

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

ZSAZSA MILLINGTON : CIVIL ACTION  
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 v. :  
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 TEMPLE UNIVERSITY SCHOOL :  
 OF DENTISTRY : NO. 04-3965

MEMORANDUM

Bartle, C.J.

October 13, 2006

Pro se plaintiff ZsaZsa Millington filed this action against defendant Temple University School of Dentistry ("Temple") under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973 ("RHA"), 29 U.S.C. § 701 et seq. Before the court is Temple's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Rule 56(c) permits us to grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See Anderson, at 254. We review all evidence and make all reasonable

inferences from the evidence in the light most favorable to the non-movant. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004). The non-moving party may not rest upon mere allegations or denials of the moving party's pleadings but must set forth specific facts showing there is a genuine issue for trial. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

I.

The following facts are either undisputed or viewed in the light most favorable to the plaintiff. Temple is accredited by the American Medical Association and is one of the oldest continually operating dental schools in the country. Each year the school enrolls approximately 125 students in its freshman class. After completing four years of successful study, the student receives the degree Doctor of Dental Medicine.

The plaintiff enrolled at Temple in the fall semester of 1997. During her first semester, plaintiff missed fourteen days of class. Not only did the plaintiff have a poor attendance record but she also failed General and Oral Histology and Dental Biochemistry and Nutrition.<sup>1</sup> At the close of the 1997 fall

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1. Temple afforded plaintiff the opportunity to remedy her subpar performance through its remediation program during its summer session in 1999. In the remediation program, a student meets with the professor one-on-one to identify the student's difficulty in the course. Professor and student then create a study plan to rectify the problem. At the conclusion of that course of study, the student is provided another opportunity to take the exam he or she failed. In doing so the student may raise his or her grade to a "C" or "D."

In the fall 1997 semester the plaintiff failed General and  
(continued...)

semester her grade point average ("GPA") was a substandard 1.78, and she ranked 111 out of the 114 students in her class. Due to her failure to maintain a 2.0 GPA, Temple placed the plaintiff on academic probation.

Although the plaintiff entered the spring 1998 semester on academic probation, she did not improve significantly. While she continued to miss class, she was able to pass her courses, earning a GPA of 2.06 for the semester. She was unable to maintain this level of performance, however, in the fall 1998 semester. She missed several classes and earned a letter grade of "C" in four courses and a "D" in another. The plaintiff initially received an incomplete in one of her classes, but the grade was later changed to a "B." Plaintiff again was placed on academic probation.

Shortly after the start of the spring 1999 semester, on January 18, the plaintiff claims that she injured herself when she slipped and fell inside a building at Temple. She asserts that while descending a flight of stairs she fell and hurt her neck.

On February 16, 1999, nearly one month after her alleged injury, the plaintiff was scheduled to take a midterm examination in her Sophomoric Pediatric Dentistry class. The day

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Oral Histology. After remediation in the summer of 1999 the grade was changed to a "C." The plaintiff also remediated her failure in Dental Biochemistry and Nutrition and earned a final grade of "D." With these changes, her GPA for the fall 1997 semester was 2.13.

of the exam she informed the professor by telephone that she had injured her neck and would not be able to take the exam. The professor arranged with the plaintiff to have her take the exam on February 19, but she did not appear as scheduled. Instead, the plaintiff left the professor a voicemail claiming that she was too "ill"<sup>2</sup> to take the exam and that she would contact the professor to arrange another time to do so after students returned from Temple's spring recess on March 1. The professor did not hear from the plaintiff until March 11, more than one week after classes resumed, when she left another voicemail message indicating she would be available to sit for the exam the following day. On March 12, the plaintiff changed her mind and asked the professor if she could skip the midterm and have her entire grade depend on the cumulative final exam. The professor rejected plaintiff's proposal. Instead, they decided that the plaintiff would take the midterm on March 22, provided she produced a proper excuse from a physician. March 22 came and went without any word from the plaintiff. On March 26, the professor informed her by letter that she failed the midterm.

It was not until May, 1999, after nearly two years at Temple, that the plaintiff submitted her first request for

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2. Throughout her enrollment at Temple, the plaintiff often missed exams and classes due to "illness" as recounted in greater detail below. While we recount the facts in the light most favorable to the plaintiff, plaintiff has not provided documentation to support her claims that she was "ill." Consequently, we are left only with her assertions that she was "ill."

accommodations to Temple's Disability Resources and Services Department ("DRS"). The plaintiff requested several accommodations including the following: (1) extension of time to complete class assignments; (2) the freedom to stand periodically while in class and walk short distances; and (3) the placement of furniture "to accommodate any limitations in standard setting." On May 5, 1999, Temple agreed to provide the requested accommodations even though it made no determination whether the plaintiff was permanently disabled.

Despite being provided these accommodations, the plaintiff's scholastic performance did not improve significantly on her final exams for the spring 1999 semester. The plaintiff failed Oral Radiology, though she was able to raise the grade to a "D" by subsequent remediation. She also received a "D" in Pediatric Dentistry and did not complete Local Anesthesia. She remediated the latter, eventually earning a "D" in that class. Though she enrolled in Temple's 1999 summer session, she did not complete Oral Pathology, the only non-clinical class she took during the summer.

In August, 1999 the plaintiff again sought various accommodations through DRS for the classes for the fall 1999 semester. She asked for: (1) extended (double) time for test administration; (2) testing proctored by DRS; (3) the use of a computer, word processor, calculator, and CCTV for testing; (4) permission to tape record class lectures; and (5) a seat in the

front of the class. Without determining whether plaintiff was permanently disabled, Temple agreed to the accommodations.

The accommodations had little effect, however, in raising her level of performance during the fall of 1999. As on several occasions in previous semesters, the plaintiff was often absent from class and during administration of exams. On November 4 plaintiff was scheduled to take a midterm examination in Pharmacology. She did not appear and instead called her professor, explained she was "ill," and agreed to take the exam on November 8. On November 8, the plaintiff informed the professor she was "ill" and rescheduled the exam for November 11. That day the plaintiff called to report she was "ill" and said she would take the exam on November 15. The same sequence of events occurred on November 15, November 17, and November 18. She did not appear. On November 18, plaintiff agreed to take the exam on the following day. On November 19, plaintiff did not show up as she had previously agreed to do and did not provide requested documentation that she was "ill."<sup>3</sup> Consequently, she failed the midterm exam in Pharmacology.

At the close of the fall 1999 semester the plaintiff failed her courses in Pharmacology and Restorative Dentistry

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3. The plaintiff was told that she must present a doctor's note explaining that she was "ill" on November 4, the date she was originally slated to take the midterm examination. On November 17, she provided an emergency room discharge dated November 6. On November 18, the plaintiff reported that she had previously attempted to contact the relevant doctor but he had been called away to an emergency. The record does not reveal that the requested documentation was ever provided.

because she did not take the final examinations in either class.<sup>4</sup> As her GPA for the semester was a meager 0.50, she was again placed on academic probation. Temple provided the plaintiff the opportunity to retake the examinations during the spring 2000 semester. Again, she did not show up. The plaintiff continued to struggle with her course work and failed to take her Clinical Endodontology midterm exam on three scheduled occasions. When she eventually sat for the final exam in that subject, she failed it. Temple offered the plaintiff the opportunity to retake the final exam. She failed it a second time and declined Temple's offers both to help her with her struggles in the class and to take the exam for a third time. Nevertheless, Temple offered the plaintiff a fourth opportunity to take the final exam. She did not attend "due to illness."

In March, 2000, through a letter sent by Shwe Z. Tun, the neurologist treating the plaintiff, she requested the following accommodations "due to trauma involved hitting head":

1. Inability to hold neck down while looking in patient's mouth for longer than five (5) minutes without chronic neck pain due to fall. She may, therefore, be able to work two (2) days a week clinically.
2. She has to stand periodically while doing a procedure, if sitting for longer than 30 minutes due to muscle spasms in back and numbness and tingling in feet. This is resolved by periodically standing.
3. Inability to hold hand drill for prolonged time due to weakness in left arm

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4. The record contains a four-line doctor's note the plaintiff provided to excuse her absence from various final exams in December, 1999 due to migraines.

and some neural involvement. This often results in use of her right arm only. She is used to steadying drills with both hands. She will need periodic in between drilling.

4. Sometimes she may need to resolve severe migraines with rest only. She may be absent some days and doctor's note can be available.
5. She may need pairing with clinic tutor to have clear understanding of completing clinic requirements efficiently.

According to didactic extensions:

1. Ms. Millington needs extended time beyond regular testing time to complete examinations. Medical side effects make her drowsy and sometimes incoherent.
2. She may need to delay an exam due to severe migraine headaches and/or neck pain. Relief may be accomplished with administration of migraine medication.
3. Sometimes relief of headaches may be brought about by bed rest and avoiding direct light.

Temple granted the plaintiff some of the accommodations and denied those it felt would fundamentally alter the curriculum of the dental school. The school rejected her requests to work only two days each week in the clinic due to the significant negative impact such would have on the continuity of care provided Temple's patients and her ability to complete course requirements. Temple also denied her doctor's suggestion that she be permitted to hold drills with two hands during procedures and take frequent rests due to the potential danger to patients and the increased likelihood of their discomfort.

The spring 2000 semester did not go well for the plaintiff. Her transcript for the semester contains "F" grades in six classes, including Operative Dental Clinic, Pediatric

Dental Clinic, Periodontology Clinic, Radiology Clinic, and Restorative Dentistry. She did not complete Oral Surgery, Admissions Clinic, Emergency Services Clinic, and two other classes. Her only passing grade was in the Oral Surgery Clinic.

In late June, 2000 the plaintiff sought and received permission to take a leave of absence from Temple. Her leave extended through the fall 2000 semester. She informed Temple that she planned to return on January 2, 2001. In November, 2000, plaintiff again sought accommodations. She telephoned Dr. Sarah Gray, the Associate Dean of Academic Affairs, who informed her that she had to submit such a request in writing. On January 14, the plaintiff sent Dr. Gray a letter seeking the following:

1. Extended time to complete class and clinical assignments.
2. Didactic test taking increased to double time.
3. Clinic cart will not be used due to size and weight both without instruments in it and with instruments in it. Currently seeking alternative.
4. Duty days should be limited to working only one half day and cannot be consecutive days.
5. Clinic day reduced to working only half day and cannot be consecutive days.
6. Duty days and clinic days must never be consecutive.
7. Maximum of three patients to start. Additional patients will be requested when needed from Dr. Sperazza.
8. A hard chair, with arched back similar to the ones currently located in first floor laboratory will be needed on each clinic floor to work on patients.
9. A hard chair at back of classroom reserved is required to sit during lecture.

10. Whilst doing procedures may need to stand periodically.
11. Will need dental assistant's help with some procedures.
12. May need to walk short distances during lecture/clinic.

Temple granted requests one through three and seven through twelve. It rejected the remaining proposals because it concluded they would have a negative impact on the care provided its patients and the plaintiff's ability to complete course requirements.

Again, despite these accommodations, the plaintiff continued to have difficulty with attendance and completing her work during the spring 2001 semester. She was absent several times for multiple days and did not take all of her exams. The plaintiff requested a second leave of absence, but Dr. Gray postponed her consideration of it until after the Promotions Committee met regarding plaintiff's status at Temple. Due to her record of inadequate performance, the Promotions Committee dismissed her from the School of Dentistry and informed her of its decision by a letter sent July 31, 2001. The plaintiff appealed this determination to the school's Appeals Committee, which after a hearing overturned the decision of the Promotions Committee on August 17, 2001. As a condition of her continued enrollment, however, the Appeals Committee required her to repeat her third year in its entirety. She appealed the portion of the Appeals Committee's decision requiring her to repeat her third year to the Dean of Temple School of Dentistry, Martin F. Tansy.

Dean Tansy agreed with the decision of the Appeals Committee. After the Appeal Committee issued its decision, Dr. Gray approved a second leave of absence for the plaintiff.

The plaintiff returned from her second leave of absence on April 22, 2002. During the summer session of 2002, she missed multiple class days on several occasions. Her absenteeism continued in the fall 2002 semester. She missed the midterm exam in Oral Pathology and did not take advantage of an offer to take it at a later time because she was "sick." Significantly, at least two patients complained to Temple that she missed appointments with them throughout the summer and fall of 2002 and was very difficult to contact.

On November 5, 2002, the plaintiff again requested additional accommodations in the form of: (1) extended time (up to double) for didactic testing in a quiet, proctored area such as DRS; (2) availability of a hard backed chair with a firm seat in classrooms and clinics; and (3) consideration for need to stand periodically and walk short distances during class. Temple granted these requests. Despite these accommodations, she continued to miss classes and examinations. She often failed the exams she did take. For example, she failed Oral Pathology and Oral Surgery and finished the fall 2002 semester with an unsatisfactory GPA of 1.44. On January 9, 2003, she petitioned for the same accommodations recounted above and was again granted them. Temple also provided her the use of a dental assistant and allowed her to see the minimum number of patients.

Throughout the spring 2003 semester, plaintiff continued to miss class. She claimed she suffered from "chronic bronchitis" though doctors treating her at the time described her condition as a "reinjury of her cervical spine region." Her doctors also requested that she be allowed until September 30, 2003 to complete her requirements. Of the fourteen grades listed on the plaintiff's transcript for the spring 2003 semester, she failed seven, took "incomplete" in two others, and received three "B" grades and one "C."<sup>5</sup>

On May 2, 2003, the Promotions Committee voted to dismiss the plaintiff from Temple based on her failure to satisfy the regulations of the dental school program. The Appeals Committee upheld the expulsion on May 13, and she again appealed to the Dean. After canceling two appointments to meet with the Dean of Temple, she finally did meet with him on June 30. Dean Tansy gave the plaintiff one final chance to remediate all failing grades prior to August 22, 2003. On August 14, she sought an extension until September 30. Because Temple requires students complete prior work before the start of a new semester, it denied the request. On August 26, 2003, Temple formally dismissed plaintiff.

## II.

Title II of the ADA forbids discrimination against certain, qualified individuals with disabilities and ensures such

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5. Plaintiff received an "NR" in the remaining course.

individuals are provided reasonable accommodations so that they are not "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Congress believed Title II was necessary to address "pervasive discrimination in such critical areas as ... housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 487 (4th Cir. 2005) (quoting 42 U.S.C. § 12101(a)(3)). The RHA imposes nearly identical obligations on all entities that receive federal funding. See 29 U.S.C. § 794.

To establish a violation of the ADA, the plaintiff must demonstrate (1) that she is a "qualified individual with a disability;" (2) that the defendant is an entity covered under the ADA; and (3) that she was denied the opportunity to participate in or benefit from defendant's services, programs, or activities. See 42 U.S.C. § 12132. To prove a violation of § 504 of the RHA, plaintiff must demonstrate (1) she is an individual with a disability; (2) she is otherwise qualified to receive the benefit in question; (3) she was denied the benefits of the program solely by reason of her disability; and (4) the program receives federal financial assistance. See Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1009 (3d Cir. 1995); 29 U.S.C. § 794. Temple concedes that it is an entity covered by both the ADA and the RHA.

To withstand summary judgment, plaintiff must set forth evidence that she has a disability, that is, a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or that she is regarded as having such an impairment. See 42 U.S.C. § 12102(2); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 193 (2002). Temple argues there is no evidence that plaintiff is disabled under either the ADA or RHA.

The plaintiff has not presented a consistent picture of her disabilities, their duration, or their severity. She claims she has suffered from orthopedic, arthritic, and neurological impairments, vertigo/hearing loss, irritable bowel syndrome ("IBS"), Endometriosis, premenstrual dysphoric disorder ("PMDD"), chronic migraine cephalgia, chronic pain syndrome, chronic abdominal pain, back pain, disc disease, bilateral carpal tunnel syndrome, as well as neck and cervical sprain and strain. In her deposition, for example, she acknowledged that she was not diagnosed with carpal tunnel syndrome until after she was dismissed from Temple. She admitted that her Endometriosis was a temporary condition that has been remedied by surgery and that her vertigo/hearing loss, chronic abdominal pain, and chronic pain syndrome were symptoms of her other alleged ailments.

Even assuming plaintiff has one or more physical impairments, plaintiff has not come forward with evidence that any of her disabilities "substantially affects" any major life activity. The Supreme Court has instructed that these terms must be "interpreted strictly to create a demanding standard for

qualifying as disabled" under the ADA. Williams, 534 U.S. at 197. At this stage, the plaintiff must produce some evidence that her alleged impairments "prevents or severely restricts ... [her] from doing activities that are of central importance to most people's daily lives." Id. at 198. Our inquiry does not focus on whether or not the plaintiff is able to perform the tasks associated with being a dentist or a dental student. Id. at 200-01. The disability must be permanent or long term and plaintiff must submit evidence that the extent of the limitations caused by her impairments is substantial in her life. Id. at 198.

Plaintiff has not produced any evidence that demonstrates that any of her disabilities prevents or restricts her from doing any activities essential to the daily lives of most people, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, and breathing. See 45 C.F.R. § 84.3(j)(2)(ii). Handling a dental drill and participation in the clinics and classes of a dental school are not activities "essential" to daily living. Accordingly, she is not disabled within the meaning of the ADA and RHA.<sup>6</sup>

Even if the plaintiff had produced evidence demonstrating that she was or is disabled within the meaning of the ADA and RHA, she cannot withstand summary judgment because

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6. In addition, there is no evidence that plaintiff has "a record of an impairment" or that she is "regarded as having such an impairment" within the meaning of the ADA and RHA.

she has not come forward with evidence that shows Temple discriminated against her or dismissed her due to any of her disabilities. Rather, the uncontradicted evidence before the court establishes that Temple made extensive efforts to accommodate the plaintiff and dismissed her only after she repeatedly failed to satisfy the school's academic requirements. The Supreme Court has cautioned that we must accord great deference to university professors in their academic evaluation of students. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985). From the moment she arrived, before she sought accommodations or claimed any sort of disability, plaintiff's attendance in class and performance on exams were substandard. Indeed, plaintiff does not challenge any grade she received for any exam or class while at Temple. Instead of precipitously expelling her, Temple attempted to work with her on numerous occasions over several years. It provided her multiple occasions to retake and remediate deficient performance throughout her enrollment at Temple. Contrary to the plaintiff's suggestions, Temple provided most of the numerous accommodations that she set forth in her complaint, including a dental assistant. The evidence demonstrates without contradiction that Temple granted the plaintiff the accommodations she requested that would not have fundamentally altered the school's curriculum. Plaintiff does not claim that denial of certain requested accommodations, for example, to hold a dental drill with two hands, were unreasonable or pretexts for discrimination.

In sum, the plaintiff has not produced any evidence that she has a disability as defined under either the ADA or RHA. Moreover, the uncontradicted evidence before the court demonstrates that Temple's decision to discontinue the plaintiff's enrollment was due to her academic failure, not her disabilities. Accordingly, we will grant Temple's motion for summary judgment.

