

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

SUSAN WALKER,	:	
Plaintiff	:	CIVIL ACTION
	:	NO. 03-6396
v.	:	
	:	
INDEPENDENCE BLUE CROSS et al.,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

May 27, 2005

Plaintiff Susan Walker has filed a complaint against her former employer alleging disability discrimination in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. Ann. § 951, et seq., and for unlawful termination in violation of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601, et seq. Before the Court are Defendants’ Motion for Summary Judgment and Plaintiff’s Motion for Partial Summary Judgment. For the reasons set forth below, Defendants’ Motion is granted, Plaintiff’s Motion is denied, and this case is dismissed with prejudice.

I. FACTUAL BACKGROUND¹

Defendant Independence Blue Cross (“IBC”) hired Plaintiff as a temporary Data Security Specialist (“DSS”) in June 1999. As a temporary DSS, Plaintiff had many of the same responsibilities of a permanent DSS² with the exception that her duties did not require her to use the

¹ “In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party.” Callahan v. Sunoco, Inc., No. Civ.A.03-4461, 2005 WL 994615, at *1 n.2 (E.D. Pa. Apr. 28, 2005). Although the Court is presented with cross-motions for summary judgment, the Court recites the following facts in the light most favorable to Plaintiff. Even when the facts are viewed in her favor, Plaintiff cannot succeed on her Motion for Partial Summary Judgment.

² The following is the “General Summary” contained in the DSS job description: “Under the direction of the Supervisor – Help Desk, the incumbent will be required to administer mainframe, network (LAN/Gateway/WAN, UNIX), Internet and application level security in addition to maintenance of existing accounts.” Defs.’ Reply, Exh.

telephone.³ While she was a temporary employee, Plaintiff did not have any problems with her health and did not need any accommodations to perform her job. Walker Dep. at 66.

After six months as a temporary employee, Plaintiff applied for the position of permanent DSS and was hired in December 1999. Defendant Robert Marciak was her immediate supervisor. During her first six months as a permanent employee, Plaintiff's work consisted primarily of addressing a backlog of network access requests. This work did not require her to use the telephone. By June 2000 the backlog of requests had been remedied, so IBC assigned Plaintiff to second level support staff for the help desk "because of [her] experience and ability." Walker Dep. at 97. As a second level support worker, Plaintiff helped alleviate the overflow of problems that could not be solved by the first level help desk. This work required Plaintiff to use the telephone frequently. Over time, Plaintiff's duties gradually shifted to spending eighty percent of her time on second level support work and only twenty percent of her time on network access request work.

Plaintiff worked in a cubicle approximately five feet wide. The cubicle was in a large room with twenty-five other cubicles that were occupied by other help desk support employees. When Plaintiff became a permanent employee, she was moved to a cubicle approximately twenty feet from where she had worked as a temporary employee. Her permanent cubicle was next to a window and heating vents. From this cubicle, if Plaintiff extended her arm and the person in the cubicle next to her extended his/her arm, the two of them could shake hands.

B; Walker Dep. at 57.

³ According to the job description, the "Duties and Responsibilities" of a permanent DSS included "[f]ield[ing] access/security related calls from both internal and external clients." Defs.' Reply, Exh. B; Walker Dep. at 57.

In June 2000, Plaintiff started to experience health problems. According to Plaintiff, these problems resulted from more frequent telephone use at work. Plaintiff testified that she was congested, coughing, throwing up, and having asthma attacks daily, including multiple coughing episodes each day at work. During these coughing episodes, which Plaintiff contends were a result of her asthma, Plaintiff would cough so hard that she would bring up phlegm. Plaintiff would then remove the phlegm from her mouth with a napkin and place the napkin into the trash can in her cubicle. Approximately twice a week, these coughing episodes would conclude with Plaintiff vomiting, often into the trash can at her desk if she could not make it to the restroom.

