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

WENDY SHALBERT,	:	
	:	
Plaintiff	:	CIVIL ACTION
v.	:	
	:	
MARYBETH MARCINCIN, D.M.D., M.S.,	:	NO. 04-5116
	:	
Defendant	:	

OPINION

Stengel, J. **Date: August 9, 2005**

Wendy Shalbert filed a complaint against her former employer, Dr. Marybeth Marcincin, in the Court of Common Pleas in Northampton County, alleging that Defendant discriminated against and harassed her on the basis of her anorexia and depression in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq*., and the Pennsylvania Human Relations Act (PHRA) 42 Pa. C.S. §§ 915 *et seq*. Defendant removed the action to this court and now seeks summary judgment on all of Plaintiff's claims. For the reasons set forth below, I will grant Defendant's motion for summary judgment.

I. Background

Dr. Marcincin owns an orthodontic practice in Lehigh Valley, Pennsylvania. Marcincin Dep., Def.'s Mem. Supp. Summ. J., Ex A, at 71. She hired Wendy Shalbert in September 1998 as an orthodontic assistant. Id. at 29; Shalbert Dep., Def.'s Mem. Supp. Summ. J., Ex. C, at 8. As an orthodontic assistant, Ms. Shalbert was responsible for, among other things, taking molds and ex-rays, changing wires, removing brackets, bands, and ties, and fitting orthodontic appliances. Marcincin Dep. at 28; Shalbert Dep. at 11. Initially, Ms. Shalbert worked full-time,

but after the birth of each of her children, she requested and was permitted to reduce the number of days that she worked. Shalbert Dep. at 12-13. At the time of her resignation, Ms. Shalbert was working two days per week in the office. Id. She also made orthodontic appliances in her home on a weekly basis with equipment purchased by Dr. Marcincin–a task for which she was compensated on a per appliance basis. Id. at 15-21; Marcincin Dep. at 30-32. Lynn Herman oversaw all the orthodontic assistants in Dr. Marcincin's practice, and served as Wendy Shalbert's direct supervisor. See Herman Dep., Def.'s Mem. Supp. Summ. J., Ex B., at 7.

In early 2002, Ms. Shalbert was upset at work and expressed concern that she did not want to spend time with her children or to take care of them. Shalbert Dep. at 60-62; Marcincin Dep. at 45-47; Herman Dep. at 36-37. Dr. Marcincin, Ms. Herman, and other members of the staff recommended that Ms. Shalbert consider seeking the help of a mental health professional. Shalbert Dep. at 55-56. Dr. Marcincin also gave Ms. Shalbert a book regarding postpartum depression. Shalbert Dep. at 61-62. Ms. Shalbert was diagnosed with postpartum depression and anorexia. Shalbert Dep. at 32-33. She informed Dr. Marcincin, Ms. Herman, and other members of the staff of her diagnosis. Marcincin Dep. at 45-46; Herman Aff., Def.'s Mem. Supp. Summ. J., Ex. D, ¶3.

Over the next year and a half, there were several instances in which Ms. Shalbert arrived late to work, started crying in the office, and stopped treating patients so she could gain her composure in the back room--a process which would range from five minutes to four hours. Shalbert Dep. at 103-105, 136-37; Marcincin Dep. at 33-36, 47-49, 74; Herman Dep. 10-14, 28-29, 31-37; Herman Aff. ¶¶ 4-10. Dr. Marcincin never disciplined Ms. Shalbert or took any adverse action in relation to any of these events. Shalbert Dep. at 22. One day in June 2002, Ms.

Herman discovered Ms. Shalbert sitting on the floor of the lab, with her head on her knees. She was shaking and pale and her lips were blue. Herman Dep. 21; Herman Aff. ¶¶ 5-6; Shalbert Dep. at 108-09. She told Ms. Herman and other co-workers that she had not eaten in several days. Shalbert Dep. at 109; Herman Aff. ¶ 6. Her mother eventually picked her up and took her to a hospital emergency room where she was treated for dehydration. Shalbert Dep. at 110-112; Herman Aff. ¶¶ 7-8. She was subsequently referred to an in-patient treatment program for anorexics, but never entered the program. Shalbert Dep. at 112-13; Herman Aff. ¶ 8.

Ms. Shalbert voluntarily resigned her position with Dr. Marcincin in late March 2003, because she had accepted a job offer from Dr. Gregg Frey, another local orthodontist and Ms. Shalbert's former employer. Marcincin Dep. at 60; Herman Dep. at 21-22. When she notified Dr. Marcincin of her intent to resign, Dr. Marcincin requested two weeks notice, and they agreed that her last day would be April 10. Marcincin Dep. at 60, 61; Herman Dep. at 21-22. Several days later, Ms. Shalbert asked to rescind her resignation. Shalbert Dep. 155-56; Marcincin Dep. 64-65; Herman Dep. at 23. Ms. Shalbert contends that Dr. Marcincin accepted the rescission, but told her to take a week of off to "collect [her] thoughts, get better, get [her] thoughts in [her] head clear...." . Shalbert Dep. at 157-58, 165-66. Dr. Marcincin claims that she explicitly refused to reinstate Ms. Shalbert's employment because she had already filled the position. Marcincin Dep. at 64-65. Her position is supported by Ms. Herman's testimony. Herman Dep. at 23. On the last day that Ms. Shalbert worked in Dr. Marcincin's office, she was visibly upset, shaking and staring into space while she was engaged in patient care. Dr. Marcincin asked Ms. Herman to find an employee to relieve her. Marcincin Dep. at 50-51; Herman Dep. at 14-15; Herman Aff. ¶ 13.

On or about April 20, 2003, Dr. Marcincin called Ms. Shalbert at home. Shalbert Dep. at 171-74; Marcincin Dep. at 67-68. Dr. Marcincin claims she simply called to see how Ms. Shalbert was feeling and when asked, once again refused Ms. Shalbert's request to rescind her resignation. Marcincin Dep. at 67-68. Ms. Shalbert, by contrast, states that Dr. Marcincin told her she did not think she was "better" and therefore explained that she could not return to work. Shalbert Dep. at 171. Ms. Shalbert called Dr. Marcincin back and said that she planned to file a claim for unemployment. Dr. Marcincin responded that she would not be able to collect unemployment benefits because she voluntarily resigned. Shalbert Dep. at 172; Marcincin Dep. at 68.

Ms. Shalbert filed for unemployment benefits on April 22, 2003. Def.'s Mem. Supp. Summ. J., Ex. J. Her claim was denied on May 19, 2003, based on finding that she voluntarily resigned and that Dr. Marcincin had taken steps to replace her. Id. Ms. Shalbert then filed suit in the Court of Common Pleas of Northampton County and Dr. Marcincin removed the case to this court. Dr. Marcincin now moves for summary judgment.

II. Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted "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...." FED. RULE CIV. PROC. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact**.** Highlands Ins. Co. v. Hobbs Group LLC, 373 F.3d 347, 350-51 (3d Cir. 2004). Once the moving party has carried its burden, the nonmoving party must come forward with specific facts to show that there is a genuine issue for trial. Williams v. West

Chester, 891 F.2d 458, 464 (3d Cir. 1989). A fact is "material" if its resolution will affect the outcome under the applicable law, and an issue about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in favor of the nonmoving party. Highland, 373 F.3d at 351.

III. Shalbert's Disability Discrimination Claim

In Counts I and III of her Complaint, Ms. Shalbert claims that Dr. Marcincin terminated her employment on the basis of her disabilities in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*,[1] and the Pennsylvania Human Relations Act (PHRA), 42 Pa. C.S. §§ 915 *et seq.*[2] In order to establish a *prima facie* case of disability discrimination, under the ADA, a plaintiff must prove that: (1) she has a disability, (2) she is a qualified individual, and (3) she has suffered an adverse employment action because of that disability. Buskirk v. Apollo Metals, 307 F.3d 160, 166 (3d Cir. 2002) (citations omitted); Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 761 (3d Cir. 2004). Dr. Marcincin does not contest that Ms. Shalbert was qualified for the position of orthodontic assistant. Rather, she contends that Ms. Shalbert is not disabled within the meaning of the ADA and that she did not suffer an adverse employment action because of her disability. Because

[1] Section 12102(a) provides: "No covered entity shall discriminate 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).

[2] Disability discrimination claims under the PHRA are subject to the same standards as those applied to claims under the ADA. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); see also Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (citation omitted). Therefore, the court's discussion applies equally to both claims.

Plaintiff has failed to come forward with specific facts sufficient to show that she is disabled within the meaning of the ADA, I will grant Defendant's motion for summary judgment on this claim.

A. The ADA's Definition of Disability: Actual Disability

The ADA defines "disability" 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 impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). No one disputes that anorexia and depression qualify as impairments.[3] The relevant inquiry, therefore, is whether those impairments substantially limit one or more of Ms. Shalbert's major life activities as those terms are described under the ADA. The record in this case provides insufficient evidence that they do.

1. Anorexia

Anorexia is a "disorder characterized by a disturbed sense of body image, a morbid fear of obesity, a refusal to maintain a minimally normal body weight, and in women, amenorrhea." The Merck Manual 1595 (Mark H. Beers et al. eds., 17th ed. 1999). It may be transient and temporary or permanent and long-term. Id. at 1596. The precise cause of anorexia is unknown, but it seems to be influenced by social factors, as well psychological, genetic, and metabolic vulnerabilities. Id. at 1595-96. Anorexia can result in significant associated medical conditions, including, for example, impaired renal function, cardiovascular problems, and osteoporosis, or in some cases, even death. See Diagnostic and Statistical Manual of Mental Disorders 587-88 (4th

[3] Although the ADA itself does not define the term, the Code of Federal Regulations describes a "physical or mental impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one of the [body's] systems...or any mental or psychological disorder...." 29 C.F.R. § 1630.2(h).

ed. 2000). Undoubtedly, anorexia is a serious and potentially debilitating condition. However, whether a person has a disability under the ADA is a highly individualized determination, see Sutton v. United Airlines, 527 U.S. 471, 483 (1999), and the question is whether Ms. Shalbert's anorexia is a disability as that term is statutorily defined. Thus, the inquiry is limited to the facts of this case.

Ms. Shalbert contends that as a result of her anorexia, she was substantially limited in the major life activity of eating. See Pl.'s Mem. Opp. Summ. J. at 7-8. A "major life activity" is one which is "of central importance to daily life." Toyota Motor Mfg. v. Williams, 534 U.S. 184, 197 (2002); see also 29 C.F.R. 1630.2(h)(2)(I) (describing "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"). In Fiscus v. Wal-Mart Stores, 385 F.3d 378, 384-85 (3d Cir. 2004), the Third Circuit acknowledged with approval decisions in which courts held that eating is a major life activity. ("In this respect, waste elimination is comparable to other life-sustaining activities, such as breathing, eating, or drinking, all of which have been held to be major life activities within the statute.") (emphasis added) (citing 29 C.F.R. § 1630.2(I); Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001) (eating); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (eating, drinking, and learning)). The question then is whether Ms. Shalbert was "substantially limited" in her ability to eat.

To be "substantially limiting," the impairment must "prevent[] or severely restrict[]" the individual's ability to perform the major life activities alleged. Toyota, 534 at 198. The Federal Regulations identify several factors that courts should consider when determining whether an individual's impairment is "substantially limiting," namely: "(i) the nature and severity of the

impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2). Intermittent, isolated, or episodic impairments do not constitute disabilities under the ADA. See, e.g., Ogborn v. United Food and Comm. Workers Union, Local 881, 305 F.3d 763 (7th Cir. 2002); see also Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002) ("[A] temporary or non-chronic impairment of short duration is not a disability covered by the ADA."). The plaintiff bears the burden of showing that "an impairment's impact is 'permanent or long-term.'" Cella v. Villanova Univ., 113 Fed. Appx. 454, 455 (3d Cir. Oct. 19, 2004) (quoting Toyota Mfg. v. Williams, 534 U.S. 184, 198 (2002)).

In this case, Ms. Shalbert has failed to meet her burden of providing record evidence that her anorexia was sufficiently severe, permanent, or long-term to qualify as a disability as defined by the ADA. See, e.g., Frank v. United Airlines, 216 F.3d 845, 857 (9th Cir. 2001) ("While eating disorders can substantially limit major life activities, [plaintiffs] have not presented evidence that their eating disorders have that effect."); Dicino v. Aetna U.S. Healthcare, 2003 U.S. Dist. LEXIS 26487, at *26-27 (D.N.J. June 23, 2003) (finding that chronic pancreatitis and abdominal pain did not substantially limit major life activity of eating where plaintiff established that she was unable to eat solid foods for four months, but did not provide evidence that her eating restrictions were a long-term or permanent); see also McDonald v. Commonwealth of Pennsylvania, Dep't of Public Welfare, 62 F.3d 92, 95 (3d Cir. 1995) (finding no disability under the ADA where plaintiff was unable to work for two months after abdominal surgery); Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir. 1996) (concluding that temporary psychological impairment of less then four months did not constitute disability); Brown v.

Northern Trust Bank, 1997 U.S. Dist. LEXIS 13184 (N.D. Ill. Sept. 2, 1997) (holding that single episode of major depression not sufficient to establish disability under the ADA). The record shows that Ms. Shalbert reported to one of her physicians, Dr. Pushpi Chaudary, that she began to experience symptoms of anorexia at age sixteen. Psychiatric Evaluation by Dr. Pushpi Chaudhary, Pl.'s Mem. Opp. Summ. J., Ex. 6, at 2. At that time, however, the anorexia did not result in any medical complications or require hospitalization. Id. She also reported that this bout of anorexic behavior lasted only one year, and that she "snapped out" of it when she became involved in sports and dating. Id. Ms. Shalbert was formally diagnosed with anorexia after the birth of her second child in September 2001. There is no evidence in the record regarding whether or when her anorexia recurred between the time she "snapped out" of it and her official diagnosis. At the time of her deposition, she stated that her anorexia affected her only "occasionally." Id. at 36.

Although the evidence presented by Ms. Shalbert establishes that she had anorexia, there is no evidence about the severity, duration, or permanency of that condition. The evidence she offers is therefore insufficient to establish that her anorexia constitutes a "substantial limitation" on her ability to eat.

2. Depression

Although it is clear that depression may be a disability for ADA purposes if it "substantially limits" a major life activity, see Wilson v. Lemington Home for the Aged, 159 F. Supp. 2d 186, 198-99 (W.D. Pa. 2001) (citing cases), the record in this case does not support a finding that Ms. Shalbert's condition did. Ms. Shalbert received her diagnosis of postpartum depression simultaneously with the anorexia diagnosis. She claims that as a result of her

depression she was substantially limited in her ability to eat,[4] cook, and care for her children. Assuming that cooking and caring for children constitute "major life activities," I nevertheless find that there is insufficient evidence in the record to support Ms. Shalbert's assertion that she was "substantially limited" in these activities. With respect to child care, Ms. Shalbert admits that even on the days when she "didn't feel like getting out of bed," she played with her children, got them dressed, fed them, and took them outside. Shalbert Dep. at 41-42. She also admitted that both prior to and after her diagnosis of depression, her husband was responsible for cooking. Id. at 41. The only evidence she provides to support her claim that she was limited in her ability to cook was her own testimony that "when [she] got home from work....[she] was tired, [and she] didn't want to be standing in the kitchen." Id. Ms. Shalbert admits that her depression did not otherwise limit her ability to function at work, to drive, or care for herself. See id. at 37-38.

Furthermore, Ms. Shalbert has not produced evidence to show that her depression was long-lasting or permanent. At her deposition, Ms. Shalbert testified that she was prescribed Paxil on the day she was diagnosed, and that she began feeling better within two months. Shalbert Dep. at 34. According to the testimony of her therapist, Ms. Herzon-Lony, during her first meeting with Ms. Shalbert in May 2002, Ms. Shalbert reported that she was "over her postpartum depression." Herzon-Lony Dep. at 21. When asked whether she is still suffering from depression, she answered, "No." Shalbert Dep. at 33. Because a "temporary, non-chronic impairment of short duration is not a disability covered by the ADA," Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002) (citation omitted), there is insufficient evidence to

[4] As discussed above, there is insufficient evidence to support a finding that Ms. Shalbert was "substantially limited" in her ability to eat. I therefore do not address it again here.

establish that Ms. Shalbert's depression "substantially limited" any of her major life activities, there is no genuine issue of material fact for trial.

B. Regarded As Disabled

Ms. Shalbert contends that even if she does not have an impairment that substantially limits a major life activity, Dr. Marcincin regarded her as having such an impairment. To establish that she was "regarded as having an impairment," a plaintiff must show that she:

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;
> (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or
> (C) has none of the impairments defined in paragraph (j)(2)(1) of this section but is treated by a recipient as having such an impairment.

29 C.F.R. § 1630.2(1); see also Williams, 380 F.3d at 766.

In Sutton v. United Airlines, 527 U.S. 471, 470 (1999), the Supreme Court noted that in order to prove a claim under the "regarded as" prong, the employer must believe that the plaintiff has a substantially limiting impairment that she does not have, or that the plaintiff's impairment is more limiting than it actually is. There is no dispute that Dr. Marcincin was aware of Shalbert's diagnosis of anorexia and depression. This knowledge, standing alone, however, is not enough to prove that she regarded Ms. Shalbert as disabled under the "regarded as" prong. See Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996).

Ms. Shalbert has proffered evidence that Dr. Marcincin told her that she needed to "get better" and suggests that this statement proves that Dr. Marcincin regarded her as unable to work.

"[A]n employer's perception that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999). Ms. Shalbert has not shown that Dr. Marcincin believed that she could not perform a wide array of jobs. See Ogborn, 305 F.3d at 768 (finding union vice-president's statement that plaintiff should "see a doctor" insufficient to prove that plaintiff was regarded as disabled). As Dr. Marcincin points out in her Motion for Summary Judgment, she knew about Ms. Shalbert's diagnosis for a year and a half before Ms. Shalbert voluntarily resigned, but never took any adverse actions against her. Quite to the contrary, Dr. Marcincin often complimented Ms. Shalbert on her work, gave her regular raises, and seasonal bonuses. Therefore, I am not persuaded that Ms. Shalbert has come forward with sufficient evidence to create a genuine issue of material fact that Dr. Marcincin regarded her as substantially limited in any major activity.

IV. Shalbert's Disability-Based Harassment Claim

In Counts II and IV of Ms. Shalbert's Complaint, she alleges claims for harassment on the basis of her disabilities. To prove a claim for disability-based harassment, plaintiff must show that: "(1) [she] is a qualified individual with a disability under the ADA; (2) she was subject to unwelcome harassment; (3) the harassment was based on her disability or a request for accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and (5) that [her employer] knew or should have known of the harassment and failed to take prompt effective remedial action." Walton v. Mental Health Assoc. of Southeastern Pennsylvania, 168 F.3d 661 (3d Cir. 1999) (assuming without stating that there is a cause of action for disability-based harassment and setting forth the elements). Not only has Ms. Shalbert failed to establish that she has or is

regarded as having a disability as discussed above, she has also failed to provide sufficient evidence that the alleged conduct was sufficiently severe or pervasive to support a claim of disability-based harassment. I will therefore grant Defendant's motion for summary judgment on Counts II and IV.

In evaluating whether harassing conduct is "sufficiently severe or pervasive so as to alter the conditions of employment, a court must consider all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Galle v. Dep't of Gen. Servs., 2003 U.S. Dist. LEXIS 4548, at *14-15 (E.D. Pa. March 18, 2003) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)). Severity and pervasiveness are gauged by both an objective and subjective standard. Harris, 510 U.S. at 21. In other words, to be actionable, both the proverbial "reasonable person" and the plaintiff herself must perceive the environment as hostile or abusive.

The following statements form the basis for Ms. Shalbert's harassment claim: (1) Dr. Marcincin told Ms. Shalbert that she "looked pale" two or three times; (2) Dr. Marcincin said that that Ms. Shalbert "looked horrible" on a few occasions; (3) Dr. Marcincin told Ms. Shalbert that she "looked like she was going to pass out"; (4) Dr. Marcincin commented once that Ms. Shalbert had "blue lips"; (5) Dr. Marcincin remarked "maybe a total of two or three times" that she "wanted her old Wendy back"; (6) Dr. Marcincin asked on several occasions whether Shalbert had eaten anything; (7) Dr. Marcincin once indicated to Ms. Shalbert that "it sounds to me like your want to go live with your mother"; (8) Dr. Marcincin refused to speak to Ms. Shalbert about anything other than patient care for several days. See Shalbert Dep. at 72-92.

These alleged comments were made in the context of a very open office environment in which staff members (and Ms. Shalbert in particular) regularly discussed personal issues. Shalbert Dep. at 15-16, 64-65, 67, 88, 118-120, 158, 189; Herman Dep. at 23, 33, 35; Marcincin Dep. at 58-59, 68. The statements occurred over the course of approximately fifteen months--and notably, after Ms. Shalbert was hospitalized in relation to her anorexia. Shalbert Dep. at 79, 84.

The evidence in the record does not indicate that Ms. Shalbert herself perceived these statements as sufficiently severe or pervasive to create an abusive work environment. Ms. Shalbert regularly discussed her anorexia and depression at work, both with Dr. Marcincin and with her fellow co-workers, and routinely asked Dr. Marcincin's advice about personal matters. See Shalbert Dep. at 59-60. Although Ms. Shalbert testified that she was "offended" by some of Dr. Marcincin's comments and spoke to Lynn Herman about them, id. at 72-96, her testimony falls short of establishing that she viewed these remarks as so severe or pervasive as to create a hostile work environment. Indeed, Ms. Shalbert testified that when she sought to rescind her resignation, she told Dr. Marcincin: "I'm glad you guys are here, and I'm glad that you do listen; and I do appreciate the fact that people are worried about me and that I had people to come to two days a week and talk to instead of being without adult contact with two kids." When asked whether these statements were true, she answered, "Yes." Id. at 158.

Ms. Shalbert's comments to her therapist, Carol Herzon-Loney, also suggest that she did not consider her work environment to be hostile or abusive. During her therapy sessions, she told Ms. Herzon-Loney that she was "close to girls at work," that she "love[d] her job," and that she "look[ed] forward to working." See Herzon-Loney Treatment Notes, Def.'s Mem. Supp. Summ. J., Ex. H, at D664-65; see also Herzon-Loney Dep., Def.'s Mem. Supp. Summ. J., Ex. E,

at 22, 39-40. Ms. Herzon-Loney testified that Ms. Shalbert did not complain about her job, but rather described work as a "positive place." Herzon-Loney Dep. at 33, 38-39. In light of this evidence, a reasonable jury could not conclude that Ms. Shalbert subjectively viewed Dr. Marcincin's comments as so severe or pervasive that they created an abusive work environment.

Even if Ms. Shalbert did subjectively perceive her employment with Dr. Marcincin as abusive and hostile, she has not raised a genuine issue of material fact her work environment was "objectively hostile or abusive." Walton, 168 F.3d at 667 (quoting Harris, 510 U.S. at 22). Dr. Marcincin was Wendy Shalbert's employer, but she also had a personal relationship with her. In fact, Ms. Shalbert testified that "anytime [she] had a question about kids or anything, [she] always went to [Dr. Marcincin]." Ms. Shalbert openly discussed her medical diagnoses and the content of her therapy sessions at work. See Shalbert Dep. at 15-16, 64-65, 67, 88, 118-120, 158, 189; Herman Dep. at 23, 33, 35; Marcincin Dep. at 58-59, 68; Herzon-Loney Dep. at 19, 43. In this context, it seems evident that Dr. Marcincin's comments regarding Ms. Shalbert's pale appearance and blue lips or questions regarding whether she had eaten were expressions of concern, not statements of hostility. Therefore, a similarly-situated reasonable person could not, given the circumstances under which they were made, perceive Dr. Marcincin's statements as so severe or pervasive that they created an abusive work environment.

V. Conclusion

Ms. Shalbert has failed to provide sufficient evidence regarding the severity and duration of her alleged disabilities to establish that she is an individual with a disability as defined by the ADA. Moreover, because the record lacks sufficient evidence to prove that Dr. Marcincin's remarks were objectively or subjectively so severe or pervasive as to create a hostile work

environment. For these reasons, I will grant Defendant's motion for summary judgment on all counts.

An appropriate order follows.

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

WENDY SHALBERT,	:	
	:	
Plaintiff	:	CIVIL ACTION
v.	:	
	:	
MARYBETH MARCINCIN, D.M.D., M.S.,	:	NO. 04-5116
	:	
Defendant	:	

ORDER

AND NOW, this 9th day of August, 2005, upon consideration of Defendant's Motion for Summary Judgment, and Plaintiff's Response thereto, it is hereby **ORDERED** that the motion is **GRANTED.**

BY THE COURT:

_____

LAWRENCE F. STENGEL, J.