

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DENISE M. DAVIS,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-5209
THE GUARDIAN LIFE INSURANCE	:	
COMPANY OF AMERICA,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

February 1, 2000

Presently before the Court is the Defendant’s Motion for Summary Judgment and the Plaintiff’s Cross Motion for Summary Judgment. For the reasons stated below, both Motions are Denied.

I. PROCEDURAL BACKGROUND

Plaintiff Denise Davis filed a six-count Complaint alleging employment discrimination against The Guardian Life Insurance Company (“Guardian”) on October 1, 1998. In summary, the Complaint alleges that Guardian discriminated against Davis because of her disability, Crohn’s disease. Count I stated a violation of the federal Americans with Disabilities Act (“ADA”). Count II asserted a claim for retaliation under the ADA, relating to Davis’ claim for disability insurance benefits after she left active employment. Count III asserts a claim for discrimination under 42 U.S.C. § 1981(a)(1) based on the assertion that Guardian engaged in

discriminatory employment practices. Count IV asserts disability discrimination based on the Pennsylvania Human Relations Act (“PHRA”). Counts V and VI alleging negligent and intentional infliction of emotional distress have previously been dismissed in an order dated November 23, 1998. Accordingly, only Counts I-IV remain.

II. FACTUAL BACKGROUND

Plaintiff was employed as a disability insurance underwriter in Guardian’s northeast regional home office in Bethlehem, Pennsylvania (the “Bethlehem Office”). Her supervisor since February 1988 has been Edward F. Rezek (“Rezek”). Davis was diagnosed with Crohn’s Disease in 1989. Crohn’s Disease is an inflammatory bowel disorder that produces a thickening of the intestinal wall, a narrowing of the bowel channel, and a variety of symptoms including abdominal pain, fever, diarrhea, extreme pain and dehydration. This condition has forced her to miss a significant number of work days throughout her career at Guardian.¹ Since the Crohn’s Disease often rendered Davis incapable of traveling to the Bethlehem Office, she requested an accommodation which would allow her to work from home several days of the week. In late 1994, Guardian granted Davis’ request to work several days a week at home. Under an agreement reached by Davis, Rezek and James Saccavino (“Saccavino”), the Plaintiff agreed to a schedule under which she would work at home on Mondays, Wednesdays and Fridays, while she would work Tuesdays and Thursdays at the office. Davis was also assigned a

1. According to Guardian, Davis missed 58 days in 1988, 44 days in 1989, 102 days in 1991, 55 days in 1992, 57 days in 1993, 225 days in 1994, 103 days in 1995, 155 days in 1996. Davis contends that the vast majority of those days, including all of the absent days in 1994-96, were related to several maternity leaves. Davis states she has not missed any work days due to the Crohn’s disease since beginning to work at home in late 1994.

new computer, which could interface with Guardian's main frame, in order to facilitate her work at home.² In August, 1995, Davis went on leave and did not return to work until July 15, 1996.

Upon her return to duty, Davis assumed a schedule which allowed her to work only Mondays and Thursdays in the Bethlehem Office. Eventually, Rezek learned that Davis had not been coming to the Bethlehem Office on the days that she was assigned to do so. Therefore, he asked Davis to commit to a schedule which fixed the days she would report to the Bethlehem Office. Guardian required that if Davis could not travel to Bethlehem on a day she was scheduled to be there, then she would have the day counted as a "sick day". Davis said that she could not commit to a fixed schedule because she never knew when the Crohn's Disease would "flare up" on her. Davis requested that she be allowed to work exclusively from her home during periods when her condition became aggravated. These "flare-up" periods generally lasted two or three weeks. Guardian would not agree to such a condition. On April 24, 1997, Davis went on disability leave.

From April through August of 1997, Davis received disability benefits through Guardian, which served as both her employer and disability insurance administrator. In May, 1997, Davis filed a discrimination claim with the Equal Employment Opportunity Commission ("EEOC"). Guardian, claiming that Davis had not adequately provided the medical information required to continue benefits, discontinued Davis' disability benefits from August, 1997 to March 1998. In March, 1998, Guardian resumed disability benefits and made current, with interest, the payments Guardian had withheld from August to March.

2. There is a dispute as to when the computer was placed in Davis' home. Davis contends that she worked from home without a computer until November, 1996. Guardian states that Ms. Davis had access to the Guardian-provided computer since approximately April, 1995.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), that test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir.1992). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). When considering a motion for summary judgment, a court must view all evidence in favor of the non-moving party. See Bixler v. Central Pa. Teamsters Health and Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993).

A movant “bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact”. Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, they need only point to the court “that there is an absence of evidence to support the nonmoving party’s case. Id. at 325. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). For the dispute over the material fact to be genuine, “the evidence must be such that a reasonable jury could return a verdict in favor of the non-moving party.” Id. To successfully challenge a motion for summary judgment, the non-moving party cannot merely rely upon the allegations contained in the complaint, but must offer specific facts contradicting

the movant's assertion that no genuine issue is in dispute. Kline v. First West Government Securities, 24 F.3d 480, 485 (3d Cir. 1994).

