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

TIBOR MAJTAN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
PILLING WECK	:	**NO. 99-718**

M E M O R A N D U M

WALDMAN, J. **September 21, 2000**

I. Introduction

Plaintiff alleges that defendant failed to accommodate his disability and terminated his employment because of that disability.[1] He has asserted a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"), and a parallel claim under the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. §§ 951 et seq.[2] Presently before the court is defendant's Motion for Summary Judgment.

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[1]Plaintiff has not pled a discrete failure to accommodate claim in a separate count. The factual allegations in the ADA count, however, are sufficient to raise a failure to accommodate as well as a wrongful termination and defendant addresses both claims in its brief.

[2]Plaintiff also asserted claims under Title VII and the ADEA for national origin and age discrimination and parallel claims under the PHRA. In his response to defendant's motion, plaintiff concedes that he cannot support these claims and agrees that judgment should be entered for the defendant on them.

II. Legal Standard

In considering a motion for summary judgment, the court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d

458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff was born in Hungary in 1947 and became deaf at three years of age as a result of a childhood disease. He immigrated to the United States in 1970. Plaintiff is extremely limited in his abilities to read and write English. He can speak but in an odd voice which others find difficult to understand.

Plaintiff worked for defendant and its predecessor as a surgical instrument mechanic from 1971 until his termination in May 1997. He worked in various locations including Long Island City for ten years, Brooklyn for five years and Irvington, New Jersey for ten years until his final transfer to Fort Washington, Pennsylvania in May 1994.

Plaintiff worked in the repair department. His primary duty was to repair broken surgical instruments forwarded to defendant from various hospitals. His daily routine included going to a designated shelf, removing a surgical instrument in need of repair, repairing the instrument if possible, placing the instrument on another designated shelf and then repeating the process throughout the day. Plaintiff received favorable

performance reviews from at least 1990.

Plaintiff would use instrument catalogs to assist him with repairs. He stored these catalogs in a blue file cabinet. Both the catalogs and the cabinet were given to plaintiff by a former manager in the Long Island City facility about seventeen years ago. When plaintiff transferred from the Irvington location to Fort Washington, the file cabinet and the catalogs were moved to Fort Washington by defendant.

During the course of plaintiff's employment at the Fort Washington site, defendant held periodic companywide and repair department meetings of employees. A total of approximately nine meetings were held each year. Although plaintiff requested that sign language interpreters be provided for him at these meetings, defendant hired interpreters for only three or four meetings. Plaintiff can read lips but not well. He was unable to understand much of what was said at the meetings without interpreters because of how fast many people spoke.

During his tenure at the Fort Washington facility, plaintiff observed co-workers mimic him on one or two occasions and was told by co-worker Robert James that on several occasions other co-workers had used terms like “deaf mute” in referring to him. Plaintiff felt this was harassment and complained about it to his supervisor, Diane Clemson, and to Lee Wimer, defendant's Vice President of Operations. In response to these complaints,

Ms. Clemson addressed the issue at several meetings with department employees.[3]

On May 1, 1997, Vincent Tarantella, plaintiff's immediate supervisor, informed him that the department would be moving to another location within the facility. With the aid of Robert James, plaintiff removed the file cabinet containing the catalogs from company premises and brought it to his home. The file cabinet was taken without defendant's permission.

Plaintiff acknowledges receiving defendant's employee handbook before this incident. The handbook lists removal of company property as an offense for which an employed may be terminated. The handbook also provides that an employee's past work and length of service would be considered in determining discipline for infractions of company rules.

At a meeting on May 6, 1997, plaintiff was informed that he was being suspended for two weeks pending an investigation of the suspected theft of the file cabinet and catalogs. An interpreter was not present for this meeting. Plaintiff acknowledges that nevertheless he understood he was being suspended for two weeks and why. Sandra Shook, defendant's Human Resources Manager, investigated the incident. She interviewed co-workers who confirmed that plaintiff and Mr. James

[3]Plaintiff has not alleged or shown that this conduct was pervasive and in any event has not pled a hostile environment claim or suggested in his brief that he had attempted to do so.

had removed the cabinet from the facility. Ms. Shook, Ms. Clemson and Mr. Wimer determined that the incident was a serious infraction of company policy and warranted termination of plaintiff and Mr. James.