On December 13, 2000, Defendant Marciak initiated a meeting with Plaintiff about her coughing episodes. At this meeting, Marciak told Plaintiff that her co-workers had been complaining that her coughing and spitting-up distracted them and asked Plaintiff to excuse herself when coughing episodes occurred. He also asked Plaintiff to provide medical documentation of her condition, including proof that she was under a doctor's care. Plaintiff responded that as of July 2000, her physician was no longer a part of the practice she visited, and that she would have to find out who was her primary physician. At this meeting, Plaintiff also stated that the air quality around her cubicle aggravated her condition, but she refused Marciak's offer to return her to the cubicle she had occupied as a temporary employee.

Plaintiff's coughing episodes continued, and on January 11, 2001, Marciak sent Plaintiff an email, again asking her to excuse herself "from the work area when you are suffering coughing spells." Defs.' Reply, Exh. E. Plaintiff responded that she was unable to excuse herself when she had experienced a coughing spell that morning because she was busy cleaning her work area. Defs.' Reply, Exh. G. As of January 11, 2001, Plaintiff had yet to present any medical

documentation of her condition.

Plaintiff also testified that she met with Marciak on other occasions but did not request any changes in her job duties such as a reduction in the time she spent on the telephone. On January 22, 2001, Plaintiff met with Michelle Sautter, an employee in IBC's human resources department, and Sonia Alcoba, an IBC benefits administrator, who discussed the need for Plaintiff to provide medical documentation of her asthma and suggested ways of handling the coughing episodes. Alcoba also informed Plaintiff of her rights under the FMLA. At this meeting Plaintiff did not request any changes to her job duties.

While these meetings were occurring, Plaintiff's coughing episodes did not abate, and the IBC employees around her cubicle continued to complain. On May 30, 2001, Stacie Zenon, one of Plaintiff's co-workers, emailed Sautter and Marciak to complain about Plaintiff's coughing episodes. Zenon stated that earlier that day she had to put a call on hold and run to the restroom to vomit after hearing Plaintiff vomit into her trash can. Def.'s Reply, Exh. J.

Sometime prior to June 2, 2001, Plaintiff requested FMLA leave. To process this request, IBC repeatedly asked Plaintiff to provide medical documentation of her condition. Def.'s Reply, Exh. I. Plaintiff did not provide such documentation until August 6, 2001. Plaintiff testified that she could not provide such documentation sooner because she did not have a primary care physician until this time. Walker Dep. at 130. In the documentation Plaintiff provided, Plaintiff's new primary care physician stated that it would be necessary for Plaintiff to work intermittently or on less than a full schedule for approximately four to six weeks because of her asthma. Def.'s Reply, Exh. I. On August 9, 2001, IBC approved Plaintiff for "intermittent/reduced hours" FMLA leave and also for twenty-seven consecutive days of FMLA leave for the period of July 26, 2001 to

September 4, 2001, so that Plaintiff could have nasal surgery to improve her condition. Id.

On September 4, 2001, Plaintiff returned from nasal surgery to her pre-leave position at IBC. Plaintiff testified that the surgery improved her condition temporarily, and for three weeks, despite having to use the telephone frequently, she did not have any coughing episodes. Walker Dep. at 140. Unfortunately, after three weeks Plaintiff's coughing episodes returned with the same frequency and intensity as before the surgery. Id. at 141. Plaintiff testified that she went to the restroom as often as possible when she had these episodes but, as before, was only able to make it to the restroom approximately half of the time. Id. at 143. If she could not make it to the restroom, Plaintiff would transfer phlegm to a napkin and occasionally vomit into her trash can. Id. at 142.

In November and December of 2001, Marciak and Sautter began receiving more complaints from employees about Plaintiff's coughing episodes. These complaints described the episodes as "unbearable," "disgusting," and "very loud." According to one complaint, every episode could be heard throughout Plaintiff's work room. In another complaining email, an employee remarked: "[Plaintiff] has had coughing fits to the point where she is throwing up into a paper towel. She then discards it into her trashcan [sic]. I think it is unsanitary and uncalled for. She doesn't seem to have any regard for her neighbors because she never leaves to go to the bathroom and take care of things." Defs.' Reply, Exh. K. Another email remarked: "[Plaintiff] does not cover her mouth, she does not get up and wash her hands on a regular basis." Id. Plaintiff attributed these attacks to allergies that surgery could not cure. Walker Dep. at 149.

