

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

JOAN ESHELMAN, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
AGERE SYSTEMS, INC., :
Defendant : NO. 03-1814

Gene E.K. Pratter, J.

Memorandum Opinion

16 December 2004

Defendant Agere Systems, Inc. (“Agere”) has moved for the entry of summary judgment in its favor in this employment discrimination case. For the reasons discussed below, Agere’s motion is denied.

FACTUAL BACKGROUND

Joan Eshelman was an employee at Agere or one of its predecessors for more than 20 years, from August 1981 until December 2001. Her job was to supervise the union technicians at Agere’s plant. Ms. Eshelman, who is now 60 years old, was diagnosed with breast cancer in August, 1998. After undergoing surgery in September, 1998, Ms. Eshelman underwent several weeks of aggressive chemotherapy treatment. As a result, Ms. Eshelman was unable to work for six months between September 11, 1998 until March 21, 1999.

When she returned to work, Ms. Eshelman modified her work schedule to allow her to continue receive outpatient chemotherapy treatments. Ms. Eshelman asserts that despite her modified schedule, she worked a full time schedule upon her return to work. Beginning in late 1998 and early 1999, Ms. Eshelman asserts that she began to experience cognitive dysfunction

resulting from the chemotherapy treatments. This condition allegedly affects her short term memory, causing her mind to “go blank unpredictably.”

Two years after Ms. Eshelman returned to work, Agere began a restructuring which included reducing its work force. The reduction in force was implemented by a Force Management Program (“FMP”), a company-wide program requiring managers to score employees on certain characteristics identified by the Human Resources Department. Under the FMP, employees with scores above a certain rating (the “clip level”) would be terminated.

As part of the FMP, Ms. Eshelman was placed into a particular group of employees to be rated. Her initial rating was established by her supervisor, Joseph DiSandro, who rated Ms. Eshelman below the critical clip level, thereby preventing her termination. However, after the results of the rating of Ms. Eshelman were reached and several discussions took place with his supervisor, David Baily, and a senior manager, Stephen Levanti, Mr. DiSandro was instructed to refocus his efforts in rating employees not on their past performance, but on the skills that Agere had identified to be important in moving the organization forward, namely (1) flexibility; (2) communication; (3) teamwork; (4) results focus (sic); and (5) decision making. Mr. DiSandro was also, at one point, instructed by his supervisors to inquire of Ms. Eshelman specifically about her ability to travel longer distances and potentially work at a facility located farther from her home, an inquiry which was not made to other employees. Agere asserts that the “forward-looking” qualities upon which employees were to be rated were in anticipation of closing the Reading facility where Ms. Eshelman had worked, and requiring workers to commute to a facility in

Breinigsville, Pennsylvania. The parties do not dispute that the commute to Breinigsville was a longer trip for Ms. Eshelman than was her commute to the Reading facility.

Immediately after this instruction, Ms. Eshelman's rating was adjusted upward, placing her above the "clip level" rating and, hence, in the termination category. Agere then terminated Ms. Eshelman at the end of November, 2001. The adjustment to Ms. Eshelman's clip level is the most difficult aspect of the record for Agere to deal with, particularly at the summary judgment stage of the case. As one would expect, the reasons for the modification of Ms. Eshelman's clip level rating remain a major dispute between the parties.

Ms. Eshelman filed her complaint on March 23, 2003, alleging that Agere violated the Americans with Disabilities Act (the "ADA"), the Age Discrimination in Employment Act (the "ADEA") and the Pennsylvania Human Relations Act (the "PHRA"). Subsequent to the completion of discovery, Agere filed its Motion for Summary Judgment.

DISCUSSION

Jurisdiction

Subject matter jurisdiction over the alleged violation of the ADA and the ADEA is proper pursuant to 28 U.S.C. § 1331. Because Ms. Eshelman's state law claims form part of the same case or controversy, subject matter jurisdiction over the Pennsylvania Human Relations Act claim is proper pursuant to 28 U.S.C. § 1367(a).

Legal Standard for Summary Judgment

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). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court must view the evidence presented in the motion in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

Americans with Disabilities Act Claim

Under the ADA, a qualified individual with a disability is “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds” 42 U.S.C. § 12111(8). The ADA further provides that an individual has a disability if she “(a) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) has a record of such an impairment; or (c) is regarded as having such an impairment.” 42 U.S.C. § 12102(2).

The burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is the appropriate analysis for summary judgment motions in cases alleging employment discrimination under the ADA. Holness v. Penn State University, No. 98-2484, 1999 U.S. Dist. LEXIS 6240, at *14 (E.D. Pa. May 5, 1999). In order to establish a prima facie case of discrimination, a plaintiff must demonstrate the existence of the following elements: (a) that he or she is a disabled person within the meaning of the ADA; (b) he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (c) he or she has suffered an otherwise adverse

employment decision as a result of discrimination. Shaner v. Synthes (USA), 204 F.3d 494, 500 (3d Cir. 2000).

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The defendant employer satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a factfinder could reasonably either (a) disbelieve the defendant's articulated legitimate reasons or (b) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. Id. at 764. To discredit the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions. Id. at 765. What is at issue is the perception of the decision maker, not the plaintiff's view of her own performance. Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) (citations omitted); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993) (pretext turns on the

qualifications and criteria identified by the employer, not the categories the plaintiff considers important).

Agere argues that summary judgment should be granted in its favor because Ms. Eshelman has not established a prima facie case of discrimination under the ADA. Agere specifically asserts that (a) Ms. Eshelman's alleged impairment does not substantially limit a major life activity and therefore cannot support a record of disability; and (b) Agere never regarded Ms. Eshelman as disabled.¹ Agere further argues that even if Ms. Eshelman can establish a prima facie case of discrimination, she cannot refute Agere's legitimate reason for terminating her.

Ms. Eshelman responds that her cognitive dysfunction, related to her having had breast cancer and undergoing aggressive post-surgery treatments, established a record of disability with Agere and that she has set forth a prima facie case of discrimination because, as a disabled individual who was qualified to perform her position, she was terminated in the FMP while other employees with no record of a disability were permitted to keep their jobs. In the alternative, Ms. Eshelman asserts that Agere discriminated against her because it perceived her to be disabled due to her difficulty in traveling to different facilities to complete her work. Ms. Eshelman finally

¹ In her complaint, Ms. Eshelman asserts that Agere discharged her "because of her disability, and/or because of the record of her disability, and/or because Agere regarded her as having a disability." (Complaint at ¶ 29). However, at oral argument, Ms. Eshelman's counsel stated that she "does not argue that she actually had a disability in accordance with the ADA at the time she was terminated." (Oral Arg. Trans. at 23:14-16). Thus, the Court assumes that there are no questions of fact with respect to the first of the prongs a plaintiff must demonstrate to establish protected status under the ADA, and will focus on the latter two prongs – whether Ms. Eshelman had a record of disability with Agere and/or whether Agere regarded Ms. Eshelman as disabled.

argues, in her response to the Agere motion, that her termination was in retaliation for requesting an accommodation for her alleged disability.²

Record of Disability

Prohibiting discrimination against an individual with a record of disability is intended to protect an individual with a history of disability, regardless of whether the individual is currently substantially limited in a major life activity. EEOC COMPLIANCE MANUAL, Chapter II at 2.2(b) (1992). To establish a record of disability, an individual must show that at the time she experienced an impairment, the impairment substantially limited a major life activity. See Tice v. Centre Area Transportation Authority, 247 F.3d 506, 513 (3d Cir. 2001) (noting that plaintiff asserting a record of disability must demonstrate that the recorded disability was a disability within the meaning of the ADA); Palmisano v. Electrolux, Inc., No. 99-426, 2000 U.S. Dist. LEXIS 11015 (E.D. Pa. Aug. 7, 2000) (finding no record of disability where impairments experienced never substantially affected a major life activity).

Agere argues that Ms. Eshelman has not established that she had a record of disability with Agere because an impairment that causes an employee to be out of work for a temporary period is not sufficient to establish a record of disability. In making this argument, Agere urges the Court to consider a case recently decided by the United States Court of Appeals for the Third Circuit,³

² As Agere pointed out in its reply to Ms. Eshelman's opposition to the Summary Judgment Motion, Ms. Eshelman did not include any allegations of retaliation in her complaint. Ms. Eshelman subsequently moved for leave to amend her complaint to include the retaliation claim. The retaliation claim is, therefore, not part of the Summary Judgment Motion, and the Motion to Amend is addressed separately.

³ Agere submitted this case as a notice of supplemental authority on June 16, 2004 (Docket No. 24).

Dawley v. Erie Indemnity Co., No. 03-3860, 2004 U.S. App. LEXIS 10793, at * 14 (3d Cir. June 3, 2004). In Dawley, the court considered, among other issues, whether the district court erred in concluding that an employee who had previously taken a year long leave to recuperate from brain surgery had not established a record of disability. In doing so, the court observed that a record of impairment exists when “a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment.” Dawley, 2004 U.S. App. LEXIS 10793 at *14 (quoting 29 C.F.R. § 1630.2(k)). Mr. Dawley’s medical records included only (a) a note that he left work to have an operation to remove a tumor and (b) a doctor’s note that the employee could return to work without restriction. The court concluded that this was not sufficient to establish a record that he had experienced a substantially limiting impairment. Id. Agere argues that, as was the case in Dawley, taking time off from work to recover from an operation does not constitute a record of impairment, and thus, there is no evidence that Ms. Eshelman had a record of disability with Agere.

Considering the facts in a light most favorable to Ms. Eshelman, the Court finds that although Agere has made a laudable effort and has raised difficult issues in the context of this record, the record does contain sufficient evidence from which a reasonable jury could infer that Ms. Eshelman had a record of disability with Agere. Dawley, which the Court notes is not a precedential opinion, is not dispositive here. The facts underlying Dawley differ from this case, in that the present record includes substantially more information with respect to Ms. Eshelman’s condition than did the record as described in Dawley. In Dawley, the record contained only two items – a note that the plaintiff left work to have an operation, and a doctor’s note that the plaintiff

was able to return to work. In contrast, the record in this case includes several documents titled “Disability Information Notes” and “Healthcare Provider’s Report” on which Ms. Eshelman’s cancer and subsequent treatment are noted in detail. See Eshelman Appendix at Exhibit F, Agere/Eshelman 0381-88; 0450-0453. Some of these documents include the Agere logo. It appears that the record in this case contains more than two short references in the employer’s files about Ms. Eshelman’s battle with cancer. Thus, a jury could reasonably infer that Ms. Eshelman had a history of disability with Agere.

“Regarded As” Disabled

The Court next considers whether the record also includes facts from which a jury could find that Agere regarded Ms. Eshelman as being disabled. Under the ADA, a person is regarded as being disabled if he or she: (a) has a physical impairment that does not substantially limit major life activities but is treated as having a limiting disability; (b) is substantially limited by a physical or mental impairment only because of the attitudes of others toward the impairment; or (c) does not have a substantially limiting impairment but is treated as though he or she does. 29 CFR § 1630.2(l). The “regarded as” provision was enacted as part of the ADA to prevent employers from basing decisions about employees on societal myths and fears about disabilities and diseases. Deane v. Pocono Medical Center, 142 F.3d 138, 143 n.5 (3d Cir. 1998).

If an employer can be seen to have incorrectly perceived that an employee cannot perform a wide range of jobs, an affected employee might have a valid “regarded as” claim. Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999). The United States Court of Appeals for the Third Circuit has stated, however, that an employer’s awareness of an employee’s impairment,

absent other evidence, is insufficient to establish that the employer regarded the employee as disabled. Kelly v. Drexel University, 94 F.3d 102, 109 (3d Cir. 1996). Therefore, something more is necessary.

Agere argues that while the record might reflect that it regarded Ms. Eshelman as being impaired with respect to her inability to commute to work due to her unwillingness or inability to drive, it did not regard Ms. Eshelman as having a qualified disability. In its submissions and at oral argument, Agere cited several cases in which courts have found that driving or commuting to work does not constitute a major life activity under the ADA and, therefore, the inability to drive to work is not a qualified disability.

In return, Ms. Eshelman argues that it was her cognitive impairment, and not her inability to commute to work, that prompted Agere's concern in allowing Ms. Eshelman to retain her job. As Ms. Eshelman's counsel explained at oral argument, Ms. Eshelman asserts that the dysfunction she experiences is not just about driving, it is about being placed in new situations. This alleged dysfunction requires Ms. Eshelman to either not place herself in a new situation or to write things down that are new to her until she becomes familiar with them. Ms. Eshelman further asserts that she neither refused nor was unable to drive to the new facility, but rather simply expressed concern to her supervisor at Agere about having assistance if she was asked to do so. Thus, Ms. Eshelman asserts that Agere terminated her based on it regarding her as having a cancer-related cognitive dysfunction that precluded her from the major life activities of working and thinking.

With respect to the major life activity of working, an employer must perceive an impairment to be so substantial that it significantly restricts an individual from performing either a

class of jobs or a broad range of jobs; the inability to perform a particular job is not considered a substantial limitation. 29 C.F.R. § 1630.2(j)(3)(i); see also Deane v. Pocono Medical Center, 142 F.3d 138, 144 n.7 (3d Cir. 1998) (citing ADA regulations). To determine whether an individual is substantially limited in his or her ability to work, a court may consider: (a) the geographic area to which the individual has reasonable access; (b) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment; and/or (c) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). 29 C.F.R. § 1630.2(j)(3)(ii). If there is a question of fact as to whether Agere perceived that Ms. Eshelman was substantially limited in a major life activity and, as a result of this limitation, could not perform any of a broad range of jobs, summary judgment would be inappropriate.

Ms. Eshelman has presented evidence that after the initial “clip levels” were determined (at which point she was not in the group at risk for termination), the managers responsible for rating her were questioned by their seniors as to her ability to commute to a different location. There is also evidence on the record that this inquiry was not made with respect to other employees, and that Ms. Eshelman’s clip level was subsequently adjusted to reflect the concerns of Agere’s managers as to her ability to work at the Breinigsville facility. Finally, the parties appear to have a dispute as to the significance and meaning of a particular electronic mail message which Ms.

Eshelman sent to Mr. DiSandro, in which she stated that while her preference would be to maintain her position in Reading, she would be willing to be present at the proposed site, as was needed.

Considering the facts and record in a light most favorable to Ms. Eshelman as the Court must, there remain some factual disputes with respect to material facts as to whether Ms. Eshelman has presented a prima facie case of discrimination under the ADA. The evaluation of these facts is best left to a trier of fact to determine. Summary judgment with respect to Ms. Eshelman's ADA claim is, therefore, not appropriate at this time. Accordingly, this portion of Agere's motion will be denied.

Age Discrimination in Employment Claim

To establish a claim for age discrimination, a plaintiff must show, by either direct or circumstantial evidence, that his or her age "actually motivated" and "had a determinative influence on" an employer's decision to terminate him or her. Fakete v. Aetna, Inc., 308 F.3d 335, 337-38 (3d Cir. 2002). If a plaintiff presents direct evidence of discrimination, he or she must prove his or her claim by satisfying the test laid out in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Fakete, 308 F.3d at 338. Under Price Waterhouse, evidence of discrimination is direct if it is "sufficient to allow the jury to find that the decision makers placed a substantial negative reliance on the plaintiff's age in reaching their decision." Glanzman v. Metropolitan Mgt Corp., Nos. 03-4546, 03-4547, 2004 U.S. App. LEXIS 25795, at * 14 (3d Cir. Dec. 14, 2004).

Alternatively, if a claim is being proven by circumstantial evidence of age discrimination, the claimant must satisfy the three-step test defined in McDonnell-Douglas Corp. v. Green, as

discussed supra. Fakete, 308 F.3d at 338; see also Glanzman, 2004 U.S. App. LEXIS 25795 at * 13 n.3. Under the McDonnell-Douglas test, a claimant must first demonstrate a prima facie case of discrimination by proving that (a) he or she was forty years or older at the time of the alleged discriminatory action; (b) he or she was terminated from employment with the defendant; (c) he or she was qualified to perform the job; and (d) persons “sufficiently younger” than her were retained. Showalter v. University of Pgh. Medical Ctr, 190 F.3d 231, 235 (3d Cir. 1999). After establishing a prima facie case, a plaintiff must then also (a) discredit “the [employer’s] proffered reasons, either circumstantially or directly,” or (b) adduce evidence, “whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause” of the termination. Torre v. Casio, Inc., 42 F.3d 825, 830 (3d Cir. 1994). The evidence Ms. Eshelman has presented in this case is circumstantial in nature, and thus the Court will apply the McDonnell-Douglas test.

Agere first argues that Ms. Eshelman has not established a prima facie case of age discrimination because she (a) was not qualified to perform the jobs remaining at Agere due to her unwillingness or inability to travel; and (b) cannot prove that she was replaced by a significantly younger person. Moreover, Agere asserts that pursuant to Anderson v. Consolidated Rail Corp, 297 F. 3d 242 (3d Cir. 2002), Ms. Eshelman is required to demonstrate that under its reduction in force plan, Agere retained an employee “similarly situated” to Ms. Eshelman who was “sufficiently younger.”

In response to the first charge, Ms. Eshelman argues that her alleged lack of qualification was based “solely on a false and discriminatory assumption.” Ms. Eshelman states that, contrary

to Agere's assertion, she never expressed an unwillingness or inability to travel. In response to the second charge, Ms. Eshelman asserts that similarly situated employees who were significantly younger than her were retained in the reduced work force at Agere. Specifically, Ms. Eshelman asserts that except for one other employee who was three years younger than her, the employees who remained in Ms. Eshelman's department after her termination were between 14 and 31 years younger. Ms. Eshelman also asserts that of all of the managers working in Pennsylvania under Mr. Baily, Ms. Eshelman was the oldest and the only one who was terminated. For all of these reasons, Ms. Eshelman asserts that she has established that other younger, similarly situated employees were retained.

The record contains two electronic mail messages that cause the Court to conclude that there are disputed questions of material fact with respect to whether Ms. Eshelman was qualified to perform her job at the Breinigsville facility. In the first message, dated October 25, 2001, Ms. Eshelman stated "I don't mind supporting AL; however, I'd have trouble with the drive, unless I could carpool or something like that." The second message was dated October 26, 2001, in which Ms. Eshelman stated "[m]y obvious preference would be to support OEC and RD from Reading, with my presence at OEC, as needed. Doing the job is not an issue, and I believe I have proved my flexibility and ability to get the job done." These statements, if presented to a jury, could reasonably be found to support Ms. Eshelman's assertion that she was willing and able to work from the more distant Breinigsville facility.

Moreover, the record also demonstrates that the parties dispute which employee assumed Ms. Eshelman's position, or whether the position remained in existence at all. Ms. Eshelman

disagrees with Agere's statement that her job responsibilities were assumed by John Nickey, the employee who was three years younger than Ms. Eshelman. Rather, Ms. Eshelman asserts that "[t]here is evidence that Jonathan Schultz, who is 31 years younger than Eshelman" assumed her responsibilities.⁴ Because there remain disputes about material facts, the Court cannot conclude on the record presented that Ms. Eshelman has failed to establish a prima facie case of age discrimination. Thus, summary judgment will be denied as to Ms. Eshelman's age discrimination claim.

Agere's Purported Legitimate Reasons for Termination

Agere argues that even if Ms. Eshelman has established a prima facie case of either disability or age discrimination, she has neither discredited its legitimate reason for terminating her nor provided evidence that Agere was motivated by discrimination in deciding to terminate her. Not surprisingly, Ms. Eshelman disagrees, arguing that the reasons proffered by Agere for her termination are not credible.

To discredit an employer's proffered reasons for termination, a plaintiff must do more than "simply show that the employer's decision was wrong or mistaken." Fuentes, 32 F.3d at 765. To defeat a motion for summary judgment, a plaintiff must demonstrate that an employer's explanations were so weak, implausible, inconsistent, or contradictory that a reasonable factfinder could rationally find them "unworthy of credence." Id. Assuming that a prima facie case of disability or age discrimination has been established, the Court believes that there is sufficient

⁴ The record contains an electronic mail message sent after Ms. Eshelman's termination in which Mr. DiSandro informs the recipients that they would be "supported by Jonathan Shultz." Ms. Eshelman contends that the support tasks would have been included in her job description.

evidence from which a jury could conclude that the legitimate reasons proffered by Agere were pretextual. Again, considering the facts in a light most favorable to Ms. Eshelman, the fact and circumstances of the modification to Ms. Eshelman's rating presents evidence that could lead a reasonable trier of fact to conclude that the manner in which the FMP was administered as to Ms. Eshelman was flawed and that Agere's explanation should not be accepted.

The PHRA Claim

The Pennsylvania Human Relations Act states that an employer may not, among other things, discharge an employee because of "race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap." 43 P.S. § 955. In interpreting the PHRA, courts within Pennsylvania and in the Third Circuit have applied the same burden-shifting analysis as for federal ADA claims. Buskirk v. Apollo Metals, 307 F.3d 160, 166 n.1 (3d Cir. 2002) ("Pennsylvania courts . . . generally interpret the PHRA in accord with its federal counterparts"). Thus, the foregoing analyses apply to Ms. Eshelman's PHRA claim, and summary judgment would likewise be inappropriate.

CONCLUSION

For the reasons stated above, the Motion for Summary Judgment of Agere Systems, Inc. is denied. An appropriate order follows.

Gene E.K. Pratter
United States District Judge

December 16, 2004

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

JOAN ESHELMAN,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
AGERE SYSTEMS, INC.,	:	
Defendant	:	NO. 03-1814

ORDER

And now, this 16th day of December, 2004, upon consideration of the Motion for Summary Judgment of Agere Systems, Inc. (Docket Nos. 16, 17), the Plaintiff's response thereto (Docket Nos. 18, 19), Agere Systems, Inc.'s Reply Memorandum in Support of the Motion (Docket No. 21), the Supplemental Authority filed by Agere Systems, Inc. (Docket No. 24), the Surreply Brief filed by Ms. Eshelman opposing the Motion (Docket No. 29), oral argument held on September 9, 2004 (Docket No. 30), and the Supplemental Memoranda filed by each of the parties thereafter (Docket Nos. 31, 32), it is hereby ORDERED that the Motion for Summary Judgment is DENIED.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE