

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

SANDRA WALTON : Civil Action
 :
 v. :
 : No. 96-5682
 MENTAL HEALTH ASSOCIATION :
 OF SOUTHEASTERN PENNSYLVANIA :

MEMORANDUM

Rendell, J.

November ____, 1997

Plaintiff, Sandra Walton, ("Walton") has brought this action under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1996), arising out of her termination from her employment with the Mental Health Association of Southeastern Pennsylvania ("MHASP"). For reasons discussed below, I will grant MHASP's motion for summary judgment and deny plaintiff's motion to amend the complaint.

I. Factual Background

From January 22, 1990 until her termination on January 7, 1994, Walton was employed by MHASP as the Director of the Advocacy Consumer Training for New Opportunities to Work ("ACT NOW") program. MHASP is an organization which advocates on behalf of people with mental illnesses; approximately eighty

percent of the staff are mental health "consumers."¹ ACT NOW is a program designed to provide employment training and placement to mental health consumers. As Director of ACT NOW, plaintiff had responsibility for the management of the program and supervision of the program staff.

It is uncontested that plaintiff suffers from major depression and from March of 1990 to December of 1993, plaintiff was hospitalized on six different occasions for depression. It is also not disputed that in each year of her employment by MHASP, plaintiff had absences significantly in excess of the number permitted by MHASP's written policy.²

During the course of her employment with MHASP, Walton requested -- and was granted -- several accommodations to enable her to continue in her position in spite of her condition. Defendant granted plaintiff additional sick leave beyond that permitted by the MHASP policy. Defendant allowed plaintiff to work from 7:00 a.m. to 3:00 p.m. rather than the normal work hours at the organization of 9:00 a.m. to 5:00 p.m. In June of 1993 plaintiff requested that she not be required to attend any social functions, including the ACT NOW program graduation,

1. The term "mental health consumers" is used by both parties to describe individuals who suffer from mental illness and use mental health services.

2. In 1990, plaintiff was absent for three days over the eighteen days permitted by MHASP policy; in 1991 that number was 22; in 1992, plaintiff was absent for 32 days. Def. Mem. Ex. E. In October of 1993, when plaintiff made her request for a leave of absence without pay, she had only 3½ days of sick leave left. Def. Mem. Ex. G.

because of her agoraphobia. This request was granted. Plaintiff also requested and received a part-time assistant to help with the paperwork of the program. In 1990, when plaintiff was having difficulty with her supervisor, her request to be transferred to a new supervisor, Paolo del Vecchio, was granted. When del Vecchio left in 1992, Carmen Meek became plaintiff's supervisor. It is uncontested that Walton experienced problems with Meek as a supervisor and requested that she be supervised by someone else, but she was not reassigned.

In October, 1993, plaintiff was once again hospitalized for depression and asked for a leave of absence without pay. In the letter of October 26, 1993 granting this leave, MHASP's Human Resource Manager made the following request: "In the near future would you please let me know the expected duration of your leave." The letter also stated that "[i]t is our policy that a leave without pay should not exceed 6 months." Plff. Mem. Ex. L. While on leave, specifically, on January 6, 1997, plaintiff was terminated. It is uncontested that before plaintiff received notice of her termination, she twice notified defendant that she would be returning to work but did not do so. By letter dated November 12, 1993, plaintiff informed MHASP that she would be back at work on November 22, 1993. Plaintiff did not in fact return to work on this date. In December, plaintiff notified defendant that she would be returning to work on January 4, 1994; she did not return on that date either. Plaintiff contends that during this extended absence, she kept in weekly contact with

MHASP regarding her projected return date. Defendant contests this assertion.³ The parties do agree that on December 30, 1993 plaintiff's physician contacted MHASP to inform them that plaintiff would be returning to work a few weeks later than her previously projected return date of January 4, 1994. Then, on January 4, 1994, plaintiff notified defendant that she would not be reporting for work as planned but that she intended to return on January 10, 1994. On January 6, 1994 MHASP informed Walton by letter that she had been terminated.

On July 7, 1994, plaintiff filed a charge of discrimination with the Pennsylvania Human Relations Commission ("PHRC") which was filed with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff has made the following allegations: defendant discriminated against her on the basis of her disability by terminating her while she was on an approved leave of absence and replacing her with an employee not a member of her protected class, Compl. ¶¶ 31-32;⁴ defendant failed to reasonably accommodate plaintiff's request for a leave of absence without pay by violating its own policy regarding such absences and by hiring her replacement one month before plaintiff was notified

3. Of course, for the purposes of assessing this motion for summary judgment, we accept plaintiff's facts as true.

4. Consistent with federal law, this court will treat the word "handicap" -- as used in plaintiff's complaint -- as synonymous with the word "disability."

that she was terminated, Compl. ¶¶ 29-30;⁵ and finally, plaintiff's supervisor harassed her because of plaintiff's medically diagnosed condition, Compl. ¶ 22. On May 17, 1996, the PHRC notified plaintiff of a "No Cause" determination regarding its investigation of plaintiff's complaint of unlawful discrimination. By letter dated August 14, 1996 plaintiff requested a Notice of Right-to-Sue from the EEOC. On August 15, 1996, Walton filed this action against MHASP.

Two motions are currently pending before me: defendant's motion for summary judgment and plaintiff's petition to amend her complaint. I will discuss the summary judgment issue first and then address the motion to amend.