On May 13, 1997, Mr. Wimer, Ms. Clemson and Ms. Shook met with plaintiff and Mr. James. An interpreter was provided for plaintiff. At this meeting plaintiff admitted that he had taken the file cabinet and catalogs to his home, but stated that he thought the items belonged to him. Defendant believed that the property belonged to the company. Plaintiff acknowledges that he and his employer had an "honest disagreement" regarding ownership of the property. Both plaintiff and Mr. James were terminated for unauthorized removal of company property.

Mr. James is not disabled. Plaintiff has not been replaced at Pilling Weck. Defendant continues to employ another deaf individual who was hired in 1995.

IV. Discussion

A. Termination Claim

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." See 42 U.S.C. § 12112(a). The same standards and

analyses are applicable to plaintiff's ADA and parallel PHRA claim. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996).

Plaintiff has not presented direct evidence of discrimination by any decisionmaker at Pilling Weck. He relies on the McDonnell Douglas burden-shifting framework which applies to claims for disability discrimination. See Lawrence v. Nat'l Westminster Bank N.J., 98 F.3d 61, 66 (3d Cir. 1996); McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996).

The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); McNemar, 91 F.3d at 619. This prima facia case has been characterized as a showing by a plaintiff that he: (1) is a disabled person within the meaning of the ADA; (2) is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and, (3) has suffered an adverse employment decision as a result of discrimination. See Taylor, 184 F.3d at 306.[4] There is no requirement that plaintiff have been replaced by someone outside the protected class. See

[4]A plaintiff who presents evidence sufficient literally to show that he was subjected to an adverse employment action as a result of unlawful discrimination has made out a claim. The court thus assumes that for purposes of merely making out a prima facie case, a plaintiff can satisfy the third prong by showing he was subjected to an adverse employment action in circumstances which, if not otherwise satisfactorily explained, could suggest or permit an inference of discrimination.

Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356-57 (3d Cir. 1999). Defendant concedes that plaintiff is a qualified individual with a disability who suffered an adverse employment decision. Limiting ourself at this initial stage of the burden shifting process to the circumstances as characterized by plaintiff, he has established a prima facie case.

Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). Defendant has done so. It asserts that plaintiff was terminated for the unauthorized removal of company property in violation of express company policy.

The burden then shifts back to plaintiff to prove by a preponderance of the evidence that the legitimate reason proffered was not the true reason for the discharge, but rather a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802; Shaner, 204 F.3d at 500. Plaintiff must present evidence from which a fact finder reasonably could disbelieve the employer's articulated legitimate reasons, from which it may reasonably be inferred that the real reason was discriminatory, or evidence from which one could otherwise reasonably conclude that invidious discrimination was more likely than not a motivating or determinative factor in the employer's decision. See Lawrence, 98 F.3d at 66; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). A plaintiff may raise a genuine issue as to the

truth of an employer's proffered reason by showing “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons.” Fuentes, 32 F.3d at 765.

Plaintiff points to four things to show pretext: defendant’s failure to follow its disciplinary policy when it terminated him; plaintiff's innocence of the offense charged; defendant’s failure to provide sign language interpreters for many of the employee meetings; and, the harassment of plaintiff by co-workers.

Plaintiff contends that Ms. Shook conducted an inadequate investigation because she did not sufficiently pursue plaintiff's claim of ownership of the property. The handbook did not state that the company would investigate every assertion made by an accused employee or that it would exhaustively investigate each incident, but only that the “nature of the infraction will be investigated.” Ms. Shook's investigation complied with that policy statement. Plaintiff also asserts that his length of service and past work were not properly considered. The handbook did not ensure employees that they would not be discharged for an otherwise terminable infraction if they had lengthy service or a previously good work record. It clearly reserved the employer’s discretion. It is uncontroverted that Ms. Shook and Ms. Clemson

felt that the incident was a particularly serious infraction. There is no evidence of any employee determined to be guilty of violating the policy on removal of company property who was not terminated.

