IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIE BERNARD DELOACH,

Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

CIVIL ACTION FILE

NO. 1:19-CV-5617-MHC-AJB

ORDER

This case is before the Court on the Final Report and Recommendation ("R&R") of United States Magistrate Judge Alan J. Baverman [Doc. 71] recommending that Defendant CSX Transportation, Inc. ("CSXT")'s Motion for Summary Judgment [Doc. 56] be granted. The Order for Service of the R&R [Doc. 72] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that order. Plaintiff Willie Bernard DeLoach ("DeLoach") filed objections within the permitted time period. Pl.'s Objs. to R&R ("Pl.'s Objs.").

I. BACKGROUND[1]

DeLoach was hired by CSXT as a locomotive conductor but became a locomotive engineer in 2004, the position which he held at the time of the filing of the Complaint [Doc. 1]. There is no dispute that a locomotive engineer has the duty to ensure the safe operation of the train by controlling the speed, direction, breaking, and secondary systems from the locomotive cab. Consequently, if the locomotive engineer becomes incapacitated, it would fall upon the locomotive conductor, the only other crew member in the cab but who is not authorized to operate the train by herself, to bring the train to a stop. If there is an inability to do so, then the "alerter system" will activate the train's penalty break after approximately 60-80 seconds. If the alerter system is used to stop the train, there is a greater risk of train derailment or other accident. The freight trains that DeLoach operates as an engineer weigh more than 20,000 tons, stretch more than 10,000 feet, travel at speeds up to 50 miles per hour, and can carry explosives, chlorine gas, crude oil, and sulfur.

DeLoach suffered sudden onset cardiac arrest on June 6, 2015, and was diagnosed with hypertrophic cardiomyopathy, which is not curable, and comes

[1] The factual background is taken from relevant portions of the "Facts" section of the R&R to which no objections have been made. R&R at 2-9.

with a very high risk for a subsequent cardiac arrest. The treatment for this condition is the placement of an implantable cardiac defibrillator ("ICD") in the patient's chest. If an arrhythmia is detected, the ICD will deliver an electric shock to the heart, in order to minimize the possibility of cardiac arrest. On June 10, 2015, DeLoach had an ICD placed in his chest. DeLoach was informed by his treating cardiologist, Dr. Vaibhav V. Patel, M.D., that any discharge of his ICD could cause DeLoach to faint or lose consciousness. Moreover, the moments before a shock carries the risk of lightheadedness, fainting, or loss of consciousness. In the first year after the ICD is implanted, there is an increased risk of accidental discharge which would increase the risk of loss of consciousness. In fact, the American Heart Association recommends that individuals with newly implanted ICDs do not drive for at least six months afterwards; moreover, individuals with ICDs are banned from flying a commercial airplane in the United States.

On July 27, 2015, CSXT informed DeLoach that he was not medically qualified to return to work and would need to remain off until he had the ICD for one year without any discharges based upon the safety sensitivity of his job as a locomotive engineer. On June 1, 2016, CSXT informed DeLoach that he had been medically cleared to return to work with no restrictions and he returned to work

shortly thereafter. On December 14, 2019, DeLoach filed his Complaint alleging the CSXT violated the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., by arbitrarily removing him from his position as locomotive engineer for one year. Compl. ¶ 33.

II. LEGAL STANDARD

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and need only satisfy itself that there is no plain error on the face of the record in order to accept the recommendation. See United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983). Further, "the district court has broad discretion in reviewing a magistrate judge's report and recommendation"—it "does not abuse its discretion

by considering an argument that was not presented to the magistrate judge" and "has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." Williams v. McNeil, 557 F.3d 1287, 1290-92 (11th Cir. 2009). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which the parties object and has reviewed the remainder of the R&R for plain error. See Slay, 714 F.2d at 1095.

III. DISCUSSION

Judge Baverman found that DeLoach has not established a prima facie case of disability discrimination during the year he was prevented from being a locomotive engineer because DeLoach posed a "direct threat" and was not otherwise qualified for that position based upon the severity and nature of the potential harm that could occur if he became unable to operate the train after his ICD discharged. R&R at 22-38. Judge Baverman also found that, even if DeLoach was able to establish a prima facie case, CSXT proffered a legitimate, non-discriminatory reason for its one-year waiting period before DeLoach was permitted to return to his position: the legitimate safety concerns that could arise in the event of the ICD's accidental discharge over the first year of implementation. Id. at 38-39. Finally, Judge Baverman found that DeLoach failed

to prove that CSXT's proffered non-discriminatory reason was false and based instead on his disability. Id. at 39-40.

DeLoach first contends that Judge Baverman erred in finding that he had not made a prima facie case for discrimination because DeLoach was qualified for the description for the job of locomotive engineer, was "released by his cardiologist with no restrictions," and CSXT's policies did not limit individuals with cardiac issues of ICDs from employment. Pl.'s Objs. at 2. Judge Baverman did not find that DeLoach's cardiac condition disqualified him from the job but that the first year of the implantation of the ICD constituted a "direct threat" due to the risk of an ICD shock. And it is not accurate for DeLoach to claim that he was released by his cardiologist "without restriction." In fact, Dr. Patel later amended DeLoach's return to work report indicating the potential danger of DeLoach working as a locomotive engineer without restriction:

> The problem with disability forms, unfortunately, from a cardiologist's perspective, is they are asking us about physical limitations, and cardiovascular diseases are not necessarily – they are physical, but they are not physical. . . . So it's not something that we can easily answer. So I struggled with this form about can he – is he able to do his work without restriction, and I'm like, well, it depends on what kind of work he's doing.
>
> So I specifically added the statement, allowing the medical personnel, where it says may need limitation of operation of heavy machinery due to risk of ICD shock causing transient loss of control. This is

> something that I would fill out. It all depends on the job that you're asking this person to do.
> ***
> So I was leaving that to CSX to make a decision based on this risk whether they think he could be a locomotive engineer or not.

Dep. of Vaibhav V. Patel, M.D., taken Sept. 3, 2020 [Doc. 57-6] at 55-56.

"The ADA permits an employer to require 'that an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace.'" Lewis v. United States Steel Corp. Fairfield Works, No. 2:14-cv-01965-AKK, 2016 WL 7373733, at *3 (N.D. Ala. Dec. 20, 2016) (quoting 42 U.S.C. § 12113(b)). The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12111(3). It is DeLoach's burden to establish that "he was not a direct threat or that reasonable accommodations were available." Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1280 (11th Cir. 2001) (quoting LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 836 (11th Cir. 1998)). "If he cannot meet this burden, he is not a qualified individual and therefore cannot establish a prima facie case of discrimination." Id. Because DeLoach has failed to carry his burden to establish that he was not a direct threat to the safety of others due to the severity and nature of the potential harm that could occur during the first year of his implanted ICD should he be permitted to operate as a locomotive engineer, there is no genuine

issue of material fact that DeLoach has failed to establish a prima facie case of discrimination.

DeLoach next contends that Judge Baverman erred in determining that a direct threat was established without a required individualized threat assessment. Pl.'s Objs. at 3. The Magistrate Judge fully considered this argument and performed an extensive review of the applicable case law. R&R at 28-35. Judge Baverman concluded that an individual assessment was not required in this case.

> The undisputed facts in the present case show that Plaintiff was diagnosed with hypertrophic cardiomyopathy, had an ICD implanted, and was a "very high risk" for a second event of cardiac arrest. Any such discharge of his ICD could cause him to faint or lose consciousness and he also could become lightheaded and weak before an event or faint and lose consciousness afterwards. If Plaintiff was incapacitated, the conductor, the other person in the locomotive--who was not authorized to operate the train by herself -- would be required to bring the train to a stop. Such a stop is considered an emergency and could result in derailment, collision, or a hazardous material spill. Indeed, the freight trains on which Plaintiff worked can weigh more than 20,000 tons, stretch more than 10,000 feet, and travel at speeds of up to 50 mph, and may carry explosives, chlorine gas, crude oil, and sulfur. The American Heart Association recommends that patients with newly implanted ICDs refrain from driving private vehicles for six months. More analogous to the current situation, people with ICDs are permanently banned from holding a commercial driver's license or flying a commercial plane in the United States due to syncope.

R&R at 34-35 (internal citations omitted). See also Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996) (holding that an employer's failure to investigate possible accommodations does not relieve a plaintiff of the burden of

producing probative evidence that such accommodations were available). The Court also notes that Judge Baverman alternatively found that even if DeLoach had established a prima facie case, CSXT's decision to impose a one-year waiting period was based on a legitimate, non-discriminatory reason; namely, the severe safety concern that would arise if DeLoach lost consciousness or became incapacitated due to an ICD shock.

Finally, DeLoach asserts error in the Magistrate Judge's finding that he did not establish pretext. Pl.'s Objs. at 3-4. In his brief in response to CSXT's motion for summary judgment, DeLoach never argues that CSXT's proffered legitimate, non-discriminatory reason was pretextual. Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. [Doc. 65]. This Court "has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." Williams, 557 F.3d at 1290-92. Because DeLoach failed to make any argument as to pretext in his opposition to CSXT's motion, this Court declines to consider it as a part of DeLoach's objections. The Court notes that DeLoach has offered no credible evidence that CSXT's proffered reason was false or that the actual reason for the one-year suspension of his ability to operate as a locomotive engineer was due to his disability.

IV. CONCLUSION

Therefore, after consideration of Plaintiff's objections and a *de novo* review of the record, it is hereby **ORDERED** that Plaintiff's objections to the R&R [Doc. 73] are **OVERRULED**.

Accordingly, the Court **APPROVES AND ADOPTS** the Final Report and Recommendation [Doc. 71] as the Opinion and Order of the Court.

It is hereby **ORDERED** that Defendant CSX Transportation, Inc.'s Motion for Summary Judgment [Doc. 56] is **GRANTED**.

This 12th day of August, 2021.

Mark H. Cohen

MARK H. COHEN
United States District Judge