II. Discussion

A. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the

5. Plaintiff made the allegation that defendant hired her replacement one month before her termination in her original complaint. Compl. ¶ 28. Defendant denied this allegation in its answer. Ans. ¶ 28. Nowhere in the record does plaintiff develop the facts of this assertion. Thus, again, I take the facts as alleged by the plaintiff in her original complaint to be true.

non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, id. at 248, and all inferences must be drawn, and all doubts resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert. denied, 474 U.S. 1010 (1985).

On a motion for summary judgment, the movant bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Specifically, the non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. When considering how a reasonable juror would rule, the court should apply the substantive evidentiary standard -- in this instance, a preponderance of the evidence -- that the fact-finder would be required to use at trial. Id. at 252. A mere scintilla of evidence will not require the court to send the question to the fact-finder. Id. at 251 (citing Improvement Co. v. Munson, 14 Wall. 442, 448 (1872)).

B. Disparate Treatment Claim⁶

The ADA provides, in pertinent part, that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, condition, and privileges of employment." 42 U.S.C. § 12112(a) (1994). The ADA defines a "qualified individual with a disability" as "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." 42 U.S.C. § 12111(8).

In order for a plaintiff to establish a case of disparate treatment under the ADA, the Third Circuit has applied the burden shifting analysis of McDonnell Douglas. See Lawrence v. Westminster Bank New Jersey, 98 F.3d 61, 68 (3d Cir. 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n.13 (1973)). Under this framework, a plaintiff must first make out a prima facie case of discrimination. Upon establishing a prima facie case, "the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason" for the employee's termination. Fuentes v. Perskie, 32 F.3d 759, 763 (3d. Cir. 1994)(citation and quotation marks

6. I will address only those arguments raised by plaintiff in her complaint, namely, regarding her disability due to depression and do not address the claim first referred to in her Memorandum in Opposition to Summary Judgment which relates to her obesity.

omitted). The employer is able to satisfy this burden by "introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Id. (citations omitted).

If the defendant is able to meet the burden of providing a legitimate, nondiscriminatory reason for the negative employment action, the plaintiff is then afforded an opportunity to demonstrate that the reason which the employer has asserted is actually a pretext for discrimination. Lawrence, 98 F.3d at 65. In order to do this, the plaintiff must (1) discredit the proffered reasons for termination, directly or circumstantially, or (2) adduce evidence that discrimination was more likely than not a motivating or determinative cause of the termination. Id. at 66. In deciding a motion for summary judgment, the court must determine whether the record could support an inference that the employer did not act for a non-discriminatory reason. See Sempier v. Johnson & Higgins, 45 F.3d 724, 732 (3d Cir.), cert. denied, 115 S. Ct. 2611 (1995).

1. Prima facie case

To establish a prima facie case of employment discrimination, plaintiff must prove by a preponderance of the evidence that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was dismissed despite being qualified; and (4) she was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination. Lawrence, 98 F.3d at 68. For the purposes of

an ADA claim, being a member of a "protected class" is defined as having a disability.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities" 42 U.S.C. § 12102(2). Here, MHASP does not contest that depression can be a recognized disability under the ADA. In fact, defendant does not actually contest that plaintiff was disabled for the purposes of her disparate treatment claim.⁷ Thus, plaintiff's assertion that she was disabled will be taken as true and plaintiff will be considered a member of a protected class.

The second part of the prima facie test focuses on whether Walton is "qualified." The ADA defines a "qualified individual with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). This inquiry requires that a determination be made about what constitutes the essential functions of the particular position at issue.

Defendant has asserted that attendance is an essential function of plaintiff's position as director of the ACT NOW

7. Defendant devotes much of its brief to its contention that plaintiff's "problem" with her supervisor, Ms. Meek, does not constitute a disability. However, this argument is only relevant to plaintiff's hostile work environment and failure to accommodate claims; defendant essentially fails to address the question of whether or not plaintiff is disabled for the purposes of her disparate treatment claim.

program and that her excessive absenteeism made her unable to perform an essential function of her job. In short, defendant argues that plaintiff's absences precluded her from being "qualified" as defined by the ADA. Defendant points to plaintiff's absences significantly in excess of the eighteen days per year permitted by MHASP during each year of her employment with the organization; in 1991 plaintiff was absent on sick leave for forty days; in 1992 she was out on sick leave for fifty days; at the time of her requested leave in October of 1993, plaintiff had only 3½ sick days left for that year. Def. Mem. Ex. E & F.

Defendant also argues that plaintiff's poor attendance was negatively affecting her performance. Def. Mem. at 14. However, this issue -- plaintiff's actual performance -- is different from whether attendance was essential to plaintiff's position. In order to establish that attendance was an essential function of plaintiff's position, defendants must demonstrate that the job could not be performed, by anyone, without a particular level of attendance.

Plaintiff claims that attendance was not an essential function of her job and that the program was operating successfully in spite of her absences. She describes how she trained her staff to take over the positions of those who were absent and that she was available by telephone to respond to questions. Plff. Ex. A at 114, 223; Ex. C at 43-45. Plaintiff also points to the fact that defendant had permitted her to take

additional leave as proof that attendance was not an essential element of her job.