Even accepting that plaintiff was innocent of the infraction, an employer's legitimate reason for discharge need not be a correct or well founded one. A plaintiff cannot discredit a proffered reason merely by showing that it was "wrong or mistaken" as the issue is whether "discriminatory animus motivated" the decisionmaker and not whether he or she was "wise, shrewd, prudent or competent." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). See also Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Hicks v. Arthur, 878 F. supp. 737, 739 (E.D. Pa.) (that a decision is ill-informed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995); Doyle v. Sentry Ins., 877 F. Supp. 1002, 1009 n.5 (E.D. Va. 1995) (it is the perception of the decisionmaker that is relevant).

There is no evidence that any managerial or supervisory employee participated in, encouraged or condoned harassment of plaintiff.

Plaintiff acknowledged that Ms. Clemson promised to end any harassment when plaintiff brought it to her attention, and it is uncontroverted that Ms. Clemson addressed department employees about such conduct on several occasions. The attitude of fellow line employees does not demonstrate the employer's intent. See

Shaner, 204 F.3d at 506 (harassment by coworkers did not evidence employer's discriminatory intent in terminating plaintiff). See also Smith v. Leggett Wire Co., 220 F.3d 752, 759 (6th Cir. 2000) (discriminatory statements by non-decisionmakers insufficient to demonstrate animus); Tart v. Hill Behan Lumber Co., 31 F.3d 668, 672-73 (8th Cir. 1994) (harassment by co-workers offers little insight into employer's motivation for terminating plaintiff in race discrimination suit).

Defendant's failure to provide plaintiff with an interpreter for all employment-related meetings may, as he suggests, indicate a "lack of sensitivity" but simply does not reasonably support an inference that defendant's proffered legitimate reason for plaintiff's discharge is pretextual. Plaintiff initiated his request for interpreters three years prior to the termination. It is uncontroverted that defendant provided interpreters for meetings it deemed important, hired another deaf employee for the Fort Washington plant during plaintiff's tenure and provided a TTY telephone for the use of deaf employees. It is also uncontroverted that defendant terminated both plaintiff and Mr. James, a non-disabled employee, for removing the cabinet and catalogs. See, e.g., Hite v. Biomet, Inc., 38 F. Supp.2d 720, 731 (N.D. Ind. 1999) (equal application of policy to disabled and non-disabled individuals rebuts inference of pretext).

Plaintiff has not produced evidence from which a factfinder reasonably could disbelieve defendant's articulated

legitimate reason for plaintiff's termination or conclude that disability discrimination was a real reason for the termination. Plaintiff has failed to sustain an ADA claim for unlawful termination.

B. Reasonable Accommodation Claim

Discrimination under the ADA includes failing to make reasonable accommodations for a qualified person's disabilities. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999). The ADA provides that employment discrimination against a qualified individual with a disability includes situations where the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]." See 42 U.S.C. § 12112(b)(5)(A).[5]

Plaintiff first must show that he is a qualified individual with a disability and that he gave proper notice to his employer of his disability and desire for accommodation. See Lawrence, 98 F.3d at 69. Defendant concedes that plaintiff is a

[5]The PHRA also has been read to impose on employers a duty reasonably to accommodate disabled individuals. See 16 Pa. Code § 44.14(a); Tumbler v. American Trading & Prod. Corp, 1997 WL 230819, at *2 n.2 (E.D. Pa. May 1, 1997); DiRenzo v. General Elec. Co.,1993 WL 534227, at *11 (E.D. Pa. Dec. 23, 1993) Magel v. Federal Reserve Bank of Phila., 776 F. Supp. 200, 203-04 (E.D. Pa. 1991); Cain v. Hyatt, 734 F. Supp. 671, 682 (E.D. Pa. 1990). The reasonable accommodation analyses under the PHRA and the ADA are identical. See Taylor, 184 F.3d at 306; Latch v. Southeastern Pennsylvania Transp. Auth., 984 F. Supp. 317, 319 (E.D. Pa. 1997).

qualified individual with a disability. There is evidence that plaintiff gave defendant sufficient notice of his disability and requested accommodation in the form of a sign language interpreter for all company and department meetings. One could readily find from the evidence that defendant had notice of plaintiff's disability and his desire for accommodation. See Taylor, 184 F.3d at 313 (there is no requirement that an employee make a request for accommodation in writing, mention the ADA or specifically ask for a "reasonable" accommodation).

