

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

<b>CHERYL A. SUMMERFELT</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 05-2149</b>
	:	
<b>WAWA, INC.</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**January 23 , 2007**

Plaintiff Cheryl A. Summerfelt (“Plaintiff”) brings this action against Defendant Wawa, Inc. (“Wawa”) for violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq. Now before the Court is Wawa’s Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. For the reasons that follow, the Motion will be granted.

**I. BACKGROUND**

Wawa owns and operates a chain of retail convenience stores in the Mid-Atlantic United States, including store number 48 in Pottstown, Pennsylvania (“Store 48”). Plaintiff, who suffers from degenerative joint disease, was hired to work as a part-time customer service associate at Store 48 on May 4, 1999. Pl.’s Dep. at 73. A Wawa customer service associate performs a number of “principal duties,” including preparing food service orders, operating cash registers, stocking merchandise, and performing all housekeeping and cleaning functions. “Position Description,” attached as Exhibit B to Wawa’s Mot.

Because of her disability, Plaintiff cannot stand for prolonged periods. When she first began working for Wawa, she was assigned to work at the coffee island and permitted to take sitting breaks as needed. Pl.’s Dep. at 73. After approximately one year, Plaintiff’s job responsibilities were altered and she was reassigned to work primarily on the cash register. Id. at

74. Wawa permitted her to sit on a stool while she operated the register. Id.

In March of 2003, Plaintiff temporarily stopped working in order to undergo a partial hysterectomy, a surgical procedure unrelated to her disability. Id. at 78-79. On April 4, 2003, Plaintiff returned to Store 48 and asked to be placed back on the schedule. Id. at 89-90. The General Manager of Store 48, Timothy Dale, told Plaintiff that he had thought she resigned when she failed to appear for work on March 10, 2003 and failed to respond to his telephone inquiries. Id. Dale informed Plaintiff that he had hired additional staff and did not have any room for her on the schedule at that time. Id. at 99; Deposition of Timothy Dale (“Dale Dep.”) at 25, attached as Exhibit C to Wawa’s Mot.

Plaintiff appealed to Dale’s direct supervisor, Andrew Dorley, to place her back on the schedule. Pl.’s Dep. at 95. During a meeting on June 12, 2003, Dorley asked Dale to resume scheduling Plaintiff for shifts. Id. at 102. After the meeting, Plaintiff was placed back on the schedule at Store 48 and was assigned to work in the coffee and deli areas. Plaintiff was, once again, instructed to take sitting breaks as needed. Id. at 108, 117-18, 124.

Plaintiff worked in the deli area during her first three shifts after resuming work, on June 18, June 23, and June 28, 2003. Id. at 124. On June 26, 2003, Plaintiff visited her doctor due to blisters which had formed on her legs. Id. at 128. She visited the doctor again on June 28, 2003 and on July 2, 2003. Id. at 135-137. At the July 2 visit, Plaintiff received new work restrictions requiring her predominately to sit while working. Id. 139-140, 142.

After being informed of Plaintiff’s new medical limitations, Dorley considered the types of duties Plaintiff could perform given her restrictions and Wawa’s needs. Statement of Andrew Dorley at ¶ 4, attached as Exhibit B to Wawa’s Mot. Dorley instructed Store 48 managers to

assign Plaintiff cleaning duties that could be performed while seated. *Id.*; Dale Dep. at 42.

Plaintiff resumed working in this new capacity from July 9 until August 4. She was scheduled to work at Store 48 on August 18 and August 20, but “called out” of work. Pl.’s Dep. at 170. On August 20, Wawa closed Store 48 and opened a larger store, Store 146, nearby. Employees did not have to apply for new jobs, but rather were transferred to the new store. Plaintiff was scheduled to work at Store 146 the first week after it opened, but she failed to appear for work. Statement of Rebecca Kirkner at ¶ 2, attached as Exhibit F to Wawa’s Mot. Since leaving Wawa, Plaintiff has not worked nor has she looked for work. Pl.’s Dep. at 53-54.

## **II. LEGAL STANDARD**

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the 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.” Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party’s favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, “there can be ‘no genuine issue as to any material fact’ . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for

its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then “shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial.” Id.

### **III. ANALYSIS**

#### **A. Reasonable Accommodation**

Plaintiff first argues that Wawa failed to reasonably accommodate her alleged disability after she returned from her surgery. Plaintiff concedes that from the time she began working at Wawa until July of 2003, she was instructed to take sitting breaks. She also concedes that after she submitted her July 3, 2003 doctor’s note detailing new restrictions on her ability to work, she was reassigned to duties that allowed her to sit more. Pl.’s Mot. at 12. She insists, however, that these additional accommodations were also insufficient because she still was assigned some tasks that required her to periodically stand. Furthermore, she alleges that despite her ability to run a register, she was forced to do undesirable cleaning tasks. Id. at 144, 148.

The ADA requires an employer to reasonably accommodate “the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee.” 42 U.S.C. § 12112(b)(5)(A). The employee must notify the employer of her disability and request an accommodation for it. Then, the employer should engage the employee in an “informal, interactive process” in order to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3). While “engaging in the interactive process does not require that an employer take every conceivable action posed by the plaintiff, it [does] require that an employer make a good faith effort to seek accommodations.” Kennelly v. Pa. Tpk. Comm’n, 208 F. Supp.

2d 504, 515 (E.D. Pa. 2002).

The interactive process aims to arrive at a necessarily unique accommodation for each disabled person. By its very name, the “process” requires an ongoing, good-faith effort. It does not require a prescient one-shot fix. Accordingly, in Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999), the Third Circuit held that both the employer and the employee bear an obligation to communicate and engage in the interactive process:

An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer . . . Both parties bear responsibility for determining what accommodation is necessary . . . Neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Id. at 312.

The undisputed facts in this case reveal that the interactive process broke down because Plaintiff, not Wawa, abandoned it. It is undisputed that when Wawa managers reinstated Plaintiff after her hysterectomy, they 1) did so with full knowledge of her disability, 2) met with her after she requested an accommodation, 3) requested information from her about her condition and her limitations, 4) asked the Plaintiff what medical accommodations she desired, and 5) showed consideration of her demands by offering accommodations. These steps have been recognized by the Third Circuit as demonstrative of an employer’s good faith during the interactive process. Id. at 317.

Furthermore, Wawa’s managers showed a willingness to increase Plaintiff’s

accommodations. When Plaintiff informed Wawa managers that her doctor had placed additional restrictions on her ability to work, they reassigned her to cleaning duties that could be performed predominately while sitting down. Pl.'s Mot. at 12. As stated previously, Plaintiff admits that these new assignments allowed her to sit more, but she contends that even these enhanced accommodations were insufficient. Id.

First, Plaintiff complains that during three shifts, on July 9, 11, and 14, her cleaning duties occasionally placed her and her chair "in the midst of customers." Dep. at 146. Because of the customer traffic, Plaintiff argues there was "no place to put a leg." Id. Therefore, she was unable to periodically elevate her leg, another requirement mandated by her doctor. Rather than continue the interactive process, she admits that she never spoke with anyone at Wawa about this new problem and never requested the opportunity to elevate her leg. Id.

Second, Plaintiff alleges that, during her shift on July 23, she was assigned to clean the candy displays at the front register. While she was permitted to sit in a chair during this task, she claims that this was inadequate because the flow of customers forced her to "get up, move, [and sit] back down" too often. Id. at 149. Plaintiff admits, however, that she never raised this issue with anyone at Wawa or requested any additional breaks. Id. at 150.

Finally, Plaintiff states that during her shift on July 28, she was forced to stand while working because she could not fit her chair behind the "deli island." Id. at 150-151. However, once again, she admits that she never notified anyone at Wawa that she was unable to sit and she never asked anyone for a sitting break. Id. at 151.

Taken together, Plaintiff's reasonable accommodation claims cannot survive summary judgment. She fails to identify a single episode, after her accommodations were enhanced on

July 3, 2003, where Wawa failed to satisfy a request for a medical accommodation. Plaintiff does allege episodes where the generally adequate accommodation afforded to her, the right to sit while she worked, became insufficient for brief periods of time. However, she acknowledges that she never informed her managers at Wawa about these problems nor did she seek further accommodation.

If Wawa's accommodations were at times insufficient, the only way to have continued the necessary interactive process in order to make necessary modifications was through Plaintiff's notification that further accommodation was requested. "The process must be interactive because each party holds information the other does not have or cannot easily obtain." Taylor, 184 F.3d at 316. While the record indicates that Plaintiff did complain to her managers during this period, her complaints focused on Wawa's refusal to assign her to cashier duties, her preferred position. An employee is not entitled to select her accommodation. See Hankins v. Gap, Inc., 84 F.3d 797, 800-801 (6th Cir. 1996) ("[A]n employee cannot make [her] employer provide a specific accommodation if another reasonable accommodation is instead provided."). Without alleging that she informed her supervisors that the medical accommodations she received after July 3, 2003 were insufficient, Plaintiff cannot demonstrate that Wawa failed to engage in a good-faith effort to accommodate her disability.

