

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

JOYCE E. TATUM : CIVIL ACTION  
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 v. :  
 :  
 THE HOSPITAL OF THE UNIVERSITY :  
 OF PENNSYLVANIA : NO. 98-6198

M E M O R A N D U M

Ludwig, J.

June 24, 1999

Defendant The Hospital of the University of Pennsylvania (HUP) moves for summary judgment. Fed. R. Civ. P. 56. Jurisdiction is federal question. 28 U.S.C. § 1331.

In this action under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., defendant is alleged to have refused to accommodate plaintiff Joyce E. Tatum's disability and to have terminated her employment because of her disability. The facts are viewed from plaintiff's standpoint, as required in ruling on this motion.<sup>1</sup>

In March of 1970, plaintiff began working for defendant as a nursing aid. Answer ¶ 18. Later that year she was promoted to nursing assistant – a job she held until terminated on August 8, 1995. Id. ¶¶ 18, 27. As a nursing assistant, she checked vital signs, transported patients, and helped patients eat, bathe, and

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<sup>1</sup>"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

get in and out of bed. Tatum dep. at 36-39; def. ex. C-1. These activities sometimes required lifting and moving patients. Answer ¶ 19; Tatum dep. at 40.

From 1977 to 1992, plaintiff was primarily assigned to a medical-surgical unit known as "Maloney 4" and, from 1992 to 1995, a prenatal unit, "Dulles 6." Tatum dep. at 30-35, 74-75. Like other nursing assistants, she was often assigned to other units on an as-needed basis. Id. at 36; Esposito aff. ¶ 4.

In 1973, plaintiff was diagnosed as having a vaginal Bartholin cyst.<sup>2</sup> Tatum dep. at 41-42, 46. The cyst produces a temporary but recurring condition that can be excruciatingly painful. Id. at 42, 46. When this occurs, the discomfort prevents plaintiff from lifting or pulling heavy objects, sitting on a hard surface for a prolonged period, or walking any distance. Id. at 52-54.

In 1978, plaintiff sought treatment in HUP's (her employer's) emergency room. Id. at 42-43, 47-48. An emergency room doctor sent a letter to her supervisor advising that she should not lift or pull heavy patients. Id. at 43, 49-50. For a few months, plaintiff was not assigned to nursing units that would have necessitated those types of exertion. Id. at 61-62. Until Malony 4 was closed in 1992, plaintiff dealt with the problem by

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<sup>2</sup>A Bartholin cyst is "an abnormal sac containing gas, fluid, or a semisolid material, with a membranous lining, . . . arising from the major vestibular gland or its ducts." Stedman's Medical Dictionary 429-30 (26th ed. 1995).

obtaining assistance from other staff members. Id. at 121. After the transfer to Dulles 6, such help was often not available. Id.

Beginning in 1994, plaintiff was occasionally assigned to "Founders 12," a medical-surgical unit. Id. at 55, 77. Patients there required more attention, including being lifted out of bed. Id. at 77-79. She found the resulting swelling and pain from her condition to be "unbearable." Id. at 87-88. About August, 1994, she informed her nurse manager on Dulles 6, Ms. Craig, of her difficulties working on Founders 12. Id. at 80-81. Craig requested documentation from a physician because the doctor's letter from 1978 could not be located. Id. at 81.

Plaintiff obtained a letter from her gynecologist, Dr. Parrott, M.D., which stated only that "Ms. Tatum is unable to lift or pull heavy objects." Pl. ex. A. Unsatisfied with the brevity of the note, Craig requested a more detailed letter and also gave her a "Functional Capabilities Form" for the doctor to complete. Tatum dep. at 92. However, plaintiff's gynecologist refused, explaining that plaintiff was able to work. Id. at 93-94. He so informed Craig by telephone. Id. at 131-32. Craig instructed plaintiff to have the form filled out by her primary care physician or HUP's Occupational Medicine Department. Id. at 94-95. Neither of these providers was willing to do so for reasons unrelated to plaintiff's condition, and plaintiff did not submit any further documentation. Id. at 95-98.

For awhile after submitting the note from Dr. Parrott, plaintiff was rarely given strenuous duties. Id. at 106-07. On

March 29, 1995, however, she was temporarily assigned to Founders 12, for one day. Id. at 101-03. Plaintiff protested, referring to Dr. Parrott's note. Id. at 103-04. Plaintiff was told that there were no restrictions on her assignments and was given a choice of Founders 12 or going home. Id. at 103-04. Plaintiff left. Id. at 104. Plaintiff was suspended for three days and received a so-called "Plan for Improvement," id. at 101, 107-09, which was plaintiff's second official warning.<sup>3</sup> Esposito aff. ¶ 9.

Several months later, plaintiff was given time off to attend her sister's funeral in Texas. Id. at 138. Upon her return on August 5, 1995, she informed a supervisor that she was too tired to work that evening. Id. at 139-40. On August 8, 1995, plaintiff received a "Plan for Improvement" for unauthorized absence from work. Esposito aff. ¶ 10. Under defendant's disciplinary policy, which mandates discharge upon three warning letters, she was terminated. Id. ¶¶ 8-9; def. ex. C-2.

On April 27, 1995, several months before, plaintiff had filed charges of discrimination with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission. Def. ex. C-3. The gist of the discrimination charged was that defendant did not reasonably accommodate plaintiff's disability, as evidenced by the circumstances that led to the March 29, 1995 suspension. Id. On August 15, 1995, plaintiff wrote to

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<sup>3</sup>The first warning was issued for "inappropriate behavior [and] calling out ill after request for time denied." Def. ex. C-3.

the PHRC stating she had been terminated "because I attended my Sister's funeral." Pl. ex. C.

Defendant contends that summary judgment should be granted because (1) plaintiff did not exhaust her administrative remedies as to her termination claim; (2) she did not suffer from an ADA-protected disability; (3) defendant did not have knowledge of her medical condition; and (4) the discharge was not in violation of the ADA.

#### Exhaustion

In order to sue under the ADA, a plaintiff must file a charge of discrimination with the EEOC and receive a right to sue letter. See 42 U.S.C. § 12117(a); Brennan v. King, 139 F.3d 258, 268 & n.12 (1st Cir. 1998). Our Court of Appeals has explained:

Where discriminatory actions continue after filing of an EEOC complaint, . . . the purposes of the statutory scheme are not furthered by requiring the victim to file additional EEOC complaint and restarting the . . . waiting period. This court has recognized this fact in permitting suits based on new acts that occur during the pendency of the case which are fairly within the scope of an EEOC complaint or the investigation growing out of that complaint, without requiring the victim to file additional EEOC complaints . . . The relevant test in determining whether [plaintiff] was required to exhaust her administrative remedies, therefore, is whether the acts alleged in the subsequent [ADA] suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.

Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984) (per curiam); see also Marshall v. Federal Express Corp., 130 F.3d 1095, 1098 (D.C. Cir. 1997) ("A vague or circumscribed EEOC charge will not

satisfy the exhaustion requirement for claims it does not fairly embrace." ).

Plaintiff's unlawful termination claim is not fairly within the scope of the prior administrative complaint. The EEOC charge was based on failure to accommodate. The parties agree that plaintiff "made no claim in her Charge based on termination of her employment." Pretrial stip. at 3. Plaintiff did not amend her charge to include an unlawful discharge claim. Also, there is no significant overlap between the two claims.

"The parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, including new acts which occurred during the pendency of proceedings before the Commission." Robinson v. Dalton, 107 F.3d 1018, 1025 (3d Cir. 1997) (quoting Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976)). Understandably, the EEOC does not appear to have investigated the discharge.<sup>4</sup> The unlawful termination claim could not have been expected to grow out of the original charge of failure to accommodate. First, the two claims were of a different nature. Second, an investigation into plaintiff's termination would largely focus on matters unrelated to the EEOC charge - i.e., the events surrounding plaintiff's calling out of work on August 5, 1995. Third, plaintiff's August 15, 1995

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<sup>4</sup>The PHRC's investigation was terminated because the agency was unable to contact plaintiff. Def. ex. C-4.

letter sets forth a non-discriminatory reason as the basis for the discharge.

Plaintiff's unlawful termination claim is, therefore, barred in this lawsuit for failure to exhaust administrative remedies.<sup>5</sup>

#### Existence of Disability

Under the ADA "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified

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<sup>5</sup>A comparable result was reached in Jones v. The Men's Warehouse, No. 3:97-CV-1891-R, 1999 WL 134210, at \*2 (N.D. Tex. 1999) (dismissing constructive discharge claim because EEOC charge alleged failure to accommodate only).

Even if the unlawful termination claim were considered exhausted, it would be dismissed on the merits. Plaintiff does not present evidence that defendant's proffered reason for the discharge is unworthy of belief. See Torre v. Casio, Inc., 42 F.3d 825, 830 (3d Cir. 1994) (at the summary judgement stage, plaintiff must show that disputed issues of fact exist regarding (1) whether the stated reason for discharge was false; or (2) whether an unlawful discriminatory purpose was more likely than not a motivating or determinative cause for the employment action). Plaintiff's claim of pretext - that Craig refused to accommodate plaintiff's disability, in contrast to previous supervisors - is contradicted by plaintiff's own testimony. Craig did not assign plaintiff to other floors for six months after receiving the note from Dr. Parrott. Pl. dep. at 106-07. Not since 1978 had plaintiff received such consideration. Id. at 61-62.

Also, plaintiff testified that the reason for her termination was Craig's anger at Dr. Parrott's refusal to fill out the functional disabilities forms. Pl. dep. at 126-28, 131. The ADA does not protect employees from such employment actions. See Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 332 (3d Cir. 1995) ("We recognize[] that an employer may have any reason or no reason for discharging an employee so long as it is not a discriminatory reason."). And, as a threshold matter, the complaint, which is not subdivided into counts, does not appear to plead an unlawful termination claim.

individual with a disability" is "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). A disability is, in turn, defined as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

"No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . . Most notably, no agency has been delegated authority to interpret the term 'disability.'" Sutton v. United Airlines, Inc., No. 97-1943, 1999 WL 407488 (U.S. June 22, 1999) (to be published). Nevertheless, our Court of Appeals has held that EEOC regulations are entitled to substantial deference. See Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 n.4 (3d Cir. 1998) (en banc).

Under EEOC regulations, physical impairments include conditions affecting the genito-urinary system. 29 C.F.R. § 1630.2(h)(1). Major life activities are defined as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. § 1630.2(I). The phrase "substantially limits" means unable to perform a major life activity or significantly restricted as to the condition, manner or duration of performing a major life activity. Id. § 1630.2(1)(j); see also id. § 1630.2(3). To assess whether a major life activity

has been substantially limited, the following factors should be considered: the impairment's nature and severity, its duration, and its long-term effect. Id. § 1630.2(j)(2).

According to defendant, the Bartholin cyst does not amount to a substantial impairment of a major life activity – and the report of plaintiff's expert, Albert Cook, M.D., a gynecologist, is flawed on this issue.

Dr. Cook's report states that plaintiff "most probably" has a Bartholin cyst and that "prolonged standing and heavy lifting would aggravate the area and cause symptoms." Pl. ex. D. This condition has existed since at least 1973. Tatum dep. at 41-42, 46. Plaintiff's evidence is that she has a physical impairment (cyst in genito-urinary system) that substantially limits (26-year condition causing extreme pain) major life activities (sitting, walking, pulling, lifting, and working).<sup>6</sup> Accordingly, there is a material dispute of fact whether plaintiff is "disabled" under the ADA, and summary judgment must be denied on this ground.<sup>7</sup>

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<sup>6</sup>Determining whether an individual is substantially limited in the ability to work requires an individualized assessment of plaintiff's training, skills, and abilities. See Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998). Plaintiff has been a nursing assistant since 1970 but has not received certification. Answer ¶¶ 18, 27; Tatum dep. at 24. The record does not reflect plaintiff's education, prior employment, or other skills and abilities. Whether plaintiff's impairment substantially limits her in the major life activity of working cannot be resolved at the summary judgment stage.

<sup>7</sup>There also may be a triable issue whether defendant regarded plaintiff as having an impairment. See 42 U.S.C. § 12111(8).

### Notice to Employer

Defendant asserts that plaintiff did not submit adequate medical documentation and, as a result, it had no duty to provide reasonable accommodation. "An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer." Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, \_\_\_ (3d Cir. 1999) (quoting Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)). "[B]oth parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997). The interpretive guide to the ADA explains:<sup>8</sup>

[In general] it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.

29 C.F.R. app. § 1630.9; see also Taylor, 174 F.3d at \_\_\_ (burden is on employer to request additional information).

Given plaintiff's evidence, she informed her employer of her disability as far back as 1978, when the letter from the

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<sup>8</sup>"[A]lthough the EEOC's interpretive guidelines are not entitled to the same degree of deference as regulations, we give the EEOC's interpretations 'a great deal of deference since Congress charged the EEOC with issuing regulations to implement the ADA.'" Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, \_\_\_ (3d Cir. 1999) (quoting Matczack v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997)), rev'd on other grounds, Sutton, 1999 WL 407488.

emergency room was sent to her supervisors. Tatum dep. at 43, 49-50. Thereafter, her condition was accommodated by her supervisors or her co-employees for many years. In the fall of 1994, she informed her then-supervisor, Craig, of her inability to lift and pull heavy objects – when confronted by those tasks. Id. at 80-81. In September of 1994, plaintiff turned in a note to that effect from her gynecologist. Pl. ex. A. Defendant says that this doctor subsequently repudiated his note, but viewed in the light most favorable to plaintiff, that issue is for the fact-finder. Furthermore, there may be a question of defendant's good faith if the subsequent refusal to examine plaintiff in its Occupational Medicine Department is credited.

Accordingly, defendant's motion on summary judgment will be granted as to the unlawful termination and denied as to lack of accommodation.

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Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 24th day of June 1999, the motion of defendant The Hospital of the University of Pennsylvania for summary judgment is granted as to the unlawful termination claim and denied as to the lack of accommodation claim. Fed. R. Civ. P. 56.

A memorandum will follow.

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Edmund V. Ludwig, J.