Once plaintiff has shown that he is qualified and gave proper notice, he need only show that an effective accommodation exists and that its costs do not facially exceed its benefits. See Walton v. Mental Health Ass'n, 168 F.3d 661, 670 (3d Cir. 1999). This he has done. The claim would then survive summary judgment unless defendant can show conclusively that the accommodation would impose an undue hardship. See id.

Defendant argues that plaintiff did not need an interpreter for those meetings at which none was provided to perform the essential functions of his job. That plaintiff did not require an interpreter to perform the essential functions of his job, however, does not relieve defendant of the obligation to accommodate his disability.

Reasonable accommodation includes not only those measures necessary for an employee to perform the essential functions of

his position but also those that enable the employee "to enjoy equal privileges and benefits of employment as are enjoyed by... other similarly-situated employees without disabilities." See 29 C.F.R. § 1630.2(o)(1)(iii). See also Americans with Disabilities Act Title 1 Technical Assistance Manual, I-3.3 (1992) ("Technical Assistance Manual"). Thus, even if an individual can perform the essential functions of his position without accommodation, an accommodation is nevertheless required under the ADA if it is necessary for the individual to enjoy "privileges and benefits of employment equal to those enjoyed by non-handicapped employees." Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 515 n.9 (1st Cir. 1996). See also Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993).

The Technical Assistance Manual notes that a deaf employee may require interpreters for "training situations, staff meetings or an employee party, so that [the] person can fully participate in these functions." See Technical Assistance Manual, § I-3.10 (1992). In its discussion of reasonable accommodation, the EEOC applied the undue hardship analysis to conclude that a business must provide interpreters for monthly staff meetings if it is not overly burdensome. See Technical Assistance Manual, § I-3.9 (1992). As the agency charged with promulgating regulations for this section of the ADA, see 42 U.S.C. § 12116, the EEOC's views are entitled to deference from

the courts. See Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 123 (3d Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) (courts must give EEOC interpretation of ADA regulations "controlling weight" unless plainly erroneous or inconsistent with regulations).[6]

A jury could reasonably find that plaintiff was denied enjoyment of equal privileges and benefits when he was denied an interpreter at various employment-related staff meetings.

Defendant nevertheless need not have accommodated plaintiff if the accommodation would cause it to incur "significant difficulty or expense." See 29 C.F.R. § 1630.2(p)(1). The ADA lists the following factors to be considered in determining if an accommodation would impose an undue burden on an employer:

> (i) the nature and cost of the accommodation needed;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and

[6]Legislative history also provides evidence that Congress intended employers to provide interpreters for staff meetings. Senator Harkin, the floor manager for the bill, noted that the ADA would not impose undue costs on employers of deaf workers because employees would only require an interpreter when attending meetings or workshops or when there was an essential need for one-on-one communication. See 135 Cong. Rec. S10765-01 (1989).

> location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(9).

Defendant has produced no evidence to show, and indeed does not contend, that provision of interpreters for plaintiff at staff meetings would have imposed an undue hardship.

V. Conclusion

Plaintiff acknowledges that he has failed to sustain any of his non-disability related claims.

Plaintiff has not presented evidence from which one reasonably could find that defendant's legitimate non-discriminatory reason for the termination is unworthy of belief or otherwise that discrimination was a motivating or determinative factor in that action.

Plaintiff has presented evidence sufficient to sustain his ADA and PHRA accommodation claims.

Defendants are thus entitled to judgment on all of plaintiff's claims except those for failure to accommodate his disability. An appropriate order will be entered.

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O R D E R

AND NOW, this day of September, 2000, upon consideration of defendant's Motion for Summary Judgment and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to all claims asserted by plaintiff in this action except for plaintiff's ADA and PHRA claims for failure to accommodate his disability as to which the Motion is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.