On December 11, 2001, Marciak and Sautter met with Plaintiff again regarding her coughing episodes and reminded her that she was to excuse herself when she experienced one of these episodes. Defs.' Reply, Exh. L. Marciak informed Plaintiff that if he received more employee

complaints about Plaintiff not excusing herself, he would request that she take FMLA leave time. Id. Plaintiff acknowledges that Marciak told her that if she was not feeling well she could go home. However, Plaintiff never took any FMLA leave. Plaintiff testified that after her surgery she had multiple meetings each week like this one with either Marciak, Sautter, or both of them, concerning her health. Nevertheless, Plaintiff never requested any change to her job duties at any meeting she had with IBC employees after her surgery.⁴

On December 13, 2001, Marciak was in his cubicle when he heard Plaintiff having a coughing episode. He approached Plaintiff and asked her to excuse herself when she was coughing. Plaintiff responded that “she ‘wasn’t supposed to excuse herself if she was coughing, only if she was throwing up in the can.”” Defs.’ Reply, Exh. M. Marciak reminded Plaintiff of the procedure they discussed at the December 11, 2001 meeting and left the area.

On January 10, 2002, IBC terminated Plaintiff “because [she was] getting sick in the trash can and throwing up. And [she] didn’t comply with what [IBC] wanted [her] to do.” Walker Dep. at 168. Since her termination, Plaintiff has been taking allergy and asthma medication that has diminished her congestion, coughing, sneezing, choking and vomiting. While on this medication, Plaintiff is congested only twice a day and can remedy that congestion by blowing her nose. Plaintiff also has only two coughing episodes a day. These episodes last only one or two minutes and can be remedied by clearing her throat. She also no longer sneezes or vomits and only experiences choking episodes during the night.⁵ Plaintiff testified that, with the aid of medication for her allergies and

⁴ Plaintiff testified that she asked Marciak to move her cubicle to a location closer to the ladies’ room, but Marciak denied this request. Walker Dep. at 159-60.

⁵ Plaintiff took medication while she worked for IBC, but that medication was less effective than the current medication. Walker Dep. at 189.

asthma, the only things she cannot do because of these ailments are petting a cat, walking outside when the grass is freshly cut, dusting without a dust mask, running a forty-yard dash, walking quickly up a flight of stairs, playing sports, or carrying heavy packages for a long distance. Walker Dep. at 180-190.⁶

Plaintiff filed the instant action on November 24, 2003,⁷ and the parties' motions for summary judgment are now ripe for disposition.

II. DISCUSSION

The Complaint asserts three causes of action: 1) discrimination under the ADA; 2) discrimination under the PHRA; and 3) unlawful termination under the FMLA. Defendants move for summary judgment on all three claims, while Plaintiff moves for summary judgment on the FMLA claim. Because the Court's analysis of Plaintiff's ADA discrimination claim applies equally to her PHRA claim,⁸ the Court first addresses those claims simultaneously, followed by a discussion

⁶ Despite this testimony from Plaintiff about how medication alleviates most of the impact her health problems have on her daily life, Plaintiff has received Social Security disability benefits since March 2003. Pl.'s Sur-reply at 6-7. Plaintiff contends that her current inability to work is due to the deterioration of her health subsequent to her termination from IBC. *Id.* at 6.

⁷ The record is devoid of any reference to Plaintiff filing a complaint with the EEOC and/or PHRC and receiving a right to sue letter, as is required prior to the filing of a civil action alleging ADA discrimination claims. *See* 42 U.S.C. § 12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment."); 42 U.S.C. §2000e-5(c); *Churchill v. Star Enterprises*, 3 F. Supp. 2d 625, 629 (E.D. Pa. 1998) ("Under 42 U.S.C. § 12117, the ADA incorporates the procedures set forth in Title VII . . ."). Nevertheless, as defense counsel makes no argument on this ground, the Court presumes that Plaintiff filed such a complaint and received a right to sue letter.

