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

WANDA E. MENDEZ,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-01095
	)	
vs.	)	
	)	
PILGRIM'S PRIDE CORPORATION,	)	
	)	
Defendant	)	

* * *

APPEARANCES:
RICHARD J. ORLOSKI, ESQUIRE
ROBERT R. PANDALEON, ESQUIRE
On behalf of Plaintiff

MARSHALL H. ROSS, ESQUIRE
THOMAS E. ULRICH, ESQUIRE
WENDY G. ROTHSTEIN, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendant's Motion for Summary Judgment filed November 15, 2004. Wanda E. Mendez's Brief in Opposition to Defendant's Motion for Summary Judgment was filed December 1, 2004. For the reasons expressed below, we grant Defendant's Motion for Summary Judgment and dismiss plaintiff's Complaint.

Specifically, we find that plaintiff has not met her burden of establishing a claim under the Americans with

Disabilities Act ("ADA")[1].

PROCEDURAL BACKGROUND

On March 15, 2004 plaintiff Wanda E. Mendez filed a two-count Complaint in the United States District Court for the Eastern District of Pennsylvania. On March 25, 2004 defendant filed its answer and affirmative defenses.

Count One of plaintiff's Complaint avers a cause of action for discrimination pursuant to the ADA. Specifically, plaintiff asserts that defendant failed to provide plaintiff with reasonable accommodations and that defendant terminated her employment based upon her disability. Plaintiff seeks damages of $75,000 and reinstatement to her former position.

In Count Two, plaintiff alleges that defendant violated the ADA by terminating her in retaliation for bringing a workers' compensation claim. Plaintiff seeks damages of $75,000 for this case.

JURISDICTION

Federal question jurisdiction provides district courts with original jurisdiction to hear civil claims arising under "the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. In this case, the court may properly assert jurisdiction under Section 1331 because plaintiff's claims arise under federal law.

[1] 42 U.S.C. §§12101-12213.

PLAINTIFF'S CONTENTIONS

Plaintiff claims that on November 9, 2001 she sustained a work-related injury to her lumbar spine involving a central herniated disc and aggravation of degenerative disc disease.[2] Plaintiff asserts that on August 2, 2002 she provided defendant with medical restrictions concerning her injury but that defendant failed to make reasonable accommodations for her.[3]

Plaintiff contends that defendant terminated her position on August 7, 2002 because of her perceived disability. Plaintiff further contends that defendant terminated her employment in retaliation for her bringing a state workers' compensation claim.

Based upon the pleadings, record papers, affidavits, exhibits, and depositions, the pertinent facts are as follows:

FACTS

On March 16, 2001 plaintiff Wanda E. Mendez was hired at Pilgrim's Pride Franconia plant in the Turkey Packaging

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[2] Complaint paragraph ("¶") 11.

[3] Defendant's Statement of Uncontested Facts ("Facts") ¶ 1. Plaintiff filed Plaintiff's Reply to Defendant's Statement of Uncontested Facts on December 1, 2004. In it plaintiff admits to many of defendant's "uncontested" facts but denies some of them. In citing to defendant's document, we refer only to facts which are uncontested.

Department.[4] On November 9, 2001 plaintiff sustained a work-related injury while on the job.[5] Following her injury plaintiff was placed on light duty work.[6]

Approximately one month after her injury, plaintiff applied, was interviewed, and hired, for a position in the Quality Assurance ("QA") Department at Pilgrim's Pride.[7] In the QA Department, employees monitor processing standards and the quality of meat products, which requires the employee to check chicken temperatures, monitor the weights of products and inspect chicken salad for unwanted bones.[8]

From January 29, 2002 through July 25, 2002 plaintiff met with defendant's doctors on 11 occasions. After each visit an Injury Status Report was prepared which contained work restrictions based upon plaintiff's condition.[9] The Injury Status Report reveal that plaintiff's restrictions fluctuated during that period. For instance, beginning on May 28, 2002, she

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[4] Complaint ¶ 7.

[5] Complaint ¶ 11.

[6] Notes of Testimony of Wanda E. Mendez before the Workers' Compensation Commission, November 5, 2003 ("Mendez Testimony"), Exhibit 7 to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment (Defendant's Memorandum) at page 90.

[7] Notes of Testimony of the deposition of Wanda E. Mendez, September 15, 2004 ("Mendez Deposition"), Exhibit 4 to Defendant's Memorandum at pages 89-90.

[8] Affidavit of Barbara Davis dated November 11, 2004 ("Davis Affidavit"), Exhibit 1 to Defendant's Memorandum, ¶ 5.

[9] Restrictions, Exhibit 5 to Defendant's Memorandum.

was restricted from bending. This restriction continued through June 27, 2002, at which time a restriction allowing her to bend "occasionally" was placed on her. This occasional bending restriction was placed on plaintiff following an examination on July 25, 2002 with defendant's doctor.

