IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOSEPH BONGIOVANNI,	§	
	§	
Plaintiff,	§	
	§	
-v-	§	Civil Action No. 4:13cv175
	§	Judge Clark / Judge Mazzant
COMPASS BANK,	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

TO THE HONORABLE DISTRICT COURT JUDGE:

NOW COMES Plaintiff, Joseph Bongiovanni, and files this, Plaintiff's Response to Defendant's Motion for Partial Dismissal and asks the Court to deny the motion in its entirety.

A. INTRODUCTION

1. Plaintiff is Joseph Bongiovanni; Defendants are Compass Bank and BBVA Compass Bancshares, Inc. d/b/a BBVA Compass.[1]

2. Mr. Bongiovanni sued Defendant for disability discrimination (Count 1), age discrimination (Count 2), retaliation (Count 3), and FMLA retaliation (Count 4).

3. Defendant filed a motion for partial dismissal for failure to state a claim upon which relief can be granted, limited solely to Mr. Bongiovanni's claim of retaliation (Count 3).

4. Mr. Bongiovanni files this response requesting the Court to deny Defendant's motion.

[1] Defendant asserts in its Memorandum in Support of its Motion for Partial Dismissal that Plaintiff has incorrectly identified BBVA Compass Bancshares, Inc. as the proper defendant in this lawsuit, and that Plaintiff was employed by Compass Bank. Accordingly, Plaintiff has filed its Second Amended Complaint and Jury Demand to include Compass Bank as a Defendant.

5. In his First Amended Complaint and Jury Demand, Mr. Bongiovanni alleged a claim for retaliation based on harassment, termination, and other adverse actions that would dissuade a worker from engaging in protected activity, taken in retaliation for Mr. Bongiovanni's application for long-term disability.

B. ARGUMENT

6. When considering a defendant's motion to dismiss, a court must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff. *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009). If the complaint alleges enough facts to state a claim to relief that is plausible on its face, a court should deny the defendant's motion. *Id*.

7. In Plaintiff's First Amended Complaint and Jury Demand, Mr. Bongiovanni alleged a claim for, *inter alia*, retaliation. The complaint provides Defendant with fair notice of the claim.

8. In support of his claim of retaliation, Mr. Bongiovanni alleged that: (a) Mr. Bongiovanni was an employee of Defendant; (b) Mr. Bongiovanni was disabled by the serious medical conditions of cancer, a stroke, and a blood clot; (c) Mr. Bongiovanni informed the President of the company that Mr. Bongiovanni was disabled; (d) Mr. Bongiovanni formally applied to Defendant for long-term disability; and (e) Defendant retaliated against Mr. Bongiovanni for his application by: denying his disability qualification, treating Mr. Bongiovanni differently from other employees, harassing Mr. Bongiovanni, and terminating Mr. Bongiovanni. *See* Docket No. 1-3, *Plaintiff's Original Petition and Request for Disclosure*, ¶¶ 2, 7, 13, 58, 59.

9. In its Motion for Partial Dismissal (Dkt. #9) and its Brief in Support of Motion for Partial Dismissal (Dkt. #10), Defendant's argument is limited to its claim that Mr. Bongiovanni never engaged in a "protected activity."

10. Defendant's primary argument is that " . . . an application for disability benefits is not 'protected activity' under either the Texas Labor Code or the ADA and therefore plaintiff cannot establish a *prima facie* case of retaliation under either statute."

11. Defendant's statement of law is incorrect.

12. The Fifth Circuit has held that requesting a reasonable accommodation is a protected activity. *Tabatchnik v. Continental Airlines*, 262 Fed. Appx. 674, 676 (5th Cir. 2008) (unpublished) ("It is undisputed that making a request for a reasonable accommodation under the ADA may constitute engaging in a protected activity."); *Smith ex rel. C.R.S. v. Tangipahoa Parish School Bd.*, 2006 WL 3395938, *13 (E.D. La. Nov. 22, 2006) ("[I]t is undisputed that Plaintiffs engaged in protected activity by attempting to secure accommodations . . . under the ADA . . . .").

13. Other circuits have similarly assumed or expressly held that requesting a reasonable accommodation is "protected activity" under the ADA. *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 191 (3d Cir. 2003) ("The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC."); *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 706 (4th Cir. 2001); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1265 (10th Cir .2001); *Silk v. City of Chicago*, 194 F.3d 788, 799-801 (7th Cir. 1999).

14. The case law cited above shows that *St. John v. Sirius Solutions, LLLP*, 299 Fed. Appx. 308 (5th Cir. 2008) (unpublished), cited by Defendant, is distinguishable from the present

case because *St. John* is a case merely of disclosure, whereas the present case is one in which Mr. Bongiovanni requested a reasonable accommodation by requesting leave. Docket No. 1-3, *Plaintiff's Original Petition and Request for Disclosure*, ¶ 58.

15. EEOC guidance has repeatedly confirmed that leave is an accommodation. *See*, *e.g.*, 29 C.F.R. Part 1630 App., § 1630.2(o) ("permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"); A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 3.10(4) (EEOC Jan. 1992); The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, Question 1 and n.4 (EEOC July 6, 2000).

16. The case law also makes clear that requesting disability leave is a request for an accommodation. The Supreme Court has recognized that that accommodations may include breaks for medical treatment, *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397–398 (2002), and many circuits recognize that leave can be a reasonable accommodation. *See, e.g., Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998); *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661, 671 (3d Cir. 1999) ("unpaid leave supplementing regular sick and personal days might, under other facts, represent a reasonable accommodation," but leave requested here was not reasonable); *Rodgers v. Lehman*, 869 F.2d 253, 259 (4th Cir.1989) (decided under § 501 of the Rehabilitation Act); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782–783 (6th Cir. 1998) (medical leave of absence, paid or unpaid, may be reasonable accommodation); *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir.1998); *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002); *Taylor v. Rice*, 451 F.3d 898, 910 (D.C. Cir. 2006).

17. Defendant also claims that " . . . plaintiff never applied for, and therefore was never denied, long-term disability benefits" and purports to attach supporting evidence.

18. However, citing extrinsic evidence is improper at this stage because a court must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff when considering a defendant's motion to dismiss. *See True v. Robles*, 571 F.3d at 417.

19. Further, Defendant's claim that Mr. Bongiovanni applied for and was denied short-term disability rather than long-term disability is also irrelevant, since denial of either form of disability can be an adverse action.

C. CONCLUSION

20. Because Mr. Bongiovanni stated a claim on which relief can be granted, the Court should deny Defendant's motion and retain the case on the Court's docket.

Respectfully submitted,
ROB WILEY, P.C.

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CERTIFICATE OF SERVICE

I certify that on May 16, 2013, I served a copy of the foregoing on opposing counsel via the Court's ECF system and via First Class Mail.

/s/ Justin G. Manchester