In a discrimination case, to defeat summary judgment when the defendant answers the plaintiff's prima facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. See, Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511(1993)). The plaintiff cannot avoid summary judgment simply by arguing that the fact finder need not believe the defendant's proffered legitimate explanations. Id. However, the Plaintiff need not adduce evidence directly contradicting the defendant's proffered legitimate explanations to avoid summary judgment. Id. Rather, the non-moving plaintiff must demonstrate such "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for the asserted non-discriminatory reasons." Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir.1993).

IV. DISCUSSION

A. Discrimination in Violation of the ADA and PHRA (Counts I & IV)

The ADA prohibits employers from discriminating against qualified individuals with disabilities³ because of their disabilities, in certain employment-related matters. 42 U.S.C. 12112(a). A plaintiff has a "disability" for the purposes of the ADA if he (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) has "a record of such an impairment"; or (3) is "regarded as having such an impairment." 42 U.S.C. 12102(2). Discrimination under the ADA encompasses not only adverse actions motivated by prejudice against the disabled, but also includes failing to make reasonable accommodations for a plaintiff's disabilities⁴. An employer also discriminates under the ADA for not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless that employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. See 42 U.S.C. § 12112(b)(5)(A). The burden is

3. The term "qualified individual with a disability" means 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. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8).

4. The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. § 12111(8).

on the employee to prove that she is a “qualified individual” with a disability under the ADA. See Gaul v. Lucent Tech., Inc., 134 F.3d 576, 580 (3d Cir. 1998).

A plaintiff presents a prima facie case of discrimination under the ADA by demonstrating: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination. See Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir.1996). It is conceded that Davis’ Crohn’s Disease is a disability. However, Guardian claims that Davis has failed to establish that she is a qualified person with a disability. First, Guardian argues that it had already made a reasonable accommodation by allowing Davis to work from home and she still could not perform an essential function of the job; traveling to Bethlehem on two non-consecutive days of the week. Secondly, Guardian claims that it had no further duty to accommodate Davis by allowing her to work exclusively from home during her “flare-up” periods.

The ADA does not limit an employer’s ability to establish or change the content, nature or functions of a job. See Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) (employer not required to reduce workload to accommodate plaintiff). Attendance at work can be considered an essential function of an employee’s job. See Nesser v. TWA, 160 F.3d 442, 445 (8th Cir. 1998) (employee of airline who suffered from Crohn’s disease was not qualified person because he was unable to regularly attend work when doing so was considered an essential feature of the job). An employer’s identification of a position’s essential functions is

given some deference under the ADA. *Id.* Consideration shall be given to the employer's judgment as to what functions of a job are essential. See 42 U.S.C. § 12111(8).

Recognizing that her condition would stop her from coming to the Bethlehem Office as a matter of course, Guardian allowed Davis to work only two days a week at the office. All parties agree that this was a reasonable accommodation (although they dispute when she received the computer that facilitated Davis tele-commuting). From the time this reasonable accommodation was instituted until she went on leave in April, 1997, Davis received two evaluations. Both evaluations noted her overall good work, as well as her absenteeism.

Davis contends that in December, 1996, Guardian suddenly changed its policy towards her work schedule. Guardian wanted Davis to agree to the Alternative Work Schedule ("AWS"). This schedule would have required that Davis travel to Bethlehem only two non-consecutive days of the week. Davis argues that Guardian knew that she could not agree to such a schedule because of the Crohn's Disease's unpredictability. She claims that Guardian used the AWS to force her out of a job because of her disability.

Guardian contends that Davis' presence at the Bethlehem Office twice a week was essential to fulfilling her job requirements.⁵ It is uncontested that Guardian offered Ms. Davis the opportunity to only report to the office any two non-consecutive days during a week. The reasons Guardian offers for requiring Davis to report to the Bethlehem Office include:

- (a) The disability underwriting work which Ms. Davis performed is paper intensive. It was extremely difficult and costly for Guardian to allow Ms. Davis to store records at her home or to have transported records back and

5. The Court accepts the fact that attendance is normally an essential element of any job. See e.g., Rogers v. Intern. Marine Terminals, 87 F.3d 755, 759 (5th Cir. 1996); Nesser v. TWA, 160 F.3d at 445. However, everyday attendance need not always be an essential element of a job.

forth from her home. Records are often viewed by several members of the department on the same work day.

- (b) File access is critical in order for supervisors to handle customer complaints. Customer service would suffer if files were not available.
- (c) Disability insurance underwriting requires interaction between team members. When employees are in the Bethlehem Office on a predictable basis, this interaction is fostered.
- (d) Training and development on underwriting issues and procedural changes are not always efficiently communicated via telephone to employees not in the Bethlehem Office.

Although consideration shall be given to an employer's judgment as to what functions of a job are essential, such judgment is not free from review. Also, it is fairly clear that Davis performed the other essential features of the job well, or at least competently.

The evidence Guardian presents to buttress this claim cannot satisfy the strong standard needed for a summary judgment claim. For example, Guardian's use of the team concept for underwriting insurance, which is a reason given for the necessity of her presence in Bethlehem, has been in practice since 1994. Also, Guardian admits that it did not specifically schedule training sessions on any specific day of the week which would necessitate her presence. Therefore, the necessity of Davis' commitment to even the limited AWS, which required only two non-consecutive days a week, is not evident. It also appears that Davis had often switched schedules in the past but was never seriously reprimanded for doing so. On the other hand, Davis' absenteeism, was consistently noted as a problem on her yearly reviews, even after she received the reasonable accommodation of working at home. Also, because the Court is to give some deference to the employers' definition of a position's essential tasks, the mere fact that Guardian did not formally record every instance in which Davis' absenteeism harmed

productivity is not conclusive. In summary, Davis has produced enough evidence that she was a qualified person with a disability to survive summary judgment. But Guardian has also raised evidence to suggest that Davis was not a qualified person because she could not work at the Bethlehem Offices on a regular schedule.

Davis argues that, even if she had been unable to show that she could perform the essential elements of her job without agreeing to the AWS, she is entitled to the further accommodation of a two or three week amnesty from attendance at Bethlehem Office for periods when her Crohn's Disease flares. The evidence suggests that if Ms. Davis was granted this further accommodation (which is not necessarily reasonable), she would be able to fulfill the other essential aspects of her underwriting job. Clearly, it is inconvenient to Guardian if Davis cannot come to the Bethlehem Office for a two or three week period. But as Guardian's Saccovino admitted, he could see no reason why Davis could not perform her job exclusively from home for a period of 2-3 weeks. In fact, Davis had already worked competently for years at home without supervision. There would also have been little additional cost for Guardian. For example, Davis' home was already equipped with a computer. Secondly, Davis reportedly offered, through her father-in-law to have files carried between Bethlehem and her home in Feasterville. The Court cannot, as matter of law, say that Davis' request would be an unreasonable accommodation under the ADA. Summary judgment will be denied.

B. Retaliation under the ADA

Title V of the ADA prohibits retaliation and coercion directed at persons who have taken steps to oppose an act or practice or who have made a charge of illegality under the ADA. To establish prima facie case of retaliation under the ADA, an employee must show

protected employee activity, an adverse action by the employer either after or contemporaneous with employee's protected activity, and a causal connection between the employee's protected activity, and the employer's adverse action. See, Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). If the employee establishes a prima facie case of retaliation under ADA, the burden shifts to the employer to advance legitimate, non-retaliatory reasons for its adverse employment action; employer's burden at this stage is relatively light and is satisfied if employer articulates any legitimate reason for adverse employment action. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). If the employer advances legitimate, non-retaliatory reason for its adverse employment action under ADA, the employee must be able to convince the fact finder both that employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action. Krouse, 126 F.3d at 500. To obtain summary judgment on ADA retaliation claim, the employer must show that trier of fact could not conclude, as matter of law, that retaliatory animus played a role in employer's decision-making process and that it had determinative effect on outcome of that process; this may be accomplished by establishing employee's inability to raise genuine issue of material fact as to either one or more elements of employee's prima facie case or, if employer offers legitimate non-retaliatory reason for adverse employment action, whether employer's proffered explanation was pretext for retaliation. Id. at 501.

Davis argues that soon after she filed an EEOC claim against Guardian in May, 1997, Guardian responded by denying her further disability benefits. Guardian states that it requires all claimants to provide certain medical information and submit to an interview in order to continue receiving benefits. When Ms. Davis, who knew of these requirements, refused to

comply, Guardian stopped paying benefits. Guardian also points out that since it eventually paid with interest all the disability payments that she was entitled to receive, Davis did not suffer a materially adverse employment action. Finally, Guardian disputes the causal connection between the denial of benefits and the filing of Davis' EEOC claims.

First, the Court cannot state as matter of law that depriving a claimant of benefits for eight months was simply an immaterial adverse employment action. While not every adverse action taken against an employee is material, depriving a claimant of a significant source of income may be material. Also, to state it mildly, there are disputed material facts as to Guardian's temporary termination of Davis' benefits. Both sides have put forth facts to support their respective positions that the termination of benefits was either an act of retaliation or a normal business procedure following a claimant's non-compliance. Likewise, there is sufficient evidence for a jury to find a causal connection between the filing of the EEOC complaint and the temporary denial of benefits. Therefore, summary judgment will be denied.

IV. CONCLUSION

For the reasons stated above, summary judgment will be denied to both parties. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DENISE M. DAVIS,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-5209
THE GUARDIAN LIFE INSURANCE	:	
COMPANY OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 1st day of February, 2000, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 22), and the Plaintiff's Cross-Motion for Summary Judgment (Docket No. 24); it is hereby **ORDERED** that the Defendant's Motion is **DENIED** and the Plaintiff's Cross-Motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.