⁸ *See Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999); *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996).

of the parties' cross-motions for summary judgment on Plaintiff's FMLA claim.⁹

A. Disability Discrimination Claims

The ADA prohibits employers from discriminating against a qualified individual with a disability because of the person's disability.¹⁰ Under the ADA, a "qualified 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 that such individual desires."¹¹ Thus, to succeed on her claim, Plaintiff first must prove that she has a disability, which the ADA defines 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."¹² Plaintiff argues that she has a disability under any of these three definitions. The Court disagrees.

⁹ The Court applies the familiar standard of review to the instant motions, as recently explained by the Third Circuit:

Summary judgment is appropriate if there are no genuine issues of material fact presented and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Wisniewski v. JohnsManville Corp., 812 F.2d 81, 83 (3d Cir. 1987). In determining whether a genuine issue of fact exists, we resolve all factual doubts and draw all reasonable inferences in favor of the nonmoving party. Suders v. Easton, 325 F.3d 432, 435 n.2 (3d Cir.2003). "Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Singletary v. Pennsylvania Dept. of Corrections, 266 F.3d 186, 192 n.2 (3d Cir. 2001) (quoting Celotex, 477 U.S. at 325, 106 S.Ct. 2548, 91 L.Ed.2d 265). Conoshenti v. Public Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004).

UPMC Health Sys. v. Metropolitan Life Ins. Co., 391 F.3d 497, 502 (3d Cir. 2004).

¹⁰ 42 U.S.C. § 12112(a).

¹¹ § 12111(8).

¹² § 12102(2).

1. Plaintiff Cannot Prove She Has a Physical or Mental Impairment That Substantially Limits One or More Major Life Activities

Under Third Circuit precedent and EEOC regulations, determining whether an individual is substantially limited in one or more major life activities requires a two-step analysis. First, the Court must determine whether the plaintiff is substantially limited in any major life activity other than working. If the Court finds that the plaintiff is so limited, the inquiry ends. However, if the plaintiff is not so limited, the next step is to determine whether the individual is substantially limited in the major life activity of working.¹³

When determining whether a plaintiff asserting ADA claims is affected by a disability that substantially limits a major life activity, a court should consider: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact resulting from the impairment. Courts must adjudicate ADA claims on a case-by-case basis, but “only extremely limiting disabilities--- in either the short or long-term--- ... qualify for protected status under the ADA.”¹⁴

Plaintiff contends that she suffers from asthma and allergies, which substantially limit her ability to breathe, sleep, walk and talk.¹⁵ However, Plaintiff fails to cite to any evidence, medical or otherwise, that her asthma or allergies substantially limited her ability to breathe, sleep, walk or talk while she worked for IBC. Instead, Plaintiff only points to evidence of the existence

¹³ Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783-784 (3d Cir. 1998) (citing 29 C.F.R. pt. 1630, App. § 1630.2(j)).

¹⁴ Marinelli v. City of Erie, Pa., 216 F.3d 354, 362 (3d Cir. 2000).

¹⁵ Examples of “major life activities” include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 29 C.F.R. § 1630.2(I). Although not specifically listed in the regulation, Plaintiff argues that sleeping is also a major life activity.

of her asthma and other health problems and then summarily concludes that this asthma substantially limited these major life activities. Moreover, Plaintiff's few citations to actual evidence are to her own deposition testimony about her condition at the time of the deposition, and not her condition during employment.¹⁶ Furthermore, most of the limitations Plaintiff described in her deposition (e.g., inability to run a forty-yard dash, inability to play sports which she had not played for over twenty years, inability to carry heavy packages long distances, being able to sleep only for four to five hours per night, etc.) do not relate to major life activities. Even if these activities did fall into the category of "major life activity," Plaintiff's limitations are far from substantial.¹⁷ Accordingly, no reasonable jury could find that Plaintiff was substantially limited in a major life activity other than working.¹⁸

Plaintiff's claim that her asthma restricted her ability to talk on the telephone for extended periods is actually a claim of impairment in the major life activity of working, and should be analyzed as such.¹⁹ An individual is substantially limited in working if the individual is

¹⁶ Although Plaintiff cites to two reports from doctors who had evaluated her, these reports do not contain any information about how Plaintiff's asthma substantially limits her ability to breathe, sleep, walk or talk.

¹⁷ See Mondzelewski, 162 F.3d at 783-84 (In making the determination of whether an individual is substantially limited in a major life activity, "the court compares the effect of the impairment on that individual as compared with the 'average person in the general population.' For example, 'an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below average speed.'" (internal citations omitted)).

¹⁸ Due to the paucity of evidence cited in Plaintiff's briefs, the Court conducted an independent review of the record in search of other evidence that Plaintiff is substantially limited in a major life activity other than working. However, the Court was unable to find any additional evidence in Plaintiff's favor.

¹⁹ Plaintiff did not have any health problems during her first six months of employment at IBC because she was not required to use the telephone and was at a cubicle away from the window and heating vents. Prior to working at IBC Plaintiff had had only one asthma attack and had never used the telephone for two hours at a time. Walker Dep. at 74-75. Thus, Plaintiff's health condition is triggered by and flows from her job duties and from environmental factors at IBC. As such, Plaintiff's claims of substantial limitation related to her coughing episodes and other health problems attributable to her asthma and allergies are actually claims of impairment in the major life activity of working.

“significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”²⁰ Under this standard, “one must be precluded from more than one type of job, a specialized job, or a particular job choice.”²¹

Plaintiff testified that if she talked on the telephone for more than two hours per day, she would become congested and have asthma attacks.²² Plaintiff presents no evidence of any medical reports recommending that she limit the amount of time spent on the telephone or stating that spending over two hours per day on the telephone could trigger coughing episodes or asthma attacks. Plaintiff’s testimony about self-imposed limitations on telephone use is insufficient to demonstrate that she is substantially limited in the major life activity of working.²³ Plaintiff must also submit evidence that this limitation precludes her from working in a class of jobs or broad range of jobs.²⁴ On this score, Plaintiff’s evidence falls short.

To show a significant restriction in her ability to perform a class of jobs or a broad range of jobs, Plaintiff must present some affirmative evidence of, inter alia, her own work-related

²⁰ 29 C.F.R. § 1630.2(j)(3)(I); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999).

²¹ Sutton v. United Air Lines, Inc., 527 U.S. 471, 491-92 (1999); Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 763 (3d Cir. 2004); Tice v. Centre Area Transp. Auth., 247 F.3d 506, 512 (3d Cir. 2001).

²² Walker Dep. at 72-74.

²³ To the extent that Plaintiff argues that the dustiness and uncleanliness of the area around her cubicle contributed to her health problems, her sensitivity to these conditions did not substantially limit a major life activity. See Rinehimer, 292 F.3d at 381 (“[The plaintiff’s] condition of being sensitive to dust and fumes, which is not temporary . . . and which [the defendant] arguably knew about . . . does not ‘substantially limit’ a ‘major life activit[y].’”).

²⁴ See, e.g., Marinelli, 216 F.3d at 364 (evidence of plaintiff’s physical limitations, without evidence of class of jobs from which plaintiff is disqualified as a result of her limitations, is insufficient to establish significant restriction in major life activity of working).

abilities and qualifications, the jobs available in her geographic area, the number of jobs utilizing her particular abilities and the number of those jobs from which she is disqualified due to her impairments (i.e., she is restricted from a class of jobs), or the number of jobs that do not utilize her particular abilities and the number of those jobs from which she is disqualified due to her impairments (i.e., she is restricted from a broad range of jobs in various classes).²⁵ Without such evidence, no reasonable jury could conclude that she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, or that her limitations, compared to the average person, constitute “a significant barrier to employment.”²⁶ This is “not intended to require an onerous evidentiary showing,” but at a minimum it requires a “presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., ‘few,’ ‘many,’ ‘most’) from which [Plaintiff] would be excluded because of an impairment.”²⁷ There is simply no such evidence before the Court,²⁸ and its absence is fatal to Plaintiff’s claim that she is substantially limited in the major life

²⁵ See 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C).

²⁶ Mondzelewski, 162 F.3d at 784.

²⁷ 29 C.F.R. pt. 1630, App. § 1630.2(j); see also Ryan v. St. Mary of Providence, No. 00 C 2453, 2001 WL 1143249, at *4, (N.D. Ill. Sept. 28, 2001) (“Because ‘this is not one of the rare cases in which the [plaintiff’s] impairments are so severe that [her] substantial foreclosure from the job market is obvious,’ at a minimum she was required to come up with some evidence of the types of jobs in her area from which she would have been excluded.”) (quoting EEOC v. Rockwell Int’l Corp., 243 F.3d 1012, 1017 (7th Cir. 2001)).

²⁸ It bears noting that the evidence suggests that Plaintiff did not believe she was limited in any of her job duties or needed accommodation while she worked for IBC. Indeed, Plaintiff’s supervisors initiated every meeting with her to discuss her health problems and only did so because of complaints from Plaintiff’s co-workers. Plaintiff never requested a change in her job duties to limit her telephone use and rejected Marciak’s offer to return her to the work area she occupied as a temporary employee before she began experiencing coughing episodes. Further, there is no evidence in the record that Plaintiff’s asthma or allergies affected her job performance aside from causing major distractions to her co-workers.

activity of working.²⁹

2. Plaintiff Cannot Prove She Has a Record of Disability

A record of disability means an individual “has a history of, or has been misclassified as having,” a substantially limiting impairment.³⁰ “A plaintiff attempting to prove the existence of a ‘record’ of disability still must demonstrate that the recorded impairment is a ‘disability’ within the meaning of the ADA.”³¹ Thus, like proof of a disability itself, proof of a record of disability demands evidence of a substantial limitation in the performance of a major life activity. A mere diagnosis of a particular impairment is not enough. As explained supra, Plaintiff has failed to present evidence that her asthma or allergies substantially limit her in any major life activity. Accordingly, Plaintiff cannot establish that she has a record of disability under the ADA.³²

3. Plaintiff Cannot Prove She Is Regarded as Disabled

Under 42 U.S.C. § 12102(2)(c), individuals who are “regarded as” having a substantially limiting impairment are disabled within the meaning of the ADA. This provision must be read in conjunction with § 12102(2)(A), such that having a disability includes being regarded as

²⁹ Compare Mondzelewski, 162 F.3d at 785-86 (finding vocational expert’s report was sufficient to show plaintiff was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes), with Cade v. Consol. Rail Corp., No. Civ.A. 98-5941, 2002 WL 922150, at *11-12 (E.D. Pa. May 7, 2002) (holding plaintiff was not substantially limited in working because she failed to present evidence that her knee condition disqualified her from any jobs in the geographic area to which she had reasonable access); Balls v. AT & T Corp., 28 F. Supp. 2d 970, 975 (E.D. Pa. 1998) (granting summary judgment because plaintiff failed to present demographic evidence to show from what jobs in her geographic area she had been excluded due to her impairment), aff’d, 229 F.3d 1137 (3d Cir. 2000) (Table); Howell v. Sam’s Club # 8160/Wal-Mart, 959 F. Supp. 260, 266-67 (E.D. Pa. 1997) (granting summary judgment because, inter alia, “[plaintiff] has not presented any evidence detailing the class of jobs from which he is foreclosed . . .”), aff’d, 141 F.3d 1153 (3d Cir. 1998).

³⁰ 29 C.F.R. § 1630.2(k).

³¹ Tice, 247 F.3d at 513.

³² See, e.g., Taylor v. Phoenixville Sch. Dist., 113 F. Supp. 2d 770, 774 (E.D. Pa. 2000) (finding no record of impairment because “[t]o the extent a record of impairment exists at all, nothing in that record suggests that the impairment substantially limited a major life activity”).

having an impairment that substantially limits one or more of the plaintiff's major life activities.³³ Plaintiff argues that she was regarded as disabled because of the negative reactions of her co-workers to her health problems. Plaintiff is correct insofar as EEOC regulations state that an individual can be "regarded as" disabled if the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."³⁴ Nevertheless, Plaintiff's claim suffers from the same fatal shortcoming as her other arguments regarding disability. Like proof of a disability or a record of disability, this theory requires evidence of a substantial limitation in a major life activity. Because Plaintiff has failed to present any such evidence, her claim that she was "regarded as" disabled fails.³⁵

Based on the foregoing, Plaintiff cannot establish that she is a qualified individual with a disability under either the ADA or the PHRA. Thus, Plaintiff cannot successfully claim that Defendants discriminated against her because of a disability, and summary judgment in favor of Defendants is appropriate on Plaintiff's disability discrimination claims.

B. FMLA Retaliation Claim

Plaintiff contends that Defendants terminated Plaintiff in retaliation for exercising

³³ See Sutton, 527 U.S. at 489; Rinehimer, 292 F.3d at 381(employer must regard the employee "to be suffering an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled") (quoting district court slip opinion).

³⁴ 29 C.F.R. § 1630.2(1)(2). An individual can also be regarded as disabled if she "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation" or "[h]as none of the impairments defined in [(1) or (2)] but is treated by a covered entity as having a substantially limiting impairment." Id. at § 1630.2(1)(1) and (3). However, there is nothing in Plaintiff's memoranda suggesting that Plaintiff is pursuing either of theories. Nor is there any evidence in the record indicating that such an argument would succeed.

³⁵ See Custer v. Penn State Geisinger Health System, No. Civ.A.00-1860, 2004 WL 3088616, at *7 (M.D. Pa. Dec. 27, 2004) (holding that because plaintiff was judicially estopped from arguing that he was actually disabled, he could "proceed only under § 1630.2(1)(1) or (3), because (2) requires a finding that he was impaired, and unable to complete a major life activity").

her rights under the FMLA.³⁶ The familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies to unlawful retaliation claims under the FMLA.³⁷ Plaintiff must first establish a prima facie case of discrimination before the Court need address Defendants' asserted reasons for their actions. Subsection 825.220(c) of the FMLA regulations provides that:

An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

Thus, to establish a prima facie case on her FMLA claim, Plaintiff must prove: "(1) [s]he took an FMLA leave, (2) [s]he suffered an adverse employment decision, and (3) the adverse decision was causally related to [her] leave."³⁸ As stated above, there is no dispute that Plaintiff took FMLA leave in the summer of 2001 for nasal surgery and returned to work on September 4, 2001, and that IBC discharged Plaintiff on January 10, 2002. Therefore, the only issue for the Court is whether the record reflects a material issue of fact regarding a causal connection between Plaintiff's utilization of FMLA leave and her discharge. Upon review of the record, the Court can find no such connection.

Plaintiff's only argument for the existence of a causal connection is the temporal proximity of her termination to her use of FMLA leave. Although temporal proximity between the

³⁶ "The stated purposes of the FMLA are to 'balance the demands of the workplace with the needs of families' and 'to entitle employees to take reasonable leave for medical reasons.'" Conoshenti, 364 F.3d at 140-41 (quoting 29 U.S.C. § 2601(b)(1) and (2)).

³⁷ Baily v. Aetna, Inc., No. Civ.A.02-5153, 2003 WL 22462182, at *7 (E.D. Pa. Oct. 28, 2003).

³⁸ Conoshenti, 364 F.3d at 146.

protected activity and the retaliatory action can alone establish a causal connection, in such cases “the timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred.”³⁹ The undisputed evidence here shows that the adverse action (Plaintiff’s termination) occurred over four months after Plaintiff returned from FMLA leave for surgery. A four month period between the protected activity and the adverse action is by itself insufficient to establish a causal connection.⁴⁰ However, “where there is a lack of temporal proximity, circumstantial evidence of a ‘pattern of antagonism’ following the protected conduct can also give rise to the inference.”⁴¹ Plaintiff presents no evidence of a pattern of antagonism here.⁴²

The only other evidence Plaintiff references is Marciak’s admission that IBC discussed terminating Plaintiff in the fall of 2001, after she returned from FMLA leave for her surgery and the coughing episodes continued. However, Plaintiff ignores her own admissions that Marciak told her that she could take FMLA leave whenever she did not feel well. Moreover, the limited evidence before the Court suggests that IBC only discussed terminating Plaintiff because she was not following the instruction to excuse herself when she experienced a coughing episode. There

³⁹ Williams, 380 F.3d at 760 (citation omitted).

⁴⁰ See id. (two month proximity insufficient); Todd v. New England Motor Freight, No. Civ.A.03-1684, 2004 WL 846782, at *4 (E.D. Pa. Apr. 20, 2004) (three and one half month gap suggestive that the plaintiff’s complaints did not provoke her termination).

⁴¹ Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997).

⁴² Plaintiff makes a rather specious argument that “Defendants terminated Plaintiff rather than permit her to take additional leave to deal with her serious health issues.” Pl.’s Mot. For Summ. J. at 5. Plaintiff cites to no evidence in support of this allegation. Moreover, the only evidence before the Court suggests the exact opposite. It is undisputed that IBC approved Plaintiff for intermittent FMLA leave following her return from surgery. During her deposition, Plaintiff admitted that she knew she was entitled to use her FMLA leave if she did not feel well but never did so. Walker Dep. at 155-57. In light of this evidence, and the absence of evidence supporting Plaintiff’s allegation, no reasonable jury could find that IBC ever prevented Plaintiff from taking FMLA leave or discharged her instead of allowing her to take such leave.

is no evidence before the Court that Plaintiff's use of FMLA leave factored into IBC's decision to terminate her or that IBC "antagonized" Plaintiff following her return from surgery.⁴³

Although her brief is not entirely clear, Plaintiff makes a number of other arguments in support of her motion for partial summary judgment on her FMLA claim.⁴⁴ These arguments, however, relate to whether IBC's asserted reason for discharging her—for failure to follow the instruction that she excuse herself when she experienced a coughing episode—was pretextual. Because Plaintiff has failed to establish a prima facie case of retaliation, the Court need not reach the pretext prong of the McDonnell-Douglas burden-shifting analysis to grant summary judgment in favor of Defendants and dismiss Plaintiff's FMLA retaliation claim with prejudice.⁴⁵

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted, Plaintiff's Motion for Partial Summary Judgment is denied, and the Complaint is dismissed with prejudice.

An appropriate Order follows.

⁴³ If anything, the evidence suggests that Plaintiff's failure to take FMLA leave when she was having coughing episodes may have contributed to IBC's decision.

⁴⁴ Plaintiff appears to argue that IBC's reason for discharging Plaintiff was pretextual because IBC failed to follow its own corrective action policy with regard to Plaintiff's failure to follow this instruction. Plaintiff also argues that the instruction itself violated the FMLA. The Court is aware of nothing in the FMLA that would prohibit IBC from requiring Plaintiff to excuse herself when experiencing a coughing episode so as not to disrupt her co-workers. Further, IBC first issued this instruction in December 2000, more than 6 months before Plaintiff exercised her rights under the FMLA, so any argument that IBC issued this rule in retaliation for Plaintiff taking FMLA leave is entirely without merit.

⁴⁵ Plaintiff also attempts to insert an ADA retaliation argument into her Motion for Summary Judgment. However, Plaintiff did not allege an ADA retaliation claim in her complaint, and whether Plaintiff attempted to exercise any rights under the ADA is irrelevant to her FMLA retaliation claim.

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

SUSAN WALKER,	:	
Plaintiff	:	CIVIL ACTION
	:	NO. 03-6396
v.	:	
	:	
INDEPENDENCE BLUE CROSS et al.,	:	
Defendants	:	

ORDER

AND NOW, this 27th day of May, 2005, upon consideration of Defendants' Motion for Summary Judgment [Doc. #26], Plaintiff's Response thereto [Docs. ##30, 31], Defendants' Reply [Doc. #34], and Plaintiff's Sur-reply [Doc. #35], and of Plaintiff's Motion for Partial Summary Judgment [Docs. ##27, 28], Defendants' Motion to Strike and/or Response to Plaintiff's Motion for Partial Summary Judgment [Doc. #29], and Plaintiff's Response thereto [Docs. ##32, 33], and for the reasons set forth in the attached memorandum opinion, it is hereby **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment [Doc. #26] is **GRANTED**;
2. Defendants' Motion to Strike [Doc. #29] is **DENIED**;
3. Plaintiff's Motion for Partial Summary Judgment [Docs. ##27, 28] is **DENIED**;
4. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**; and
5. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.