Defendant is correct that most federal courts which have considered the issue have held that attendance is an essential function of the particular position at issue. See Tyndall v. National Educ. Centers, Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994); Carr v. Reno, 23 F.3d 525, 529-30 (D.C. Cir. 1994); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), aff'd without opinion, 928 F.2d 396 (3d Cir. 1991); Magel v. Federal Reserve Bank, 776 F. Supp. 200, 203-204 (E.D. Pa. 1991), aff'd, 5 F.3d 1490 (3d Cir. 1993). However, these cases have not held that attendance is an essential element of every position. As one court has described: "[T]he requisite levels of attendance and regularity depend upon the circumstances of each employment position." Carlson v. InaCom Corp., 885 F. Supp. 1314, 1320-21 (D. Neb. 1995). The essential nature of job attendance is a fact-specific inquiry which is hotly contested in this case.

Defendant points to MHASP's sick leave policy which limits the number of sick days per year to eighteen. Def. Mem. Ex. F; Def. Supp. Ex. A. However, plaintiff has raised a genuine issue of material fact as to whether or not this policy was actually followed. Plff. Ex. G at 101; Plff. Ex. H at 72; Plff. Ex. F at 32. Furthermore, MHASP's argument is weakened by the fact that defendant has asserted that permitting plaintiff to take sick leave in excess of the amount allowed by MHASP's policy was one of the accommodations afforded to the plaintiff to enable her to

continue in her position despite her condition. Def. Mem. ¶17. While defendant's earlier toleration and accommodation of plaintiff's absences does not mean that defendant was foreclosed from ever firing plaintiff due to her absences, under the facts of this case it does raise a genuine issue as to what level of attendance was actually necessary for the job.

It may be that defendant could prove at trial that attendance was an essential function of plaintiff's position. However, in a motion for summary judgment, all evidence must be construed in a light most favorable to the plaintiff. Thus, based on the conflicting evidence before me, I cannot hold as a matter of law that attendance -- or more precisely that a particular level of attendance -- was an essential element of plaintiff's job. Therefore, I cannot find that plaintiff was not "qualified" as defined by the ADA.

The third and fourth parts of plaintiff's test to establish a prima facie case under the ADA is to demonstrate that she was dismissed despite being qualified and that she was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination. It is uncontested that plaintiff was terminated by defendant on January 6, 1994 and that the individual hired to replace plaintiff is not disabled. Thus, I cannot conclude that plaintiff cannot make out a prima facie case of discrimination under the ADA. I will assume for the present purposes that she can do so at trial.

2. Legitimate, nondiscriminatory reason for plaintiff's termination

Defendant has offered as its legitimate, nondiscriminatory reason for terminating the plaintiff the fact that the ACT NOW program was suffering under plaintiff's leadership. Defendant has asserted that the very existence of the program was threatened by its declining outcomes. MHASP attributes the program's difficulties to a great extent to plaintiff's excessive absences.

Defendant has submitted significant uncontroverted evidence to show that individuals to whom plaintiff reported in her position at MHASP had serious concerns about the program's performance. Robert Lerner, the Executive Director of MHASP, stated that "Ms. Walton was replaced because the ACT NOW program was in jeopardy because no one was running the program."⁸ The outcomes of the project were poor and the project's funding was threatened." Def. Mem. Ex. B. When asked why plaintiff was terminated, Mr. Lerner replied, "Because the program was close to being -- close to being dead because no one was running it." Plff. Mem. Ex. G at 247.

8. The extent and nature of the communication between Ms. Meek and Mr. Lerner regarding plaintiff's termination is unclear on the record before me. However, it is uncontested that Mr. Lerner was ultimately responsible for the termination decision. Def. Mem. Ex. B.

Defendant offers evidence that the program's outcomes were declining. For example, six program graduates from the January, 1991 cycle were placed in jobs; nine from the September, 1991 group. By the July, 1993 the number had dropped to two; in the final cycle of the program under plaintiff's leadership, no ACT NOW graduates were placed in jobs. Def. Mem. Ex. D; Def. Supp. Ex. O at 63-64. Plaintiff's supervisor, Ms. Meek, testified that "[t]he program wasn't running well. We had cycles where one person got a job or zero . . ." Def. Mem. Ex. C at 43. Thus, both Mr. Lerner and Ms. Meek believed the program was threatened. Plff. Mem. Ex. G at 247.

Ms. Meek documented the fact that she believed that plaintiff's absences were having a negative effect on the program in October and December, 1992. Def. Mem. Ex. D. She wrote the following as part of plaintiff's performance evaluation from that year: "I am greatly concerned that if significant absences [sic] of this magnitude continue, the project will suffer." She continued: "In general, when Sandy is gone, the program lacks supervision, direction and leadership. While it appears that staff "get by" in her absence [sic], the program is not operating to maximum effective-ness." Furthermore, defendant's evidence clearly demonstrates that plaintiff's attendance was getting progressively worse. Def. Ex. F; Plff. Ex. G at 190.

Here, the defendant has met its burden of providing a legitimate, nondiscriminatory reason for plaintiff's termination. Defendant has produced evidence to show that it legitimately

feared for the future of the program given the poor performance of the program in 1993, and that plaintiff's absence from work and inability to provide the necessary leadership was the reason for terminating her. Likewise, the defendant's evidence about plaintiff's excessive absences is clear and uncontested. Defendant has met its burden of introducing evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes, 32 F.3d at 763.

