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

PATRICIA A. MURRAY	:	CIVIL ACTION
v.	:	
SURGICAL SPECIALITIES CORPORATION	:	NO. 97-0444

MEMORANDUM AND ORDER

HUTTON, J. January 13, 1999

Presently before the Court are Defendant Surgical Specialities Corporation's Motion for Summary Judgment (Docket No. 16), Plaintiff Patricia A. Murray's reply (Docket Nos. 17 & 19), and Defendant's sur reply thereto (Docket No. 20). Also before the Court are Defendant's Motion to Compel Production of Documents in Response to Third-Party Subpoena (Docket No. 14) and Tasty Baking Company's reply thereto (Docket No. 15). For the reasons stated below, the Defendant's Motion for Summary Judgment is **DENIED** and Defendant's Motion to Compel Production of Documents is **DENIED**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. Beginning on January 29, 1996, Plaintiff Patricia Murray worked as a surgical blade inserter and monitor for Defendant Surgical Specialities Corporation ("SSC"). As part of her job, Murray inserted blades, checked blades for flaws, and

packed boxes of blades into cartons. As she performed these tasks, Murray was always sitting down.

On April 29, 1996, Murray went to Dr. Albert Roke because she had trouble walking after sitting for long periods of time. Murray told Dr. Roke that she sat continually while she worked except for the occasional bathroom or rest break. Murray also told Dr. Roke that she worked fifty-five (55) hours per week during the previous month. Dr. Roke examined Murray and diagnosed her with degenerative disk disease of the spine with cervical and lumbar sprain.

As part of his diagnosis, Dr. Roke instructed Murray not to return to work. In a note to SSC, Dr. Roke noted Murray's work restriction and informed SSC that he would check on her ability to return to work every one or two weeks. Dr. Roke also ordered an MRI and instructed Murray to undergo physical therapy.

The next day, April 30, 1996, Murray informed SSC that she was not reporting for work pursuant to her physician's instructions. On that same day, Murray went to see Teresa Smith, SSC's Human Resources Director. Murray gave Smith the note from Dr. Roke and filled out some paperwork. Murray asked Smith if she could perform another job that did not require sitting. Smith told her that there were no jobs that fit that description. Smith suggested that Murray work on a part-time basis, but Murray refused this offer pursuant to Dr. Roke's instruction not to work until the

results of the MRI were known. During that visit, Smith gave Murray an application for short term disability benefits.

Following her visit with Smith, Murray filled out a portion of the disability application and took the application to Dr. Roke. Dr. Roke filled out the remaining portions of the application and Murray returned it to SSC on May 1, 1996. SSC rejected the application because Dr. Roke failed to indicate when Murray would be able to return to work. Smith then gave Murray a second application. Murray completed this second application on May 2, 1996, which now stated that she was totally disabled. Dr. Roke certified her as totally disabled and indicated that her expected date of return to work was June 1, 1996.

After a month of working at SSC, Murray began selling Tastykakes to her co-workers. Murray asked Smith if she could still deliver orders of Tastykakes to her co-workers even though she temporarily stopped working at SSC. Smith informed Murray that she could not go onto SSC's premises to deliver Tastykakes. When returning the second disability application to Smith, Murray again asked if she could deliver Tastykakes to her co-workers by leaving them in the lunchroom. This time Smith told Murray that, while she could not go through the building, she could go to the side of the building and deliver Tastykakes to co-workers who were outside on break.

Murray drove around to the side of the building. Murray

asked a co-worker to go inside the building and get a friend who was on a lunch break. The friend came out to see Murray and took the Tastykakes inside to the lunchroom. Meanwhile, in the parking lot, Murray talked with co-workers who where outside on break. A SSC policy prohibited employees from visiting other employees in the lunchroom or in production areas during work hours without authorization. Another SSC policy prohibited visitors on company premises, including the parking lot, at any time.

On May 13, 1996, SSC terminated Murray's employment. Murray claims that SSC first told her that she was terminated for "not completing the right forms." SSC contends that it fired Murray because she violated SSC policies by visiting co-workers in the parking lot and delivering Tastykakes.

On January 29, 1997, Murray filed the instant lawsuit. Murray alleges that SSC terminated her because of her disability in violation of the Americans with Disabilities Act ("ADA"). As part of discovery, on May 11, 1998, SSC served a subpoena upon Tastykake Incorporated seeking:

> Any and all employment records pertaining to Patricia A. Murray, in the possession of Tastykake Inc., including, but not limited to, drug test results, compensation earned, hours worked, benefits received or entitled to, discipline assessed, and reasons for employment separation, if any.

On May 22, 1998, Tasty Baking Company ("Tastykake") responded to SSC's subpoena by providing certain documents. Tastykake objected,

however, to providing any documents relating to drug or alcohol test results based upon a Pennsylvania patient confidentiality statute. On July 1, 1998, SSC filed a motion to compel Tastykake to produce any such documents. On July 17, 1998, SSC also filed a motion for summary judgment. The Court addresses both motions.

II. DISCUSSION

A. Motion for Summary Judgment

1. Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on 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). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must

draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. Merits

Under the ADA, an employer is prohibited from discriminating 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." 42 U.S.C. § 12112(a) (1994). A "qualified individual with a disability" is defined 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." Id. § 12111(8). In adjudicating cases brought under the ADA, courts apply the burden-shifting framework applicable to cases brought under Title VII of the Civil Rights Act of 1964. See id. § 12117; McNemar v. Disney Stores, Inc., 91 F.3d 610, 619 (3d Cir. 1996),

cert. denied, 117 S. Ct. 958 (1997).

There are three steps to this framework. First, the plaintiff bears the burden of establishing a prima facie case of discrimination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Second, the burden then shifts to the defendant, who must offer a legitimate non-discriminatory reason for the action. See id. Third, if the defendant satisfies this burden, the plaintiff must then come forth with evidence indicating that the defendant's proffered reason is merely a pretext. See id.

In the instant action, Defendant SSC argues that summary judgment should be granted in their favor because the Plaintiff cannot prove the prima facie case of disability discrimination. A plaintiff presents a prima facie case of discrimination under the ADA by demonstrating: (1) she is a disabled person within the meaning of the ADA; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. See Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1998). The Defendant argues that summary judgment is appropriate because the Plaintiff cannot establish any of the three elements of the prima facie case of disability discrimination.

a. <u>"Disability" Under the ADA</u>

(1) <u>Is the Plaintiff "Disabled" Under the ADA?</u>

The ADA defines a "disability" as "a physical . . . impairment that <u>substantially limits</u> one or more of the <u>major life activities</u> of such individual." 42 U.S.C. § 12102(2)(A) (1994) (emphasis added). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I) (1997).[1] More specifically, "'[m]ajor life activities' are those basic activities that the average person in the general population can perform with little or no difficulty . . . includ[ing] sitting, standing, lifting, [and] reaching." 29 C.F.R. Pt. 1630, App. § 1630.2(I).

"Whether an impairment substantially limits a major life activity depends on the following factors: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or expected long term impact." <u>Sherrod v. American Airlines, Inc.</u>, 132 F.3d 1112, 1119 (5th Cir. 1998) (citing 29 C.F.R. § 1630.2(j)(2)); <u>Brown v. Lankenau Hosp.</u>, No. CIV.A.95-7829, 1997 WL 277354, at * 3 (E.D. Pa. May 19, 1997). "For an impairment to substantially limit major life activities, the impairment must be 'a significant restriction'

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3. "Because the ADA does not define many of the pertinent terms, we are guided by the Regulations issued by the Equal Employment Opportunity Commission ("EEOC") to implement Title I of the Act." <u>Deane v. Pocono Med. Ctr.</u>, 142 F.3d 138, 143 n.4 (3d Cir. 1998) (citations omitted).

on the major life activity." Taylor v. Phoenixville Sch. Dist., No. CIV.A.96-8470, 1998 WL 133628, at * 4 (E.D. Pa. Mar. 20, 1998) (quoting Nave v. Woolridge Constr., No. CIV.A.96-2891, 1997 WL 379174, at * 4 (E.D. Pa. June 30, 1997)). As the EEOC regulations explain:

> [A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices.

29 C.F.R. Pt. 1630, App. § 1630.2(j).

In the present case, the Plaintiff presented sufficient evidence to create a genuine issue of material fact of whether she suffers from impairments that substantially limits her ability to perform manual tasks, sit, walk, and work. The Plaintiff offers three letters from Dr. George Strobel. These letters indicate that Plaintiff suffers severe back pain, numbness in her legs, and difficulty in walking and sitting. For instance, Dr. Strobel reports that: "Walking for further than a block produces significant pain and produces some sensation of numbness in [Plaintiff's] legs." Pl.'s Ex. at 10a. As these letters suggest,

Plaintiff may present expert testimony that she suffers from a severe back condition which substantially limits her ability to perform manual tasks, sit, walk and work. Accordingly, the Defendant's motion must be denied in this respect.

(2) Is the Plaintiff Regarded as Disabled Under the ADA?

The ADA further provides that an individual suffers from a "disability" if he is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C). "The focus of such an inquiry is not on the plaintiff's actual abilities but instead, is 'on the reactions and perceptions of the persons interacting or working with [the plaintiff].'" Taylor, 1998 WL 133628, at * 7 (quoting Kelly, 94 F.3d at 108-09)). This Court recently stated that under Section 12102(2)(C):

> a plaintiff would be entitled to the protection of the ADA even if he does not actually have a substantially limiting impairment, as long as he can show that defendants regarded him as having such an impairment. See 29 C.F.R. § 1630.2(l). Where, as here, defendants concede that plaintiff has an impairment, plaintiff must still show that defendants perceived his impairment to be one which posed a substantial limitation on one of his major life activities. See, e.g., Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986). The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action. Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996).

Nave, 1997 WL 379174, at *8.

In this case, Plaintiff offered sufficient evidence to suggest that SSC regarded her as disabled. SSC concedes that it knew of Plaintiff's back condition. See Def.'s Reply Mem. of Law at 8. Moreover, SSC had more than mere knowledge. Plaintiff provided SSC with Dr. Roke's note, dated April 29, 1996, which stated that Plaintiff was unable to work for an unspecified period of time due to pain in her back. Plaintiff also provided SSC with a disability application. Therefore, the Court finds that there is a genuine issue of material fact concerning whether SSC regarded Plaintiff as disabled.

(3) Is the Plaintiff Reported as Disabled Under the ADA?

A plaintiff attempting to meet the second prong of the ADA disability definition--having a record of impairment--must demonstrate "a history of, or [be] misclassified as having, a mental or physical impairment that substantially limits one or more major life activity." 29 C.F.R. § 1630.2(k). Summary judgment in favor of the employer is appropriate if the employee's record of impairment does not demonstrate a substantial limitation in major life activities. See Popko v. Pennsylvania State Univ., 994 F. Supp. 293, 299 (E.D. Pa. 1998).

In the present case, the Court finds that summary judgment is not appropriate with regard to this prong of ADA disability definition. As noted above, Plaintiff provided SSC with several documents that a reasonable jury could find "reported" the

Plaintiff as disabled. Therefore, Defendant's motion for summary judgment denied in this respect.

b. Essential Functions of the Job

Defendant also argues that Plaintiff failed to establish the second prong of the prima facie case of disability discrimination: performance of the essential functions of the job. Plaintiff can satisfy this burden if she can make at least a facial showing that her proposed accommodation is possible. See Gaul, 134 F.3d at 580. More specifically, the Plaintiff must "demonstrate that there were vacant, funded positions whose essential duties [she] was capable of performing, with or without reasonable accommodation, and that these positions were at an equivalent level or position as [her former job]." Shiring v. Runyon, 90 F.3d 827, 832 (3d Cir. 1996). Plaintiff must also demonstrate as part of his facial showing that the costs associated with her proposed accommodation "are not clearly disproportionate to the benefits that it will produce." Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995). The term "costs" includes financial as well as administrative burdens on a company. See Gaul, 134 F.3d at 580. If Plaintiff is able to make out a prima facie showing, "the defendant then bears the burden of proving, as an affirmative defense, that the accommodations requested by the plaintiff are unreasonable, or would cause an undue hardship on the employer." Shiring, 90 F.3d at 831.

In this case, the Court finds that Plaintiff could perform the essential functions of the job. Plaintiff provided this Court with sufficient evidence to find that SSC refused to accommodate her request of standing while performing her surgical blade inserter and monitor job or performing another job at SSC that required only standing. However, Defendant also argues that the Plaintiff is a person unable to work and, thus, not covered by the ADA. See McNemar, 91 F.3d at 618. Defendant contends that Plaintiff is estopped from arguing that she is able to perform the essential functions of the job because she indicated on her disability application that she was totally disabled. This Court disagrees because it cannot make the necessary finding that Plaintiff was acting in bad faith when making this statement. See Krouse v. American Sterilizer Co., 126 F.3d 494, 501 (3d Cir. 1997) (cautioning district courts that a finding of inconsistency and bad faith are required before concluding that a plaintiff is judicially estopped from asserting her status as qualified under the ADA). Therefore, the Defendant's motion is denied with respect to this prong of the prima facie case.

c. Adverse Employment Decision as a Result of Discrimination

Finally, Defendant contends that Plaintiff cannot show that she has suffered an otherwise adverse employment decision as a result of discrimination, the third and final prong of the prima facie case of disability discrimination. Under this prong,

Plaintiff must show an inference of discrimination to withstand summary judgment. See Taylor, 1998 WL 133628, at *10.

In this case, Plaintiff clearly suffered an adverse employment decision as she was terminated. The issue is, however, whether this termination was a result of disability discrimination. This Court finds that Plaintiff offered evidence that raises an inference of discrimination. Plaintiff states that SSC terminated her for failing to complete forms correctly. Defendant states that it fired her for violating company policies with respect to visiting. In either case, Plaintiff demonstrated that she may have been treated less favorably than other similarly situated, non-disabled employees. Plaintiff testified that SSC's Human Resources Director gave her permission to visit employees and deliver Tastykakes in the parking lot. Nonetheless, SSC terminated the Plaintiff for doing what the SSC Human Resources Director gave her permission to do. Accordingly, the Court finds that the record contains evidence that could convince a reasonable jury to find the prima facie elements. Therefore, Defendant's motion for summary judgment is denied.

B. Motion to Compel Production of Plaintiff's Drug or Alcohol Test

In addition to the motion for summary judgment, the Defendant filed a motion to compel Tastykake to produce drug test results of the Plaintiff. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery

regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b)(1). Tastykake asserts that Plaintiff's drug tests are privileged under a Pennsylvania confidentiality statute. The statute provides:

> All patient records and all information contained therein relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential and may be disclosed only with the patient's consent and only (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to proper medical authorities solely for the purpose of providing medical treatment to the patient.

71 Pa. Cons. Stat. § 1690.108(c) (West 1995).

This Court finds that the statute applies to the case at bar. The statute does not define patient. Nevertheless, given that the purpose of the statute was to protect the release of confidential drug and alcohol tests, the Court finds that the Plaintiff may be considered a "patient" under the statute. Moreover, Tastykake may be considered a "private practitioner" which obtained and prepared Plaintiff's drug test results. Finally, the Court finds that the Plaintiff did not waive the

statutory privilege by bringing this lawsuit because these results are not relevant to any personal injuries. See O'Boyle v. Jensen, 150 F.R.D. 519, 522 (M.D. Pa. 1993) (finding an exception to the statute exists when the patient brings a personal injury action which calls into question his or her physical or mental condition). For these reasons, the Court denies the motion to compel.

An appropriate Order follows.

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PATRICIA A. MURRAY	:	CIVIL ACTION
	:	
v.	:	
	:	
SURGICAL SPECIALITIES CORPORATION	:	NO. 97-0444

O R D E R

AND NOW, this 13th day of January, 1999, upon consideration of the Defendant's Motion for Summary Judgment and Defendant's Motion to Compel Production of Documents, IT IS HEREBY ORDERED that:

(1) Defendant's Motion for Summary Judgment is **DENIED**; and

(2) Defendant's Motion to Compel Production of Documents is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.