## **B. Disparate Treatment**

In order to establish a prima facie case of disparate treatment under the ADA, a plaintiff must demonstrate that: "(1) [s]he is a disabled person within the meaning of the ADA; (2) [s]he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) [s]he has suffered an otherwise adverse employment

decision as a result of discrimination.” Gaul v. Lucent Tech., 134 F.3d 576, 580 (3d Cir. 1998) (citing Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996)).<sup>1</sup>

Wawa argues that Plaintiff never suffered an adverse employment decision, and therefore cannot establish the third element of her prima facie case. Plaintiff counters that she was constructively discharged, or compelled to resign, by Wawa’s failure to accommodate her disability.<sup>2</sup> Thus, Plaintiff’s disparate treatment claim rests on the same factual allegations as her reasonable accommodation claim.

Establishing a constructive discharge is difficult. “Employees are not guaranteed stress-free environments and [the] discrimination laws [are not] a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting.” Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998). Accordingly, “in order to establish a constructive discharge, the plaintiff must establish that the employer knowingly permitted conditions of discrimination so intolerable that a reasonable person would have felt compelled to resign.” Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988). In determining if a plaintiff has met this standard, courts in this circuit consider whether the plaintiff has been subjected, without proper cause, to (1) suggestions or encouragement of resignation, (2) the threat of discharge, (3) a demotion or reduction of pay or benefits, (4) involuntary transfer to a

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<sup>1</sup>Once the plaintiff establishes a prima facie case, the defendant must rebut an inference of wrongdoing with evidence of a legitimate, non-discriminatory or non-retaliatory reason for the action taken. See Peter v. Lincoln Tech. Inst., 255 F. Supp. 2d 417, 424 (E.D. Pa. 2002). If the defendant successfully meets this burden, in order to avoid summary judgment the plaintiff must present evidence of pretext or cover-up, or show that discrimination played a role in the employer’s decision making and had a determinative effect on the outcome. See id.

<sup>2</sup>Constructive discharge is the only adverse employment decision alleged by Plaintiff.

less desirable position, (5) alteration of job responsibilities, and/or (6) unsatisfactory job evaluations. Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993).

Plaintiff's constructive discharge claim fails as a matter of law. The record shows that Plaintiff was never encouraged to resign, she was never improperly threatened with discharge, she was never demoted or transferred to a new position, she never received an unsatisfactory job evaluation, her compensation was never reduced, and she never filed a formal grievance with Wawa management on any grounds.

Plaintiff did have her job responsibilities altered after she returned from her absence for her hysterectomy. However, Wawa Customer Service Representatives are responsible for performing many job responsibilities and their responsibilities are routinely altered according to the store's needs. Position Description, attached as Exhibit B to Wawa's Mot. Plaintiff has not alleged that she was asked to perform any task that was not a "principal duty" of a Wawa Customer Service Representative. Id.; see also Gallagher v. Sunrise Assisted Living of Haverford, 268 F. Supp. 2d 436, 442 (E.D. Pa. 2003) ("The Court is unaware and Plaintiff has failed to identify any case that holds requiring an employee to perform admitted job duties constitutes an adverse employment action.").

Given the above facts, and the evidence that Wawa engaged in a continuing good-faith effort to provide reasonable accommodations, Plaintiff has failed to present evidence sufficient to allow a reasonable jury to conclude that she had no choice but to resign. Accordingly, Wawa will be granted summary judgment on Plaintiff's disparate treatment claim.

#### **IV. CONCLUSION**

For the aforementioned reasons, Wawa's Motion for Summary Judgment will be granted.

An appropriate Order follows.

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<b>WAWA, INC.</b>	:	

**ORDER**

**AND NOW**, this 23RD day of January, 2007, upon consideration of Wawa's Motion for Summary Judgment (docket no. 9), Plaintiff's Response thereto (docket no. 10), and Wawa's Reply (docket no. 16), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that Wawa's Motion for Summary Judgment is **GRANTED**. Accordingly, the Clerk of the Court shall mark this case **CLOSED**.

**BY THE COURT:**

**S/ BRUCE W. KAUFFMAN\_**  
**BRUCE W. KAUFFMAN, J.**