3. Plaintiff's assertion of pretext

In order to rebut the defendant's stated reason for her termination, plaintiff must either (1) provide sufficient evidence to discredit the defendant's proffered reasons for termination, or (2) offer evidence that discrimination was more likely than not a motivating or determinative cause of the termination. Lawrence, 98 F.3d at 66. Plaintiff makes arguments under both prongs of this test. First, plaintiff disputes that she was fired because of her excessive absences or their negative impact on the program. She contends that the program was not suffering as a result of her absences. She also argues that termination while on an approved leave of absence in itself creates an inference of pretext. Second, plaintiff alleges that discrimination was the cause of her termination and that there

was an effort on the part of MHASP to replace mental health consumers with nonconsumers.⁹

(1) Plaintiff's attempt to discredit defendant's explanation

To counter defendant's proffered legitimate, nondiscriminatory explanation for plaintiff's termination, plaintiff has provided evidence which she contends demonstrates that at least some staff members felt that the program functioned in spite of her absences. Also, she argues that there were many factors beyond the program's control which affected how many graduates ACT NOW would place and thus, declining placement data cannot be used as a legitimate basis for her termination. Plff. Ex. C at 37.¹⁰

Two staff members, Carla Mitchell and Bernadine Randolph, submitted letters praising plaintiff's skills as a supervisor. Plff. Mem. Ex. Q. However, the deposition testimony of these two staff members provides less compelling support for plaintiff's assertion that the program was functioning well. When asked who was in charge when Walton was not in the office one staff member,

9. As part of her discussion on pretext, plaintiff again states that the individual hired to replace her was not a member of the protected class to which she belonged. While this fact can be considered in permitting a plaintiff to make a prima facie case of discrimination, it has little value as evidence of pretext.

10. The parties in this case disagree over the improvement in the ACT NOW program's outcomes under its new director, Mr. Dodson. However, this dispute is not relevant to plaintiff's case. The court can only look to defendant's knowledge and beliefs at the time of the adverse employment action to determine whether they acted for a legitimate, nondiscriminatory reason.

Carla Mitchell, replied, "[o]n paper I guess it was Carmen Meek, but officially, it was us, the staff. We kind of like were in charge of ourselves. We did what we had to do." Plff. Ex. B at 41. Neither Mitchell nor Randolph report talking to plaintiff often on the phone during her absences. In fact, when asked how often she telephoned plaintiff, Randolph replied, "Oh, not a lot. She was ill and I didn't feel like I needed to be calling her. I didn't think she needed me to do that." Plff. Mem. Ex. C at 43. During her own deposition, plaintiff testified that while she was out on leave the staff did not know how to complete all of the program's necessary paperwork. Def. Ex. E at 115.

Mr. del Vecchio, plaintiff's former supervisor, testified that while he was at MHASP, the productivity of ACT NOW did not decrease when plaintiff was hospitalized because of "Ms. Walton's preparation and the administrative abilities that she has displayed in preparing the staff to continue with the operation." Plff. Mem. Ex. H at 122. However, Mr. del Vecchio left MHASP in the summer of 1992 and thus, his testimony does not relate to the plaintiff's performance during the year and a half after his supervision of her. It was during this year and a half that the record reflects that defendant became concerned about program outcomes and plaintiff's ability to supervise the program given her continued absences. Ultimately, this evidence fails to cast doubt upon the fact that those responsible for the ACT NOW program -- at the time of plaintiff's termination -- believed

that the program's outcomes were declining under the plaintiff's leadership and terminated her for that reason.

Plaintiff points to positive performance evaluations and a raise she received in early 1993 as evidence that the her supervisors did not believe the program was not suffering. Plff. Ex. K; Plff. Ex. Q. However, the raise and performance evaluation predate the decision to terminate plaintiff and, more importantly, predate defendant's knowledge of the decline in program outcomes during 1993. The evidence offered by the plaintiff may show that plaintiff's supervisors were not questioning her performance prior to January 1993, but it does not necessarily undermine defendant's proffered explanation for terminating her in January 1994.

Finally, plaintiff contends that her termination while on an approved leave of absence creates an inference of pretext. However, plaintiff cites no authority for this proposition. There are many possible explanations -- aside from discrimination -- as to why an employer who approved a leave of absence might find it necessary to terminate an employee. Furthermore, the facts of this particular leave make an a fortiori inference of pretext particularly unwarranted. Here, plaintiff has not argued that she was on an approved six month leave. Rather, she was to keep the agency advised of her expected return date, and she knew of the policy as to an outside date of six months for such a leave. In addition, plaintiff's argument ignores the uncontested evidence concerning defendant's knowledge of the decline in

program outcomes and plaintiff's worsening attendance record. The Lawrence test does not permit such an inference of pretext to be made merely from plaintiff's termination while on a leave of absence.

Plaintiff cannot lose sight of the fact that it is her burden to provide some evidence to discredit defendant's proffered reason. Her belief, however deeply felt, that the program was running effectively does not serve to counter defendant's explanation. Those disagreements do not give her a cause of action under the ADA. Employers are entitled to make employment decision which are unpopular, unwise, and even unjust as long as they do not do so for discriminatory reasons. See, e.g., Rhett v. Carnegie Ctr. Assoc., 1997 WL 693036, at *6 (3d Cir. Oct. 31, 1997) (noting that the Pregnancy Discrimination Act does not require fairness).