In addition, plaintiff had lifting restrictions placed on her during this same period. In January 2002 she was limited to occasional lifting of 1 to 10 pounds for floor-knuckle and shoulder-overhead lifts, and 11 to 20 pounds for knuckle-shoulder lifts. In March she began to be able to lift 11 to 20 pounds occasionally for floor-knuckle and shoulder-overhead lifts. By June plaintiff was able to lift occasionally 21 to 30 pounds by knuckle-shoulder and shoulder-overhead lifts. On July 25, 2002 her restrictions were modified to allow her to lift between 21 and 30 pounds in all manners frequently.

Plaintiff's supervisors received copies of these restrictions and modified her tasks to conform to the restrictions.[10] Miss Mendez was able to perform all of the QA tasks, with accommodations.[11] The only job plaintiff could

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[10] Facts ¶ 4.

[11] Facts ¶ 4. Mendez Deposition at pages 53, 56-58 and 60. Davis Affidavit ¶ 6-10; Affidavit of Elizabeth Morales dated November 11, 2004, Exhibit 3 to Defendant's Memorandum, ¶¶ 4-5; Work Restrictions of Wanda E. Mendez from January 29, 2002 through July 31, 2002 ("Restrictions"), Exhibit 5 to Defendant's Memorandum.

not do in the QA position was bending to check for bones.[12]

Plaintiff was always in pain on the job, but any bending made it worse.[13] Her pain never got better while she was with Pilgrim's Pride.[14] Even with the bending, and the increased pain, plaintiff was able to complete the task of checking for bones whenever it was assigned to her, including on days in January, May, and August 2002.[15]

In early August 2002 Miss Mendez provided Pilgrim's Pride with restrictions from Dr. Mark J. Cerciello, which limited her to lifting less than 25 pounds and limited her from repetitive lifting.[16] At the time plaintiff presented these restrictions to defendant, she already had a similar restriction dated July 25, 2002 for "occasional" bending.[17] In May and early June 2002, plaintiff presented defendant with a no-bending

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[12] Mendez Deposition at page 60.

[13] Mendez Testimony at page 87.

[14] Mendez Testimony at page 85.

[15] Davis Affidavit ¶ 10; Mendez Deposition, at pages 53 and 57-58. A factual dispute exists as to whether defendant provided plaintiff with accommodations regarding bending. Defendant maintains that it allowed plaintiff to use a conveyor belt when checking for bones which eliminated the need for her to bend over. Defendant contends that it instructed plaintiff how to squat instead of bending over at the waist when checking for chicken bones and that plaintiff told defendant she could do this task. Plaintiff maintains that she had not been given the option to use the conveyor belt and that she had not been instructed in any alternative means to examine for bones. As discussed below, these factual disputes are not material to our determination.

[16] Mendez Deposition at pages 99-100; Restrictions at page 12.

[17] Restrictions at page 11.

restriction for which she was accommodated.[18]

At some point while she was still employed with defendant, plaintiff consulted with a company doctor, which revealed that she had a disc herniation that was a permanent injury.[19]

On August 7, 2002 plaintiff was directed to obtain a five-pound tuna sample for a United States Food and Drug Administration inspection.[20] Plaintiff delayed obtaining the sample because she "was in a lot of pain", but she did at some point provide the sample.[21] On August 7, 2002 defendant indicated to plaintiff that her employment was terminated for

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[18] Restrictions at page 8-9; Davis Affidavit ¶ 7; Mendez Deposition at page 101.

[19] Mendez Testimony at page 85.

[20] Davis Affidavit ¶ 11; Affidavit of Alan Landis dated November 10, 2004, Exhibit 2 to Defendant's Memorandum, ¶¶ 3-6; Mendez deposition at 119.

There is a factual dispute as to whether defendant instructed plaintiff to obtain additional samples. Defendant maintains that plaintiff was told on August 6, 2002 to obtain the tuna samples by that day and that she failed to do so. Defendant also maintains that plaintiff was told early in the morning on August 7, 2002 to complete the task, but that plaintiff failed to complete the task until some time in the afternoon.

Plaintiff maintains that she was not told on August 6, 2002 to collect any samples. Plaintiff acknowledges at one point on August 7, 2002 that she was told to get the samples in the morning and that she failed to do so within the time she was suppose to get it. (Mendez Testimony at 13.)

Plaintiff contradicted her own testimony in the same proceeding, testifying that she was not instructed to get the tuna until 1:00 p.m. on August 7, 2002. (Mendez Testimony at 114-115.) Shortly before that testimony plaintiff testified that she did not bring the tuna sample in the morning because she "was in a lot of pain". (Mendez Testimony at 113.)

