed to be off the call list for a couple of weeks. (Hart Dep., p. 66; Dougan Dep., p. 43). However, Defendant would have allowed an employee with a broken leg to be excused from call for 6 to 8 weeks. (Coker Dep., p. 37).

It would have been no problem to accommodate Davis by removing her from the on call rotation. (Hart Dep., pp. 70-71). Defendant did not attempt to find anyone to take Davis's call

because it did not want to set a precedent. (Noggle Dep., p. 26). Defendant thought that if it allowed Davis to trade her call for diabetes, it might have other employees asking for time off because they don't like the shift they're on or for Christmas. (Coker Dep., pp. 16-17).

After Davis's termination, Defendant was able to find volunteers to take her place on the call list without difficulty. (Noggle Dep., pp. 35-36; Dougan Dep., p. 45). In fact, after Davis's termination, there were more employees on the "Reset Call List" than there were when she worked there. (Noggle Dep., p.32; The Reset Call List is attached as Exhibit 17). Davis was one of seven employees on the Reset Call List for the period of 12/27/2004 through 2/14/2005. (Exhibit 17). There were eight employees on the List for the next period, and Davis was not one of them. (Exhibit 17). Defendant had five employees on the list in addition to the three Field Service Representatives, after Davis was terminated. (Exhibit 17). With that number of employees on the list, Davis would only have been "1st Call" once approximately every two months. In order to comply with Dr. Lee's request, Defendant would only have needed to allow Davis to trade call with another employee a few times.

II. Davis Has Sufficient Proof to Submit to a Jury in this Case.

In its Motion, Defendant disputes two elements of Davis's claim: (1) that she is disabled within the coverage of the ADA, and (2) that she requested an accommodation that required the elimination of an essential job function. The evidence shows, or certainly creates, a disputed issue of fact, that Davis should prevail on both of these elements.

A. There Is Sufficient Proof to Support Davis'ss Claim that She is "Disabled" Under the ADA.

Davis was a "qualified individual with a disability" as defined by the ADA. She had performed very well in her job as a Field Service Representative for about 4 years. (Exhibit 2). There is no question but that she was qualified. Defendant argues only that she was not "disabled" within the meaning of the Act. However, Defendant completely overlooks a definition of "disability" in the ADA. Under the ADA, the term "disability" includes "being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities" of the plaintiff. 42 U.S.C. § 12102 (2)(A) and (C). The "regarded as" portion of the ADA was "intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995).

Davis is "disabled" under the ADA, if Defendant perceived her as having a disability. There is substantial evidence that Defendant regarded Davis as disabled. Based on their perceptions of diabetes, Defendant's decision-makers immediately assumed that Davis had limitations as soon as they heard that she had the disease. Vonda Hart, the Human Resources Administrator, assumed that Davis might suddenly lose consciousness. (Hart Dep., pp. 19, 21, 31-32). She felt that passing out was just "one of the options" and that other dangerous conditions might result. She said, "I don't know what all could happen with a diabetic." *Id.* at p. 21. When asked about Davis's limitations, specifically her perceived potential to lose consciousness, Hart said, "That was an example that we used – that we could understand. I'm sure that there are more." (Hart Dep., pp. 31-32). She thought that Davis was not safe to drive at all and that she should not work alone. (Hart Dep., pp. 24, 31-32, 34-35).

Even though none of Davis's medical-care providers indicated that Davis was in danger of losing consciousness, Davis's immediate supervisor, Patrick Noggle, said that, based on his "general knowledge" of diabetes, he felt that Davis might pass out at the wheel of a car, become unconscious, or experience blindness. (Noggle Dep. pp. 8-9, 10, 22). Defendant's Training and Safety Coordinator, also felt that, since Davis was diagnosed with diabetes, she could not drive at all and that she might lose consciousness. (Coker Dep., pp 14, 27-28).

Defendant now relies on the fact that Davis's diabetes was well-controlled to argue that she was not "disabled" under the ADA. However, all of Defendant's decision-makers perceived that her diabetes was uncontrolled. (Hart Dep., p. 21). Uncontrolled diabetes is clearly disabling. It causes vision problems, increased risk of heart attack, strokes, renal failure, ulcers of the extremities, amputations, bone infections, nerve damage, sexual dysfunction, and more. (Moffit Dep., pp. 34-35). The statements of Defendant's decision-makers show that Defendant perceived that Davis had uncontrolled diabetes that limited her based on these conditions.

Even after Defendant was given all of the medical opinions that it now says show that Davis was not disabled, its decision-makers still thought that she was. After reading the letters of Dr. Lee and Dr. Moffit, Paul Dougan, the Vice President of Relations and Marketing, was of the opinion that Davis would lose consciousness and cause an accident. (Dougan Dep., pp. 26-27.) In spite of the medical records now relied on by Defendant, Coker, the Training and Safety Coordinator was still of the opinion that Davis could not drive at any time. (Coker Dep., p. 27). Patrick Noggle read the letters of Davis's doctors and concluded that she was still in danger of losing consciousness and passing out. (Noggle Dep., p. 22). When asked why he thought that Davis posed a risk because she might lose consciousness even though her doctors had never

provided evidence that it was a possibility, Noggle stated, "And there was no evidence that she would not pass out that I saw." (Noggle Dep., p. 22, l. 12-25).

Defendant's representatives reviewed the medical opinions in this case and determined that Plaintiff had a condition that causes loss of consciousness, that causes accidents, that causes blindness, that prevents people from driving, and that subjects people to all of the limitations described by Dr. Moffit, including amputation, stroke, and vision problems. If Defendant's perceptions were true, Davis would certainly be disabled. Clearly consciousness, sight, the ability to walk, the ability to drive, and the ability to work are substantial life activities that are impaired by the disabilities that Defendant attributed to Davis. Defendant now claims that Davis was not disabled based on the medical records, yet the testimony shows that Defendant reviewed those same records and regarded Plaintiff as disabled because of them or in spite of them. The proof requires that the issue of whether or not Davis was regarded as disabled be submitted to the jury.

B. A Question of Fact Exists as to Whether or Not Davis Could Perform her Essential Job Functions With or Without an Accommodation.

Defendant argues that Davis was unable to perform on call duty and that on call duty was an essential function of her job. The proof shows a disputed question of fact as to whether or not Davis was able to perform the on call duty with or without an accommodation and there is a question of fact concerning whether or not on call duty was an essential job function.

1. Davis May Have Been Able to Perform Her Essential Job Functions Without Any Accommodation.

It is true that Davis asked to be excused for on call duty based on the advice of her treating physician, Dr. Ronnie Lee. However, Defendant was not satisfied with Dr. Lee's letters and required Davis to submit to an examination by Dr. Gary Moffit.

According to Dr. Moffit, he was asked to provide his own opinion as to Davis's ability to perform her job, independent of Dr. Lee's assessment. (Deposition of Gary Moffit, M.D., excerpts of which are attached as Exhibit 14, pp. 11, 14). Defendant, not Davis, sent Dr. Moffit letters expressing concerns about her ability to perform her job prior to his examination. Defendant sent him a statement from Chris Coker expressing his concerns about Davis's ability to drive and work around electricity and a statement from Vonda Hart explaining that Defendant does not create "light duty" positions. (Exhibit 10 and Exhibit 11). Hart also sent Moffit a job description to which someone added the sentence: "Work of resetting meters is performed after 4 p.m., overtime will be required." -- to the existing description given to Davis. (Exhibit 12).

In spite of Defendant's concerns, Dr. Moffit testified that in his judgment, independent of Dr. Lee's assessment, he determined that Davis was fully capable of performing all of her essential job duties, including the on call work, without any limitations. (Moffit Dep., p. 24). After talking to Dr. Moffit, Chris Coker, the Training and Safety Coordinator, was also of the opinion that Davis could perform all of her job duties. (Coker Dep., p. 24). Noggle, Davis's immediate supervisor, also felt that Davis could return to her full duties. (Noggle Dep., p. 23).

Although Dr. Moffit felt that Davis was fully capable of performing her job, which is what he was asked to consider, he wrote a letter to Defendant, stating the opposite. In his letter, he stated that Davis could not perform her job functions because Dr. Lee had stated she was "unable to drive for six months." (Exhibit 15). Defendant now claims that Dr. Moffit deferred to

Dr. Lee even though in his own testimony he stated that he was asked to provide his own opinion and he further stated that he did not know if Dr. Lee understands job descriptions so that he can make fitness for duty determinations. (Moffit Dep., pp. 24, 31). Additionally, Dr. Lee never determined that Davis "could not drive for six months." (Lee Dep., p. 46; Exhibit 8; and Exhibit 16).

Dr. Moffit reported an opinion that was the opposite of his medical determination and that was consistent with the opinions expressed to him by Defendant's representatives prior to his examination. The written opinion he gave contradicts the information he provided to Defendant in his conversation with Coker. The inconsistency with his statements creates an inference that he was trying to help Defendant justify its termination of Davis. This inference is supported by his history of working with Defendant on employee-related health matters. He was contacted by Defendants based in part on a recommendation from Defendant's workers' compensation insurance carrier. Defendant has sent many employees to Dr. Moffit for examinations. (See Defendant's Answer to Interrogatory No. 13, attached as Exhibit 9; Hart Dep., pp. 25-26). Dr. Moffit has never contradicted any of Defendant's conclusions about whether or not one of its employees can perform his or her job duties. (Coker Dep., p. 22).

Defendant never told Davis that Dr. Moffit, Chris Coker, and Patrick Noggle felt like she could perform on call work. If it had, Davis would have attempted to do so. (Davis Dep., p. 48). Defendant decided instead to tell Davis the opposite, which was that she was unable to perform her job and therefore had to be terminated. (Hart Dep., p. 66). A jury must decide why the Defendant told Davis the opposite of what it believed to be true.

2. Working On Call was Not an Essential Function of Davis's Job.

There is at least a disputed question of fact regarding whether working after-hours call was an essential part of Davis's job. It is undisputed that the regular hours of work for Davis as a Field Service Representative were 7:30 a.m. to 4:00 p.m. (Noggle Dep., p. 29). Neither Davis, nor any doctor who has examined her, has ever expressed any concern about her ability to work her regular shift.

Field Services Representatives' primary job is to collect past due accounts. (Davis Dep., p. 19). Davis initially was not even asked to do "meter resets" as part of her job. When she started in her job, the work of resetting meters after 4:00 p.m. was handled exclusively by the service department. (Davis Dep., p. 23). Eventually, Davis and the other Field Service Representatives did participate in the call schedule with other employees. However, each person on the list was typically on call for one week a month. Working "on call" to reset meters was not a part of Davis's written job description. (Davis Dep., p. 62; Exhibit 4).

Defendant argues that on call work was an essential job function, yet just because an employee's name appeared on the call list, he or she did not have to take call as shown on the list. Employees were free to trade with someone else. (Hart Dep., p. 75, l. 19). Many other employees with different jobs handled the reset call, such as heavy equipment operators and service department workers. (Noggle Dep., p. 32; Coker Dep., pp. 34-35; Hart Dep., p. 74). Defendant allowed anyone who was qualified to do meter resets to participate in the reset call list. (Hart Dep., p. 76). Defendant had numerous employees who could do meter resets. It is one of the first things that employees learn to do. (Coker Dep., pp. 34-35). An employee can be taught to do a meter reset in 2 to 3 hours. *Id.*

Defendant acts as though it could not accommodate Davis by excusing her from call on a temporary basis because it would have been too burdensome. However, its witnesses testified to the contrary. Chris Coker testified that an employee would be excused from taking call for six to eight weeks if he had a broken arm or leg. (Coker Dep., p. 37). Hart, the Human Resources Manager said, "The on call time or call back time would have been no problem to accommodate." (Hart Dep., p. 70).

Defendant did not allow Davis to attempt to find someone to take her call, which is its usual practice, and her supervisors did not even see if it had any volunteers to take it for her. (Noggle Dep., p. 26; Hart Dep. p. 75). They never made a determination that it would be too burdensome to excuse her from call. Rather, they fired her in order to prevent other employees from requesting changes to the call list. They considered checking to see if anyone else could take her call but decided against it because they did not want to set a precedent that might encourage other employees to ask for scheduling changes. (Noggle Dep., p. 26). Defendant thought that if it allowed Davis to trade her call for diabetes, it might have other employees asking for time off because they don't like the shift they're on or for Christmas. (Coker Dep., pp. 16-17).

It must be emphasized that Davis had not missed any of her "on call" duties. (Noggle Dep., pp. 35-36). She never even required someone to take her place on the call list. Defendant decided to terminate Davis immediately even if she only needed to be off the call list for a couple of weeks. (Hart Dep., p. 66; Dougan Dep., p. 43).

The fact that Defendant was able to find volunteers to take her place on the call list without difficulty after Davis's termination shows that call duty was not an essential job

function. (Noggle Dep., pp. 35-36; Dougan Dep., p. 45). After Davis's termination, there were more employees on the "Reset Call List" than there were when she worked there. (Noggle Dep. 32; Exhibit 17). Davis was one of seven employees on the Reset call List for the period of 12/27/2004 through 2/14/2005. (Exhibit 17). There were eight employees on the list for the next period, and Davis was not one of them. (Exhibit 17).

Defendant claims that there were only three Field Services Representatives, including Davis, to handle the call, so that it would have been too burdensome to take her out of the rotation. The facts show that Defendant actually had four employees on the list in addition to the three Field Service Representatives, before Davis was terminated and five additional employees on the list after Davis was terminated. (Exhibit 17). With that number of employees on the list, Davis would only have been "1st Call" once approximately every two months. In order to comply with Dr. Lee's request, Defendant would only have needed to allow Davis to trade call with another employee at the most three times, perhaps less. Such trades were standard practice. (Hart Dep., p. 75, l. 19).

Defendant does not even try to explain why it would have been too burdensome to ask for someone to take Davis's call on a temporary basis, but it was simple enough to add additional people to do it on a permanent basis after she was fired. It terminated her to set a precedent; to prevent employees from requesting anything that might be considered an accommodation. There are sufficient facts from which a jury can conclude that Defendant could have accommodated Davis.

III. Conclusion.

There are ample facts to allow a jury to determine that Defendant regarded Davis as disabled and that she could have performed her job with or without reasonable accommodation. The facts and the inconsistencies in Defendant's witnesses' statements create an inference of discriminatory intent that must be considered by a jury.

WHEREFORE, Davis respectfully requests that Defendant's Motion for Summary Judgment be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed this 20th day of January, 2006 to:

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