While plaintiff may have a different view of the success of the program under her leadership, she has provided no evidence from which a jury could reasonably determine that defendant's explanation for her discharge was a pretext for discrimination. As the Fuentes court warned:

[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer Rather, the non-moving plaintiff must demonstrate 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."

Fuentes, 32 F.3d at 765. Plaintiff has fallen far short of meeting this burden. Rather, the record demonstrates that defendant made several attempts to accommodate plaintiff's disability, such as providing her with flex-time and a part-time assistant. Plaintiff has offered no evidence from which a jury could find that defendant's proffered reason for the termination, harm to the ACT NOW program due to plaintiff's excessive absences, was actually a pretext for discrimination against plaintiff based upon her disability.¹¹

(2) Plaintiff's evidence of discrimination

Admittedly, discrimination is often difficult to detect; in fact, it is often intentionally concealed. The McDonnell Douglas test was developed precisely because direct evidence of discrimination is rare. See Olson v. General Elec. Astrospace, 101 F.3d 947, 955 (3d Cir. 1996). Thus, plaintiff is correct that sometimes inferences of discrimination can serve as sufficient basis to allow a plaintiff to survive summary judgment. However, in this case, plaintiff has offered no evidence which would enable a reasonable jury to find even an inference of discrimination. Despite her claim that she was

11. Because I find that there is no evidence upon which a jury could find that defendant's proffered reason for terminating the plaintiff was pretextual, I need not reach the issue of judicial estoppel with respect to plaintiff's representation that she was "unable to work" in applying for benefits. I do note, however, that liberal application of the judicial estoppel principle has been widely criticized, most recently by the Third Circuit. See Krouse v. American Sterilizer Co., 1997 WL 592543, at *6 (3d Cir. Sept. 26, 1997).

terminated because of her disability, plaintiff has provided no evidence to support this allegation.

Plaintiff argues that a discriminatory policy was being implemented by the defendant, offering testimony of one former employee, Alberta Hill, who claims that MHASP desired to replace mental health consumers with non-consumers. Plff's Mem. Ex. D at 60-75. However, Ms. Hill does not in any way connect what she describes as a "changing of the guard" with discrimination against plaintiff. Ms. Hill did not attribute plaintiff's termination to disability discrimination, but testified that she believed that "higher-ups" were "displeased with" plaintiff's size. Plff. Ex. D at 76. These allegations, which do not relate to plaintiff's disability, reflect nothing more than one person's view of other's motives and fail to provide evidence from which a jury could find that disability discrimination was more likely than not a motivating or determinative cause of plaintiff's termination. See Perez de la Cruz v. Crowley Towing & Transp. Co., 807 F.2d 1084, 1086 (1st Cir. 1986) (holding that an affidavit will not defeat summary judgment if it contains no more than "vague and unsubstantiated personal observations" insufficient to support reasonable jury verdict).

Plaintiff has tried to bolster her claim of discriminatory treatment with a claim of harassment by her supervisor which created a hostile work environment. However, as is discussed below, plaintiff has produced no evidence that could support a finding of discriminatory treatment, as opposed to merely showing

that a strained relationship existed between her and her supervisor, who was herself a consumer of mental health services.

In short, plaintiff has not met her burden of showing pretext by either undermining defendant's stated reason or producing evidence that discrimination was the actual cause of her termination. Thus, based on the record before me, no reasonable jury could find that defendant's proffered reasons for firing plaintiff were pretextual.

C. Failure to Accommodate Plaintiff's Disability

Plaintiff brings three claims against defendant for failure to accommodate. Plaintiff alleges that defendant refused her request "to be assigned to another immediate supervisor"; "failed to reasonably accommodate plaintiff's request for a leave of absence without pay"; and "failed to reasonably accommodate plaintiff by hiring her replacement one month before plaintiff was notified that she had been terminated." Compl. ¶¶ 23, 29, 30.¹²

Under the ADA, failure to accommodate and disparate treatment are analytically distinct claims. In order to establish a violation of the ADA, a claim brought under failure to accommodate does not require any evidence or inference of intentional discrimination. Thus, these allegations are not

12. In her memo, plaintiff raises for the first time a failure to accommodate by reason of defendant's failure to reassign plaintiff to another available position. However, once again, as this claim was not part of the complaint, I will not address it.

evaluated using the McDonnell Douglas framework. See Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1283 (7th Cir. 1996); Brown v. Lankenau Hosp., 1997 WL 277354, at *8 (E.D. Pa. May 19, 1997). Instead, for the purposes of summary judgment, the court must evaluate whether the facts presented by the nonmoving party, if taken as true, could establish failure to accommodate in violation of the ADA. Id.

Under the ADA, the term "discriminate" includes "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 such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . ." 42 U.S.C. § 12112(b)(5)(A). An undue burden is one which creates "significant difficulty or expense in, or resulting from, the provision of the accommodation." 29 C.F.R. pt. 1630 App. § 1630.2(p). However, the terms "reasonable accommodation" and "undue burden" are not self-explanatory. Certainly, an accommodation which is reasonable in some situations will be an undue burden in others. Therefore, the determination of whether a proposed accommodation is reasonable is a fact-specific inquiry.

Caselaw is clear that when an employee brings a claim alleging failure to accommodate, "it falls to the employee to make at least a facial showing that such accommodation [was] possible." Shiring v. Runyon, 90 F.3d 827, 832 (3d Cir. 1996)

(stating that employee requesting transfer must show that there were vacant, funded positions available). Thus, it is not enough for a plaintiff to state vaguely that a reasonable accommodation could include reassignment, transfer, or job restructuring without providing any evidence that such accommodations were, in fact, possible. Id.

Thus, in order to make out a prima facie case of failure to accommodate, a plaintiff must show that a request for a possible or plausible accommodation was made. If the plaintiff can so demonstrate, the burden shifts to the defendant to show that the proposed accommodation is unreasonable -- that is, that implementation of such an accommodation would cause the defendant to suffer an undue burden. Borkowski v. Valley Central Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).¹³

In the first of her three claims of failure to accommodate, plaintiff alleges that defendant failed to accommodate her request to be assigned to a different supervisor. Compl. ¶ 23. However, plaintiff has not demonstrated -- or even alleged -- that such an accommodation was possible. Plaintiff bears the burden of producing at least some minimal evidence that there was

13. The ADA is less clear about which party bears the burden of production and persuasion with respect to what constitutes a "reasonable accommodation" or "undue burden." In Borkowski, the Second Circuit attempted to chart a middle course between placing the burden almost exclusively on either the plaintiff or the defendant. 63 F.3d at 137. While not yet explicitly adopted by the Third Circuit, the same analysis was applied in Shiring. 90 F.3d at 831. Borkowski has been applied by at least one court in this district. See Geuss v. Pfizer, Inc., 971 F. Supp. 164, 173 (E.D. Pa. 1996).

another appropriate supervisor to whom she could have been reassigned.

Furthermore, plaintiff does not allege or offer any evidence to prove that she took appropriate steps to pursue her request for an accommodation, or that she advised MHASP of the basis for her complaint and her request. Rather, plaintiff offered the following deposition testimony about her request to be reassigned:

I did ask Joseph Rogers -- I beeped him and asked him to call me at home and he did. And I told him I cannot take anymore of this stuff with Carmen. And I started telling him how she was treating me and so forth. And I said, I want a new supervisor. And he said, No. He said, I want you to work out -- write out recommendations to improve, you know, your relationship with her. And then him and I had a fight and I hung up with him.

Def. Mem. Ex. E at 68. Plaintiff further testified that she never put her request or recommendations into writing as directed. Plff. Mem. Ex. E at 69. Courts have held that in enacting the ADA, Congress envisioned that determination about what constitutes a "reasonable accommodation" would be an "interactive process" between two parties. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996); see also Mengine v. Runyon, 114 F.3d 415, 419 (3d Cir. 1997) (citing Beck in context of Rehabilitation Act). These courts have further held that when this "interactive process" breaks down, courts should look for signs of "failure by one of the parties to make reasonable efforts to help the other party determine what

specific accommodations are necessary." Beck, 75 F.3d at 1135. Such a failure can surely be found here. By refusing to put her request into writing -- or in any way pursue the request for a new supervisor -- plaintiff has failed to engage in the communication which the ADA requires before a cause of action for failure to accommodate can be sustained.

In her second allegation of failure to accommodate, plaintiff contends that "[s]ince reasonable accommodation includes appropriate adjustment of policies, accommodation could easily have included continuing to retain Walton through her approved leave without pay." Plff. Mem. at 20. Defendant's letter granting plaintiff's request for a leave of absence states that "[i]t is our policy that a leave without pay should not exceed 6 months." Plff. Mem. Ex. L. This letter, referencing a MHASP employment policy, demonstrates that in this situation a leave without pay was a "possible" accommodation.

The burden then shifts to the defendant to show that the "possible" accommodation was, in fact, not reasonable. The same evidence that demonstrates the legitimate, nondiscriminatory reason for firing plaintiff, namely that the ACT NOW program was suffering and program outcomes worsening under plaintiff's leadership, also demonstrates that the accommodation that plaintiff seeks created an undue burden for the organization. Thus, defendant has provided sufficient uncontroverted evidence to meet the burden of demonstrating that the requested accommodation, although possible, was not reasonable.

Plaintiff attempts to argue that the defendant must prove that "the additional week or so of already approved leave would have created an undue hardship for it." Plff. Mem. at 33. However, the wording of plaintiff's own statement belies this argument. It is clear that defendant could not be certain whether plaintiff would return in "a week or so" or would continue to extend her leave at the last minute. Surely, an accommodation whereby the leave would be totally dependent upon plaintiff's changing view of her return date is not required by the ADA.

Finally, plaintiff alleges that defendant "failed to reasonably accommodate plaintiff by hiring her replacement one month before plaintiff was notified that she had been terminated." Compl. ¶ 30. This allegation is merely another way of stating that defendant failed to accommodate her disability by firing her while she was on a leave of absence. Defendant's hiring of her replacement before she was terminated is a fact which, in itself, contains no allegation of failure to accommodate. Again, defendant's actions may have been unfair, but this is not an adequate basis for a cause of action for failure to accommodate plaintiff's disability.

D. Harassment Based on Plaintiff's Disability

Plaintiff also claims that she was harassed based on her disability and thus subjected to a hostile work environment. In order to make out a prima facie case of disability harassment

under the ADA, plaintiff must demonstrate: (1) that she is a qualified individual with a disability; (2) that she was subject to unwelcome harassment; (3) that the harassment was based on disability or on a request for accommodation; and (4) that the harassment altered a term, condition, or privilege of employment." See Butler v. City of Prairie Village, 974 F. Supp. 1386, 1401 (D. Kan. 1997). Further, in order to sustain a cause of action for hostile work environment, a plaintiff must demonstrate that her workplace was "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations omitted) (applying standard to Title VII case). The hostility of the work environment must be determined by considering factors such as the frequency, severity, or threatening nature of the purportedly harassing conduct. Garcia-Paz v. Swift Textiles, 873 F. Supp. 547, 561 (D. Kan. 1995) (applying Harris analysis to ADA claim).

Plaintiff has brought a claim of harassment under the ADA for incidents and comments involving her supervisor, Ms. Meek. During her deposition, plaintiff had difficulty recalling the alleged incidents of harassment. With respect to the incidents which plaintiff could remember, each falls far short of meeting the prima facie case for harassment based on disability. In fact, in her memo, plaintiff avers that Ms. Meek's was verbally abusive, "knowing of Walton's disability." Plff. Mem., at 29.

This statement reveals a misunderstanding on the part of the plaintiff about the nature of the conduct which is actionable under the ADA. The words of the ADA prohibit discrimination against an individual "because of the disability of such individual." 42 U.S.C. § 12112(a) (emphasis added). Plaintiff has failed to offer any evidence which links Ms. Meek's conduct - - either directly or circumstantially -- to discrimination against plaintiff on the basis of her disability.

Plaintiff points to the deposition testimony of co-workers, Carla Mitchell and Bernadine Randolph, to support her claim of harassment. Both colleagues testified that they observed that plaintiff was sometimes upset after meetings with Ms. Meek. Ms. Mitchell recalls that she heard Ms. Meek yell at plaintiff over the phone. Plff. Ex. B, at 30-40; Plff. Ex. B, at 53-59. However, none of this testimony in any way connects these incidents to discrimination on the part of Ms. Meek on the basis of plaintiff's disability.

Next, plaintiff points to the following exchange -- as reported in her deposition -- as evidence of discrimination:

On March 17, 1993, Carmen called me at my office and I wasn't doing too well. . . . And Carmen could hear in my voice what was wrong because she asked me what's wrong and I told her. And then she started going on by saying the following, I want you to call your doctor when we hang up and tell him that you're upset, overwhelmed, and emotional, and what can you do about it, meaning your doctor. Quote, you have to separate your problems, symptoms from the project. Quote, you have to learn to manage your illness. Quote, you have to make a decision of either

you can work or you're either too sick to work and you shouldn't be working. Quote, people with your symptoms are manic depressive and you have to manage that. And at that point I just said, Carmen, I have to go and I hung up on her.

Plff. Ex. A, at 29-30. While it is possible that these comments reveal a lack of sensitivity on the part of Ms. Meek, they do not reveal the discriminatory animus or bias necessary to rise to the level of harassment. Plaintiff concedes that it was evident in her voice that she "wasn't doing too well." Ms. Meek's comments are at worst critical, but at best appear to have been aimed at helping plaintiff sort through her difficulties and get help. There is simply no indication of intimidation, ridicule or insult in these comments. Plaintiff also makes the allegation that Ms. Meek's mere reference to her as having manic-depression is itself evidence of discrimination. Def. Mem. Ex. E. at 204-205. However, no reasonable jury could conclude that Ms. Meek's mischaracterization of plaintiff's condition, even when taken with the rest of her comments, is sufficient to support a finding of harassment.

Plaintiff also testifies about a statement purportedly made by her supervisor, Ms. Meek, in June 1993 that plaintiff must attend graduation because it "is an essential part of your job and you must go . . . if you don't go, attend this graduation, you will be fired." Def. Mem. Ex. E, at 48. Plaintiff was granted leave not to attend the graduation, and she was not fired for her failure to attend. Ms Meek's statement appears to have

been no more than a statement of policy regarding plaintiff's duties as head of the program. Ms. Meek's alleged comment -- especially combined with the fact that her disability was accommodated -- does not support a claim of harassment.

Plaintiff also contends that she felt harassed by Ms. Meek's phone calls to her while she was hospitalized. Plaintiff offered the following deposition testimony: "[F]irst she'd start out by saying, well, how are you and things like that. And then she said, Well, when are you coming back, when are you coming back . . ." Def. Mem. Ex. E at 59-62. Surely these questions do not equate with harassing plaintiff based on her disability. Again, plaintiff fails to make the necessary connection between these phone calls and her disability, thus precluding a legal finding of harassment.

Plaintiff's next argues that Ms. Meek's deposition testimony that she did not know if plaintiff's "judgment would be adequate" when she was hospitalized constitutes evidence of harassment. Plff. Supp. Ex. S at 106, 109-110.¹⁴ This statement was not made to the plaintiff, and plaintiff does not claim that she had any knowledge of Ms. Meek's statement prior to this litigation. Whether or not Ms. Meek's concern was warranted in this instance is not the question before the court. Rather, it is enough that this court find that her statement reflects a rational concern and in no way constitutes evidence that Ms. Meek was targeting

14. This deposition transcript was provided at oral argument and has been marked by the court as Plff. Supp. Ex. S.

plaintiff because of her disability. Thus, it is the determination of this court that no reasonable jury could find discrimination in this statement by Ms. Meek.

Finally, plaintiff points to a performance evaluation in which Ms. Meek's states that she felt overburdened by plaintiff's use of sick leave. Def. Mem. Ex. D. Again, this does not provide any evidence of discrimination. Instead, Ms. Meek's comment supports defendant's argument that plaintiff's absences created difficulties for the program. There is simply no evidence that Ms. Meek harassed plaintiff or treated her any differently because she was disabled.

Instead, plaintiff's evidence reveals that she had a strained working relationship with her supervisor. The stress and anxiety of this relationship exacerbated her depression. One of plaintiff's colleagues, Ms. Hill, acknowledged that Ms. Meek was difficult to work with: "[The] way that she treats people, they would feel very degraded." Plff. Ex. D at 71. However, this former MHASP employee did not testify that Ms. Meek treated mental health consumers and nonconsumers differently. Nor do any of the alleged incidents of harassment relate to plaintiff's disability. Even plaintiff's own deposition testimony fails to allege that Ms. Meek harassed her because of her disability. Counsel asked, "Why do you think Ms. Meek treated you in a hostile manner?" Plaintiff replied, "I don't know. I'm not the only one she treats this way. There had been many people that were treated wrongfully by her, many." Def. Ex. E at 66. Once

again, without proof -- or at least enough evidence to support an inference -- that she was harassed because of her disability, this conduct is not actionable under the ADA. All of these alleged incidents -- considered both individually and together -- fall far short of meeting the Harris standard. Accordingly, defendant's motion for summary judgment will be granted.

E. Motion to Amend the Complaint

Plaintiff has filed a petition to amend her original complaint in order to raise the additional claim of discrimination against her based on the perceived disability of obesity. Plff's Pet. to Amend Compl. at 2. Plaintiff's claim of discrimination based on the perceived disability of obesity is based on the testimony of one witness, Alberta Hill, who was deposed on May 6, 1997. Plff. Mem. Ex. D at 76. Yet, plaintiff waited until Oct. 3, 1997, well after discovery in the case had concluded -- and after defendant's summary judgment motion was filed -- to file this petition to amend. Plaintiff has provided no explanation for this delay.

Courts have held that a motion to amend a complaint may be denied if the additional claims could not withstand a motion to dismiss. See Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 204 (7th Cir. 1991) (holding that refusal to allow plaintiff to amend complaint is proper "where the proposed amendment fails to allege facts which would support a valid theory of liability") (citations omitted); see also F.D.I.C. v. Bathgate, 27 F.3d 850,

874-75 (3d Cir. 1994). I find that this is true of the claim raised by plaintiff in this petition. In so doing, I accept as true "all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them" and determine that "no relief could be granted under any set of facts which could be proved." Piecknick v. Commonwealth of Pa., 36 F.3d 1250, 1255 (3d Cir. 1994) (citation omitted). The claim asserted by plaintiff is meritless on its face.

Case law and the relevant regulations have established that in almost all circumstances, obesity alone is not recognized as a disability under the ADA. See 29 C.F.R. pt. 1630 App. § 1630.2(j) ("except in rare circumstances, obesity is not considered a disabling impairment"); Torcasio v. Murray, 57 F.3d 1340, 1354 (4th Cir. 1995), cert. denied, 116 S. Ct. 772 (1996) (citing recent cases which find that obesity is not a disability under the ADA); Morrow v. City of Jacksonville, Ark., 941 F. Supp. 816, 821 (E.D. Ark. 1996). An exception to this rule could possibly exist if a person claimed that obesity substantially limited his or her ability to perform a major life activity. However, that is not the case here. Plaintiff makes no contention that she was either so impaired or limited, or that

she was perceived as being substantially limited in a major life activity.¹⁵

Rather, in support of her claim, plaintiff only points to the deposition testimony of one witness that another MHASP employee made a derogatory comment about plaintiff's size in a discussion about a promotional video. Thus, the necessary allegations have not been made; nor could they be made based on the facts as presented in the proposed amendment. A disparaging remark about her size does not equate with treatment of her size as impairing one of her major life activities. Plaintiff's proposed amended complaint fails to state a claim upon which relief could be granted. Further, I am reluctant to permit amendment at this late date, especially where the nature of the purported new disability claimed is totally different from the one on which original pleadings and all discovery have been based. See, e.g., Adams v. Gould Inc., 739 F.2d 858, 868 (3d Cir. 1984). Accordingly, leave to file an amended complaint will be denied.

15. In order to bring a claim of perceived disability under the ADA, a plaintiff must show either that (1) while she had a physical or mental impairment, it did not substantially limit her ability to perform major life activities, or, alternatively, that (2) she did not suffer at all from a statutorily prescribed physical or mental impairment, and that her employer treated her impairment (whether actual or perceived) as substantially limiting one or more of her major life activities. Cook v. State of R.I. Dep't of MHRH, 10 F.3d 17, 23 (1st Cir. 1993).

For these reasons, defendant's motion for summary judgment is granted and plaintiff's motion to amend her complaint is denied. An appropriate order follows.

BY THE COURT:

Marjorie O. Rendell, J.