As discussed below, these factual disputes are not material. There is no dispute that plaintiff was told at some point to obtain the samples and that she delayed in doing so because she was in pain.

[21] Mendez Testimony at page 113.

failing to provide the sample on time.[22]

After her discharge, plaintiff applied for Social Security Disability benefits.[23] In the application, plaintiff made several sworn statements concerning her inability to work. In the application, plaintiff indicated that she was seeking benefits because she "became unable to work because of any [sic] disabling condition on August 7, 2002", and that she is still disabled.[24] She averred that "I am twenty four hours a day and seven days a week with constant pain and discomfort. My physical capabilities are very poor."[25]

At another part of her application, plaintiff answered that "I'm not able to work or sit or stand for no longer than 10 to 15 minutes with out [sic] feeling severe pain and discomfort."[26]

In addition, plaintiff testified that despite trying various treatments, her pain continued and her condition declined.[27] In her application she wrote "I bee [sic] through

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[22] Davis Affidavit ¶ 11; Landis Affidavit ¶¶ 3-7; Mendez Deposition at page 119.

[23] Application for Social Security Disability Benefits of Wanda E. Mendez signed October 21, 2003 ("Mendez Application"), Exhibit 6 to Defendant's Memorandum at page 1.

[24] Mendez Application at page 1.

[25] Mendez Application at pages 13-14.

[26] Mendez Application at pages 5 and 17.

[27] Mendez Application at page 17.

different treatments and medications, but I have no [sic] gotten any improvement[. M]y condition is worse."[28]

Plaintiff notes that she could only climb 4 to 5 steps at a time because of pain[29] and that she could only walk for 20 feet on level ground without stopping because of "a stapping [sic] sharp pain on my right leg."[30]

Moreover, plaintiff contends that she cannot carry 10 or more pounds and that she cannot lift anything because of pain and discomfort, that she is very depressed and does not go out.[31] She gets upset with criticism, she has difficulty in public, she becomes frustrated and cannot manage changes in her daily schedule.[32] Furthermore, plaintiff has been referred to a psychologist or psychiatrist to help cope with the pain.[33]

Miss Mendez experiences constant pain which causes her to get only four hours of sleep a night.[34] The pain affects plaintiff's ability to concentrate. Plaintiff's sister helps her remember and writes her appointments on a calendar. Plaintiff asserts that she does not make decisions on her own, and she

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[28] Mendez Application at page 17.

[29] Mendez Application at page 5.

[30] Mendez Application at page 5.

[31] Facts ¶ 21.

[32] Facts ¶ 21.

[33] Facts ¶ 21.

[34] Facts ¶ 21.

requires assistance with her daily activities. Finally plaintiff avers that she depends on her sister and daughter to help her shop, pay bills, carry out the trash, and perform housework.[35]

In her application, plaintiff admits that prior to her discharge she was able to perform her job with the accommodations provided by her employer.[36]

The Social Security Administration issued a Notice of Award on January 12, 2004. In that decision, the Commissioner found that plaintiff became disabled on August 7, 2004 and awarded plaintiff $586.00 per month in benefits.[37]

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003).

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[35] Facts ¶ 21.

[36] Mendez Application at pages 14 and 16.

[37] Mendez Application at page 18.

Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000).

A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D. Pa. 1995).

DISCUSSION

Plaintiff brings two distinct ADA claims that have differing burdens of proof.

In Count One of her Complaint, plaintiff asserts a disparate treatment claim. To establish a claim for disparate treatment under the ADA, a plaintiff must meet three elements: "(1) She is a disabled person within the meaning of the ADA; (2) She is otherwise qualified to perform the essential function of the job, with or without reasonable accommodations by the

employer; and (3) She has suffered an otherwise adverse employment decision as a result of discrimination." Gaul v. Lucent Technologies, 134 F.3d 576, 580 (3d Cir. 1998).

Count Two of plaintiff's Complaint raises a claim of retaliation. To establish a prima facie case of retaliation the plaintiff must show "(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." Krouse v. American Sterilizer Company, 126 F.3d 494, 500 (3d Cir. 1997).

In adjudicating summary judgment as to both the disparate treatment and retaliation ADA claims, the court applies the three step burden shifting framework of McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Shaner v. Synthes, 204 F.3d 494 (3d Cir. 2000).

Initally, plaintiff must make a prima facie case of discrimination. If plaintiff meets this burden, a presumption of discrimination or retaliation arises; and defendant must then produce evidence which, if taken as true, permits the conclusion that there was a nondiscriminatory or nonretaliatory reason for the adverse employment action. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

If defendant meets this burden, plaintiff must produce "sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment actions." Sheridan v. E.I. DuPont de Nemours & Company, 100 F.3d 1061, 1067 (3d Cir. 1996)(en banc).

Defendant argues that plaintiff fails to meet its requirements under the first and third components of the McDonnell Douglas paradigm. First defendant agues that plaintiff has failed to establish a prima facie case for discriminatory discharge. Defendant argues that plaintiff has not established that she is either disabled or was perceived as being disabled as defined by the ADA. Defendant further argues that based upon her sworn statements in the social security claim, plaintiff fails to establish that she is a qualified individual. Third, plaintiff argues that there is not evidence of failure to accommodate.

Alternatively, defendant raises several arguments that, assuming plaintiff has established a prima facie case of discriminatory discharge, plaintiff's action must still be dismissed. Defendant argues that under the burden-shifting paradigm of McDonnell Douglas, plaintiff fails to establish that defendant's reason for terminating plaintiff was mere pretext.

Defendant then argues that plaintiff has failed to establish a retaliatory discharge claim. These arguments are

addressed in order.

Disability

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2).

Concerning the major life activity of working, "[t]he term substantially limits means 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."
29 C.F.R. §1630.2(j)(3)(I).

Defendant contends that plaintiff offers no evidence that prior to the date of her discharge she was significantly restricted in her ability to perform a class of jobs or broad range of jobs. Defendant asserts that plaintiff testified that prior to her discharge she performed all assigned tasks for her QA responsibilities. Furthermore, plaintiff testified that only one of her QA duties, bone inspection, increased her back pain, but she noted that she was still able to perform the task.

Plaintiff asserts that defendant was on notice of her disability as of November 2001 after she sustained a back injury

at work. Plaintiff contends that she attended physical therapy with defendant's doctors and that one of them, after conducting an MRI, concluded that she sustained a permanent herniation. Plaintiff argues that these injuries severely impacted daily functions.

We agree with defendant that plaintiff has failed to meet her burden. Plaintiff presents no evidence that her back problems significantly restricted her ability to perform "either a class of jobs or a broad range of jobs in various classes as compared to the average person". The record presented reveals that plaintiff, after her November injury, was given light duty work before being hired for the QA position for which she had applied.

The record reveals that her condition brought about work restrictions that fluctuated in level, but that did not prohibit her from working. Plaintiff does not allege that defendant did not accommodate each of plaintiff's changing restrictions during that period. Further, the record reveals that in plaintiff's QA position she was able to perform all of her job functions.

Although the record demonstrates that plaintiff had restrictions placed on her ability to work, she does not establish how these restrictions limited her either from a class of jobs or a broad range of jobs in various classes, as compared

to the average person. Plaintiff argues that defendant failed to implement the restriction imposed by her own treating doctor in the July 31, 2002 excuse slip. However, plaintiff disregards the fact that defendant's physician placed a nearly identical lifting restriction on plaintiff,[38] and a nearly identical bending restriction.[39] Plaintiff does not allege that she was required to lift items in violation of this restriction or of any of the restrictions.

Under these circumstances, we conclude that plaintiff has not established that she was disabled as that term is defined by 42 U.S.C. §12102(2) and 29 C.F.R. §1630.2(j)(3)(I).

Disparate Treatment

In her Complaint, plaintiff alleges that "[o]n August 7, 2002, Defendant intentionally terminated Plaintiff's employment due to Plaintiff's disability or *perceived* disability."[40] (Emphasis added.) In this paragraph, plaintiff alleges as an alternative basis for relief that, even if she were not disabled under the ADA, defendant regarded her as so. As noted earlier, the ADA defines a disability as "(A) a physical or

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[38] The lifting restriction placed on plaintiff by her physician was 25 pounds. The lifting restriction suggested by defendant's physician was 21 to 30 pounds.

[39] Plaintiff's physician precluded her from repetitive bending. Defendant's doctor limited plaintiff to occasional bending.

[40] Complaint ¶ 19.

mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or *(C) being regarded as having such an impairment."* 42 U.S.C. §12102(2). (Emphasis added.)

To prove that defendant regarded plaintiff as disabled, plaintiff must establish that defendant: (1) mistakenly believed that plaintiff has a physical impairment that substantially limits one or more major life activities; or (2) mistakenly believed that an actual, nonlimiting impairment substantially limits one or more major life activities. Sutton v. United Airlines Incorporated, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). "In both cases, it is necessary that a covered entity entertain misperceptions about the individual - it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment, when in fact, the impairment is not so limiting." Sutton, 527 U.S. at 489, 119 S.Ct. at 2150, 144 L.Ed.2d at 466-467.

Even an innocent misperception based on nothing more than a simple mistake of fact as to the severity of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. Deane v. Pocono Medical Center, 142 F.3d 138, 144 (3d Cir. 1998). The fact that an employer is aware of an employee's disability, or even that

the employer made accommodations for a disabled employee, is insufficient to demonstrate that the employer regarded an employee as disabled. Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996); Sharkey v. Federal Express, No. 98-CV-3351, 2001 U.S. Dist. LEXIS 72, at *21-22 (E.D. Pa. January 9, 2001)(Giles, C.J.).

Defendant maintains that plaintiff has failed to present any evidence to establish that defendant regarded plaintiff as disabled as defined by Sutton. In her memorandum in response to defendant's motion for summary judgment, plaintiff does not respond to defendant's argument. After reviewing the record, we agree that plaintiff presented no evidence that defendant regarded her as disabled.

We agree with defendant that plaintiff cannot claim a discriminatory discharge based on "perceived disability" when she claims an inability to perform work which her employer believed she could do when the employer gave her reasonable accommodation so that she could perform the work. The record demonstrates that defendant clearly believed that defendant was capable of working despite her disability.

Defendant initially placed plaintiff on light duty work following her injury. Thereafter, on plaintiff's application, defendant hired her for a QA position. The record further shows that defendant modified plaintiff's work requirements in

conformance with the applicable work restrictions and that she was able to do her job with these accommodations.

The record also reflects that, if anything, plaintiff perceived herself to be more disabled than both defendant and her own doctor determined. This is indicated by plaintiff's belief that she could not bend at all, when her own doctor indicated she could bend occasionally.

Accordingly, we conclude that no reasonable jury could find that defendant regarded plaintiff as disabled. Therefore plaintiff cannot establish a "perceived disability" basis to establish the first element in her prima facie case under the ADA.

Accomodation

The ADA prevents employers from discriminating against qualified individuals on the basis of a person's disability. Specifically §12111 of the ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8).

Defendant contends that plaintiff fails to establish that she is otherwise capable of performing the essential function of the job, with or without accommodation. In support of its contention defendant relies on plaintiff's social security

application and her statements therein, including that she became disabled on August 7, 2004. Defendant asserts that these statements preclude plaintiff's ADA claims.

In response, plaintiff relies on the decision of the United States Supreme Court in Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). Plaintiff contends that Cleveland stands for the proposition that pursuit of a social security claim does not necessarily preclude an ADA claim. Plaintiff argues that "Her undisputed ability to perform the essential functions of her job until her termination is not inconsistent with her total disability for Social Security purposes AFTER her termination."[41] (Emphasis in original.) Plaintiff asserts that she only needs to establish that she was a qualified individual with a disability prior to her termination.

In Cleveland the Supreme Court addressed the effect of a social security claim on an ADA claim. The Court noted that "[t]he ADA seeks to eliminate unwarranted discrimination against disabled individuals in order to both guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." Cleveland, 526 U.S. at 801, 119 S.Ct. at 1601, 143 L.Ed.2d at 974.

The Court further explained that the Social

[41] Wanda E. Mendez's Brief in Opposition to Defendant's Motion for Summary Judgment at pages 9-10.

Security Act assists disabled individuals, who are defined under the act as persons with an "inability to engage in any substantial gainful activity by reason of any...physical... impairment" which has lasted or will likely last for at least one year. 42 U.S.C. §423(a)(1). The impairment must be of the kind that would prevent the person from returning to her previous work or, considering such factors as the person's education, age and work experience, would keep her from "engag[ing] in any any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §423(d)(2)(A).

The two acts differ in that Social Security Act does not consider the issue of reasonable accommodation. The Supreme Court noted that the Social Security Act does not get into the issue of reasonable accommodation because its statutory goal is to provide seriously disabled persons "critical financial support" on a timely basis and that the issue of reasonable accommodation is highly fact-specific such that the time for proper inquiry into it could unduly delay disabled individuals from receiving necessary financial support. Cleveland, 526 U.S. at 803, 119 S.Ct. at 1602, 143 L.Ed.2d at 975.

Furthermore, the Court reasoned that a situation could arise where "an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the person could not perform her own job

(or other jobs) *without* it." Cleveland, 526 U.S. at 803, 119 S.Ct. at 1602, 143 L.Ed.2d at 975. (Emphasis in original.) A person may qualify for social security benefits because the person is unable to engage in gainful activity because of the disability, but may also succeed under the ADA because with reasonable accommodations, the person might be able to work.

Although a social security claim does not necessarily preclude an ADA claim, the Supreme Court suggested that cases may arise where the former may genuinely conflict with the latter, such that summary judgment may be appropriate as to the ADA claim. Cleveland, supra. The Court stated:

> An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" -- that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U.S.C. §12111(8). And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her ADA case -- at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

Cleveland, 526 U.S. at 806, 119 S.Ct. at 1603, 143 L.Ed.2d at 976-977.

To defeat summary judgment, that explanation must be

sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation. Cleveland, 526 U.S. at 807, 119 S.Ct. at 1604, 143 L.Ed.2d at 977.

In her social security application filed October 30, 2003, plaintiff indicates that "I became unable to work because of my disabling condition on August 7, 2002."[42] She also stated that "I am still disabled".[43] Plaintiff proclaims in her application that she cannot work at any job because she experiences debilitating pain requiring her to rest if she sits, stands or walks for more than ten minutes.[44] She avers that she is "twenty four hours a day and seven days a week with constant pain and discomfort".[45]

Plaintiff, in assessing her own condition, notes that her "physical capabilities are very poor."[46] She asserts the conclusion that she is "not able to work" because "who wants to hire somebody that can not [sic] sit, or stand, bend, [or] walk

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[42] Mendez Application at page 1.

[43] Mendez Application at page 1.

[44] Mendez Application at page 13.

[45] Mendez Application at page 14.

[46] Mendez Application at page 14.

more than five or ten minutes without getting a rest in between due to my pain."[47] The Social Security Administration found these statements convincing and awarded plaintiff benefits.

As discussed in Cleveland, we conclude plaintiff's statements negate an essential component of plaintiff's ADA claim. The second element of a prima facie ADA claim requires plaintiff to show that "with or without reasonable accommodation [she] can perform the essential functions of her job." Gaul, supra. "[T]he attainment of disability benefits is certainly some evidence of an assertion that would be inconsistent with the argument that the party is a qualified individual under the ADA." Motley v. New Jersey State Police, 196 F.3d 160, 166 (3d Cir. 1999).

To defeat defendant's motion for summary judgment, plaintiff must offer some explanation for the apparent inconsistencies regarding the extent of injuries. Cleveland, supra; Motley, supra. In her memorandum opposing summary judgment, plaintiff offers the following explanation.

Plaintiff argues that she must establish that she was a qualified individual able to work with accommodations *prior* to her termination, not that she is qualified after her termination. She argues that her inability to work following her termination does not mean she was unable to work before her termination.

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[47] Mendez Application at page 13.

Plaintiff also argues that Cleveland is distinguishable from the within matter because it involved a case in which the inconsistency between the statements concerned the same time period. Plaintiff notes that in Cleveland plaintiff sought social security benefits beginning six months before her termination, such that there was on overlap between the time she indicated she was disabled for social security purposes and the time for which she sought relief under the ADA. Plaintiff also contends that the Social Security Act does not address the issue of reasonable accommodations.

Plaintiff also relies on Cleveland for the premise that a plaintiff's disability may change over time. Plaintiff argues that a plaintiff's statements at the time of a social security application may not reflect that individual's abilities at the time of the employment decision.

For the following reasons we conclude that plaintiff's explanation would not warrant a reasonable juror to conclude that plaintiff could perform the essential functions of her job, with or without accommodations.

For the purpose of receiving social security benefits, disability is defined as "a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy." 20 C.F.R. §404.1505(a). In her social security application

plaintiff averred that her injury began on November 9, 2001.

In response to the question "When did you become unable to work because of your illnesses, injuries or conditions?" she answered "11/9/01" adding the phrase "modified duty."[48] Two questions later on the application, she responded "yes" to the question of whether she returned to work after her injury date, but she also wrote in the phrase "modified duty".

In granting plaintiff social security disability benefits, the Social Security Administration had to conclude that she was unable to perform her "previous work". In light of plaintiff identifying that her injury occurred on November 9, 2001, that she had been working since then on modified duty, and that her disabling condition rendered her unable to work as of August 7, 2002, this conclusion as to her previous work had to have been made in reference to her modified work. Accord, Foster v. Pathmark, No. 99-CV-3433, 2002 WL 442825 (E.D. Pa. March 6, 2002)(Reed, S.J.).

Plaintiff contends that the findings of the Social Security Administration should be discounted because defendant has attested that plaintiff was able to perform her job prior to termination. Plaintiff essentially argues that these more debilitating conditions arose sometime following her discharge. We disagree.

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[48] Mendez Application at 14.

Plaintiff ignores the language of the ADA which requires her to prove that "with or without reasonable accommodation, [she] can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The language of the Act does not provide that she must show that she once could perform the job. Rather, she must establish that she *can* perform the essential functions of the position. The need to show a present ability to perform the duties of the job is even more clear because plaintiff as part of the relief she requests, seeks reinstatement to her former position, past income, benefits and earnings, together with future income, benefits and earnings.[49]

Plaintiff details numerous problems in her social security application that she avers prevent her from being able to work anywhere. She offers no explanation as to how she could work with these conditions or as to what accommodations would be necessary to enable her to work with these conditions.

Accordingly, we are not persuaded that plaintiff's explanation would warrant a reasonable juror concluding that plaintiff could perform the essential functions of her job, with or without accommodations.

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[49] Complaint ¶¶ 20-24, as well as the prayer for relief to Count One.

Failure to Accommodate

In the alternative, defendant argues that plaintiff has failed to identify what accommodation defendant should have provided. Defendant contends that plaintiff ignores or misapplies her own doctor's restriction letter which placed restrictions consistent with those of defendant's doctor. Additionally, defendant asserts that plaintiff ignores the testimony of defendant officials Barbara Davis and Elizabeth Morales who both testified that accommodations were made by their instructing plaintiff in alternative means for examining chicken bones that did not require bending.

In this case, plaintiff argues that her doctor provided defendant with a restriction that she could not bend, and that defendant failed to abide by that restriction. She contends that, following her giving defendant the note from her doctor, defendant failed to move her to a job that did not require bending. Plaintiff's argument for accommodation is best summed up in her deposition:

> I feel discrimination because I got this injury at work and I couldn't do the work they want me to do and instead of changing me from position, they fire me because I can't do my work on my bending, my restrictions. I came from my own doctor with restrictions and that same week they fire me. They say they can't deal with the other doctor restrictions.

(Mendez Deposition at page 99.)

As to the issue of reasonable accommodations, plaintiff has the burden of identifying an accommodation whose costs do not on their face outweigh the benefits. Walton v. Mental Health Association of Southeastern Pennsylvania, 168 F.3d 661, 670 (3d Cir. 1999). If plaintiff meets her burden, then defendant has the burden of showing that such accommodation would have created an undue hardship. Skerski v. Time Warner Cable Company, 257 F.3d 273, 284 (3d Cir. 2001).

Whether defendant instructed plaintiff in alternatives to bending, is an open question of fact. Defendant asserts that plaintiff cannot refute the testimony of her two supervisors that they instructed her in these alternatives. However, plaintiff does refute this testimony, arguing that she was not instructed in any alternatives. In doing so she raises a factual issue.

Whether this factual issue is material, is a different matter. Making all factual inferences in favor of plaintiff as we are required to do, and thus assuming that defendant had not provided plaintiff with accommodations that would eliminate her need to bend at all, we nevertheless conclude plaintiff has not sustained her burden of identifying an accommodation that defendant would be required to make.

Plaintiff's request for additional accommodations arises from the restrictions set by her own doctor. She argues that she provided defendant with the restrictions from her doctor

but instead of accommodating her by not making her bend or moving her to a job that required no bending, she was told that restrictions from outside doctors could not be applied. She argues that she was told to wait until she saw the doctor again before any additional accommodations would be made.

Plaintiff's request for work that would not require her to bend at all arises from a misunderstanding of the restrictions provided by her doctor. Plaintiff testified that she thought her doctor had issued a different set of restrictions than defendant's but that she could not remember how they were different.[50] The record reveals that contrary to plaintiff's belief that the restrictions were different as to bending, they were not.

Accordingly we conclude that plaintiff has not identified any additional accommodation that defendant should have made.

Reason for Termination

Defendant argues alternatively that, assuming that plaintiff has established a prima facie case, plaintiff has not fulfilled her obligation under the McDonnell Douglas burden-shift.

As discussed above, once plaintiff establishes a prima

[50] Mendez Deposition at page 101.

facie case, a presumption of discrimination arises and defendant must then produce evidence which, if taken as true, permits the conclusion that there was a non-discriminatory or non-retaliatory reason for the adverse employment action. Fuentes, supra.

If defendant meets this burden, plaintiff must produce "sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment actions." Sheridan, 100 F.3d at 1067.

Defendant presented evidence that plaintiff was discharged for failing to obtain a tuna sample on time for a government inspection. Defendant's evidence is that plaintiff was told on August 6, 2002 by her supervisor Barbara Davis to obtain five, five-pound samples of tuna for an upcoming inspection by the United States Food & Drug Administration. Ms. Davis told plaintiff to bring the samples that day to the QA office refrigerator. Defendant asserts that plaintiff failed to do so and that, when asked the next morning why she failed to secure the samples, she indicated that she had simply forgotten to do so.

Ms. Davis told plaintiff early on the morning of August 7, 2002 to immediately complete the task. Plaintiff again failed to collect the samples. Later that afternoon, after the FDA had arrived to retrieve the samples, plaintiff brought the

sample to the refrigerator. Defendant asserts that when plaintiff was confronted about bringing the sample late, she offered no reason for her refusal to abide by her supervisor's directives and she appeared unconcerned about not accomplishing the assigned task. Defendant contends that plaintiff was terminated for failing to retrieve this sample in time for the inspection.

This evidence, if taken as true, permits the conclusion that there was a non-discriminatory or non-retaliatory reason for the adverse employment action. Fuentes, supra. The evidence establishes that plaintiff was terminated for failing to timely perform an important task. Accordingly, we conclude that defendant has satisfied its burden of articulating a legitimate, non-discriminatory reason for plaintiff's termination.

Pretext

Under the McDonnell Douglas framework, the burden then shifts to the plaintiff to establish that defendant's stated reason for terminating her was a pretext for discrimination. Plaintiff contends that defendant's presentation of facts is not credible. Plaintiff argues that she was not told on October 6, 2002 to retrieve the samples. She argues that no one had impressed upon her the urgency of the task. Furthermore, plaintiff asserts that when she finally submitted the sample, she

was told to report to human resources the next day and that when she did so, she was fired by a human resource person without explanation.

In meeting her burden, plaintiff cannot “avoid summary judgment simply by arguing that the factfinder need not believe the defendant's proffered legitimate explanations.” Fuentes, 32 F.3d at 764. However a plaintiff does not have to “adduce evidence directly contradicting the defendant's proffered legitimate explanations.” Id. Rather,

> to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that *each* of the employer's proffered non-discriminatory reasons ... was either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).

Fuentes, supra.

Plaintiff can meet this burden by "demonstrat[ing] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder *could* rationally find them 'unworthy of credence' and hence infer ‘that the employer did not act for [the asserted] non-discriminatory reasons.’” Fuentes, 32 F.3d at 765. (Emphasis in original.)

We conclude that plaintiff’s explanation amounts to little more than an argument that the factfinder need not believe

defendant's explanation. Plaintiff raises factual disputes as to how many times plaintiff was told to retrieve the sample, how many samples she was to obtain, and on what date she was first told to secure the samples, but there is no dispute that she was told at least once to get the sample by a certain time, and that she failed to do so. Therefore, plaintiff does not demonstrate any implausibilities or inconsistencies with employer's proffered reason for terminating her.

Plaintiff asserts that she was not aware that time was of the essence. However, her testimony before the Workers' Compensation Commission suggests otherwise. Before the Commission plaintiff was asked "[a]nd you didn't bring the samples of tuna salad when were supposed; did you?" to which she responded "No, I didn't bring in the morning, the afternoon."[51]

Plaintiff has presented no evidence or arguments that would make a reasonable factfinder rationally conclude that defendant's proffered reason for termination was unworthy of credence. Accordingly, even if she has established a prima facie case, because she fails to meet her burden under the McDonnell Douglas framework, her disability discrimination claim must fail.

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[51] Mendez Testimony at page 13.

Retaliation

Count Two of plaintiff's Complaint alleges that defendant terminated plaintiff's employment in retaliation for plaintiff filing a state workers' compensation claim. To establish a prima facie case of retaliation plaintiff must show (1) plaintiff engaged in protected employee activity; (2) adverse action by the employer either after or contemporaneous with plaintiff's protected activity; and (3) a causal connection between plaintiff's protected activity and defendant's adverse action. Krouse, supra.

Plaintiff has the burden to "produce at least *some* evidence that connects the dots between her claim for workers' compensation and her termination, such as adverse personnel action promptly after her workers' compensation claim was made [or] statements by supervisors referencing her claim." Landmesser v. United Air Lines, Inc., 102 F.Supp.2d 273, 278 (E.D. Pa. 2000)(Reed, S.J.)(Emphasis in original.)

Defendant contends that plaintiff has failed to meet her burden as to this claim. In her memorandum in response to defendant's motion for summary judgment, plaintiff does not respond to defendant's argument. Plaintiff stated in her deposition that she had no information that indicates she was terminated based on a workers' compensation claim.[52]

[52] Mendez Deposition at pages 136-137.

As noted above, plaintiff may not rest on the allegations of her complaint. Ridgewood Board of Education, supra. Additionally, plaintiff filed her worker's compensation claim on August 9, 2002, two days after her termination.[53] After reviewing the record, we agree with defendant that plaintiff has failed to establish a retaliation claim. Accordingly we grant Defendant's Motion for Summary Judgment on Count Two of plaintiff's Complaint.

Conclusion

For the reasons discussed above, we grant Defendant's Motion for Summary Judgment. We enter judgment in favor of defendant on both counts of the Complaint and dismiss plaintiff's Complaint.

[53] Claim Petition for Workers' Compensation dated August 9, 2002, Exhibit 8 to Defendant's Memorandum.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WANDA E. MENDEZ,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-01095
	)	
vs.	)	
	)	
PILGRIM'S PRIDE CORPORATION,	)	
	)	
Defendant	)	

O R D E R

NOW, this 25th day of August 2005, upon consideration of Defendant's Motion for Summary Judgment filed November 15, 2004; upon consideration of the Memorandum in Support of Defendant's Motion for Summary Judgment filed November 15, 2004; upon consideration of Wanda E. Mendez's Brief in Opposition to Defendant's Motion for Summary Judgment filed December 1, 2004; and for the reasons contained in the accompanying Memorandum,

IT IS ORDERED that Defendant's Motion for Summary

Judgment is granted.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge