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

ROBIN WELDE,	:	**CIVIL ACTION**
Plaintiff	:	
v.	:	
	:	
NATIONAL DISEASE RESEARCH	:	
INTERCHANGE, et al.,	:	
Defendants.	:	**NO. 04-5905**

MEMORANDUM AND ORDER

GENE E.K. PRATTER, J. APRIL 25, 2007

Defendants National Disease Research Interchange ("NDRI") and Paul Volek move for summary judgment in this case brought under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), and the Philadelphia Fair Practices Ordinance, Phila. Code § 9-1101, et seq.[1] The Court will grant Defendants' motion because Ms. Welde's claims are time barred by the relevant statute of limitations.

I. FACTUAL BACKGROUND

NDRI is a Pennsylvania, non-profit, medical research corporation based in Philadelphia. The company was founded in 1980 for the purpose of assisting scientists to find a cure to diabetes. Over time, the scope of NDRI's research has expanded include other diseases. See NDRI, http://www.ndriresource.org/html/history.htm (last visited Apr. 18, 2007.)

NDRI occupies a relatively unique niche in the field of medical research. The company's business is to obtain human tissue and organs that are suitable for research, but not for transplant,

[1]In the Amended Complaint, Ms. Welde also sued both Defendants under the Pennsylvania Human Relations Act. The Court dismissed these claims by Order dated November 23, 2005. (Docket No. 21.)

and provide the tissue and organs to medical researchers. Id. Thus, NDRI is an intermediary between scientists and the federally-mandated, non-profit "Organ Procurement Organizations" ("OPOs") throughout the country. OPOs are the only agencies sanctioned to procure organs for transplant. (Welde Dep. 49:12-15.) NDRI's mission is to create a national network of available tissue and organs, so that researchers can go directly to NDRI for access to a broad selection of tissue and organs for their research.

On June 22, 2000, NDRI hired Robin Welde to be the manager of its Whole Organ Program. Her title changed shortly thereafter to "manager of transplant services," as NDRI began working with human tissue and material other than whole organs. Id. at 45:20-46:15. Ms. Welde's overarching responsibility was to connect NDRI's research applicants with the transplant organs and tissue best suited for their specific research protocols. Id. at Ex. 9 ¶ I. During discovery, she testified that the most important of her duties to NDRI was to travel to the various OPOs throughout the country on "marketing trips." Id. at 61:6-8; 63:4-8. The purpose of these trips was to enable NDRI to develop the relationships with the OPOs that were necessary to position itself to procure as many well-suited organs as possible. Id. On average, Ms. Welde traveled on these trips one week out of every four. Id. at 58:1-5. However, on September 6, 2002, Ms. Welde slipped and fell on her way to work along 16th and Chestnut Streets in Philadelphia. Id. at 66:5-11. She suffered a serious injury to her knee as a result of the fall, which required emergency surgery, and subsequently, significantly limited her movement. Id. at 67:19-69:1.

Notwithstanding her pain and limited movement, Ms. Welde returned to work on a part-time basis at the end of September 2002. Id. at 71:21-72:4. Upon her return to NDRI, Ms. Welde was able to fully perform all of the activities, and assume all of the responsibilities, related to her in-

office work. (Volek Dep. 169:7-13.) However, she was subject to medical restrictions that prohibited her from traveling. Id. NDRI permitted Ms. Welde to work on a flexible schedule with time for her medical appointments and physical therapy. Id. at 154:18-155:18. NDRI also adjusted Ms. Welde's travel schedule between September and December of 2002 by cancelling two of Ms. Welde's previously scheduled marketing trips, and sending Mr. Volek as her replacement on a third trip. (Welde Dep. 75:7-11.) Nevertheless, Ms. Welde testified that she felt constant pressure, particularly due to Mr. Volek's continuing inquiries regarding the condition of her knee and status of her medical clearance, to resume her previous travel schedule. (Welde Dep. 87:10-88:7.)

In December 2002, Ms. Welde returned to NDRI on a full-time basis, (Volek Dep. 160:22-161:3), and on December 18, 2002, she traveled to an OPO in Baltimore on her first marketing trip since her injury. (Welde Dep. 75:23-76:4.) Though Ms. Welde usually traveled alone, and via the most economical means possible, Mr. Volek accompanied her on this trip, and NDRI arranged for her to travel on a premier train with more leg room. Id. at 76:2-77:7. During their return trip to the office, Mr. Volek informed Ms. Welde that her annual review, which was due and which she had requested repeatedly, would take place the next day. Id. at 117:2-24.

On December 19, 2002, Mr. Volek and Ms. Welde met for the review, which ended unexpectedly, for Ms. Welde, in the termination of her employment at NDRI. Id. at 75:23-24; 118:3-5. During the meeting, Mr. Volek acknowledged Ms. Welde's areas of strength, namely, her interpersonal skills and skill in building relationships, and her weakness, specifically, a lack of knowledge in the clinical or technical recovery side of the organ procurement service. Id. at 118:6-24. Mr. Volek then notified Ms. Welde that he felt that she was unable, due to her lack of technical skill, to develop the position she then occupied in the direction Mr. Volek felt it needed to go. Id. at

119:7-13. He informed her that her last day of work would be January 10, 2003, id. at 122:8-12, and that she should spend the next three weeks informing her industry contacts and colleagues of her departure. Id. at 121:20-122:7.

Though her employment with NDRI had come to an end, Mr. Volek awarded Ms. Welde a 4% retroactive salary increase, and offered her the option to submit a letter of resignation, subject to his approval, and the approval of the human resources department, in order to "save face" within and outside of NDRI. Id. at 119:7-20; 123:4-6. Although Ms. Welde stated that she felt as though NDRI's decision to fire her was related to her inability to travel due to her knee injury, id. at 120:18-20, she nevertheless decided during the meeting to submit a letter of resignation to NDRI, and informed Mr. Volek of her decision to do so. Id. at 123:4-6.

On December 26, 2002, Ms. Welde provided the letter to Mr. Volek, (Welde Dep. at Ex. 15), who in turn provided it to Laurie Simkovich, NDRI's human resources manager, for her review. (Volek Dep. at Ex. 2.) Approximately two days later, Ms. Simkovich informed Ms. Welde that NDRI would not accept that letter of resignation. (Welde Dep. 136:8-9; Volek Dep. 209:9-211:1.) Subsequently, on January 6, 2003, NDRI sent Ms. Welde a letter summarizing the terms of her severance and benefits, as had been discussed during the December 19, 2002 meeting, and reiterating that January 10, 2003 would be her last day at work. (Welde Dep. at Ex. 16.) Ms. Welde separated from NDRI on January 10, 2003.

On October 23, 2003, Ms. Welde filed a charge with the Philadelphia Commission on Human Relations and the Equal Employment Opportunity Commission ("EEOC"), against NDRI and Mr. Volek, alleging that her termination amounted to discrimination in violation of the ADA. (Welde Dep. at Ex. 5.) In due course Ms. Welde filed a complaint in this Court, which she amended

on April 22, 2005. Following discovery, Defendants filed their motion for summary judgment seeking disposition of the case.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the

motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. DISCUSSION

Prior to filing suit for disability discrimination under the ADA, an employee must file a timely charge of discrimination with the EEOC. 42 U.S.C. § 12117(a) (applying the administrative enforcement procedures of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, to ADA claims). Gloeckl v. Giant Eagle, Inc., 176 F. App'x 324, 325 (3d Cir. 2006). In Pennsylvania, an ADA charge is timely when it is filed with the EEOC within 300 days of the alleged unlawful employment practice. Id. at 326. The filing requirement is strictly construed and enforced, and therefore, absent circumstances justifying equitable tolling of the statute of limitations, a plaintiff's failure to timely file a complaint precludes her from later seeking judicial relief. McInerney v. Moyer Lumber & Hardware, Inc., 244 F. Supp. 2d 393, 398 (3d Cir. 2002) (citing Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.1997)). See also Gloeckl, 176 F. A'ppx at 326-327 (ADA claim is time-barred when it was filed with the EEOC approximately two months late).

To establish a *prima facie* case under the ADA, a plaintiff must show that she has suffered an adverse employment action because of a disability. Robinson v. Lockheed Martin Corp., 2007 WL 38345, at *2 (3d Cir. Jan. 8, 2007) (citing Buskirk v. Apollo Metals, 307 F.3d 160, 166 (3d Cir. 2002)). For the purposes of timeliness, as a threshold matter, this adverse action triggers the limitations period for filing a claim. Bailey v. United Airlines, 279 F.3d 194, 198 (3d Cir. 2002) (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258-259, 262, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980)). Here, Ms. Welde asserts that NDRI's decision to terminate her employment was motivated by unlawful disability discrimination. Therefore, whether Ms. Welde timely filed her charge of discrimination depends on the date of her termination.

The Supreme Court held in Ricks, 449 U.S. 250, 258-259, 262, that for the purposes of a claim of unlawful discharge, the limitations period is triggered on the date when an employer establishes its official position to terminate an employee and communicates that position to the affected employee. Stated differently, "the limitations period 'must be measured from the date the plaintiff was advised he was to be discharged' as opposed to the date of separation." Bailey, 279 F.3d 198 (citing Guarnaccia v. John Wanamaker, Inc., 1990 WL 90490, at *3 (E.D. Pa. 1990)). Thus, in order to prompt the statute of limitations, the decision to terminate must be "unconditional," id. at 199 (citing Ricks, 449 U.S. at 257-258), and notice of the employer's "definitive conclusion" must be unequivocal. Id. (quoting Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1419 (3d Cir. 1991)).

Defendants argue that Ms. Welde's charge of disability discrimination was untimely filed 308 days after she was notified on December 19, 2002 of NDRI's decision to terminate her employment. For Ms. Welde's charge to have been timely, she must not have known prior to December 28, 2002 that NDRI had decided to discontinue her employment. Therefore, at the present procedural juncture, the Court must determine if there is a genuine issue of material fact as to whether Mr. Volek provided Ms. Welde official, unequivocal notice of termination during the December 19, 2002 meeting he held with her.

The record is replete with evidence that Mr. Volek advised Ms. Welde, at the latest, on December 19, 2002, of NDRI's official[2] and unequivocal decision that her employment would,

[2]Ms. Welde does not dispute that Mr. Volek was invested with the authority to make the decision to terminate her employment and to communicate that decision to her. (Tr. 11/15/2006 32:4-8; Volek Dep. 202; Strickler Dep. 66.) Compare Bailey, 279 F.3d at 199-200 (Our court of appeals reversed grant of summary judgment and found that a factual dispute existed as to whether United provided unequivocal notice of termination during a telephone call between

without question, come to an end. According to Ms. Welde, during the December 19th meeting, Mr. Volek informed her that he did not feel that she "[could] take the position in the direction that he fe[lt] it need[ed] to go, and that it [was] just not going to work out with [her] in the organization any longer." (Welde Dep. 119:7-13.) The two agreed that she would begin notifying her contacts and colleagues that she was leaving NDRI, id. at 121:20-122:7, and although he offered Ms. Welde the option to resign from NDRI, id. at 119:22-120:2, Mr. Volek explained to Ms. Welde on December 19th that whatever her choice, her "final day of work" would be January 10, 2003. (Volek Dep. 73:9-13.) Ms. Welde's testimony confirms that NDRI had reached a definitive conclusion that she would separate from the company; she had "no doubt" that whether she submitted a resignation, or not, she would no longer be employed by NDRI as of January 10, 2003. (Welde Dep. 122:7-12.) Mr. Volek considered this to be "the conversation where [Ms. Welde] was terminated," (Volek Dep. 73:9-13), and Ms. Welde continually makes reference in her own deposition testimony to December 19, 2002 as the day she was "fired" or "terminated." (Welde Dep. 119:4; 121:17-122:12.)

Notwithstanding the clarity of the evidence to the contrary, Ms. Welde argues that the evidence is equally probative of the fact that December 19, 2002 was the date when NDRI initiated discussions regarding her future, as it is of the fact that NDRI unequivocally terminated her employment on this date.

Ms. Welde compares her case to Smith v. United Parcel Service, 65 F.3d 266, 268 (2d Cir. 1995), in support of her contention. In Smith, plaintiff participated in four separate conversations with UPS management over the course of approximately two months. During the meetings, the

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plaintiff and his supervisor, where plaintiff testified at his deposition that he was unaware that his supervisor had the authority to terminate his employment.).

record shows that UPS informed Mr. Smith that he "should leave" the company, that he "wasn't carrying his weight," "that there comes a time when, through no fault of either party . . . there should be a separation of ways," and "that his performance was unacceptable, [and], that they wanted [him] to go home and think about [his] future with the company." Id. at 267. At the fourth and final meeting, according to Mr. Smith, a UPS District Manager told him to "consider what was best for [him], and perhaps continuing with UPS was not the best for [him]," he also provided Mr. Smith with papers "related to his termination" and told him "he should sign them." Id. Applying Ricks, the Second Circuit Court of Appeals reversed the district court's grant of summary judgment and held that none of UPS' statements to Mr. Smith could, as a matter of law, be considered "definite notices of termination" or statements of UPS' "official position," but rather, the statements were merely "suggestions." Id.

The comparison of Ms. Welde's situation to Smith is wholly unpersuasive. The testimony of both Mr. Volek and Ms. Welde confirms that the communications of the December 19, 2002 meeting were not ambiguous, unlike the encouragements of Mr. Smith's superiors in the other case. Ms. Welde's own testimony shows that Mr. Volek clearly informed her that he had concluded that she was no longer equipped to benefit the organization in her position, and that he provided her with an exact date that she must separate from NDRI. The date was so definite that Ms. Welde had "no doubt" that her employment had come to an end, and so concrete that Mr. Volek instructed her to make it public.

However, in a further effort to call into question the equivocalness of the notice, and to show that she remained optimistic as to her employment status beyond the December 19th meeting, Ms. Welde points to her post-deposition certification, where, for the first time, she claims that she and

Mr. Volek discussed a consulting opportunity at the meeting. (Certification of Robin Welde at ¶ 14.) She argues that the presence of this opportunity proves that NDRI had not yet decided to terminate her, or at least that the company remained unsure of what her future role would be, following the meeting.

Even if the Court were to set aside and ignore the seeming inconsistency between this certification and her previous deposition testimony,[3] and acknowledge the possibility that Ms. Welde's affidavit explained some confusion in her previous testimony, see, e.g., Baer v. Chase, 392 F.3d 609, 624-625 (3d Cir. 2004) (discussing the "sham affidavit doctrine"), the offer of a consulting opportunity does not affect the operative analysis. A consultant does not enjoy the status of an employee of an organization, and thus, the offer of a consulting opportunity only further supports NDRI's contention that it had decided to end its employment relationship with Ms. Welde. Whether the end of Ms. Welde's employment was to be followed by a fundamentally changed relationship, or no relationship, is inapposite, and does not render the termination notification equivocal. See Watson v. Eastman Kodak Company, 235 F.3d 851, 856-857 (3d Cir. 2000) (holding that an employer's letter constituted unequivocal notice of termination, where the letter notified the employee that he would be removed from his position with the company with the caveat that he could stay with the company, if he was successful in obtaining another position within the organization).

Alternatively, Ms. Welde argues that NDRI's offer to allow her to resign in lieu of

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[3]During her deposition, defense counsel inquired of Ms. Welde to "tell [him] what happened during [the December 19th] meeting." (Welde Dep. 118:6-7.) Ms. Welde can point to no place in her response to counsel's inquiry, nor any other occasion in the deposition, where she testified that Mr. Volek and she discussed consulting during the meeting.

termination delayed the accrual of the limitations period until the date when NDRI declined to accept her resignation. To the extent that the Bailey case did not answer this question,[4] the Court holds that where an offer to resign is strictly cosmetic, or "face saving," in nature, as is the case here, the offer does not toll the statute of limitations pending such an offer's acceptance, rejection, or revocation. That is, where an employee confronts a decision of whether to offer her resignation that does not arise from her own volition or ambition, but rather from an employer's unequivocal communication that her employment has come to an end, a claim of unlawful discrimination accrues when the employer communicates its official "resign or be terminated" position.

As our court of appeals noted in Colgan, the Supreme Court in Ricks "fashioned its determinations concerning the limitations periods to require prompt filing of discrimination charges." 935 F.2d at 1418. In view of this policy, NDRI's offer to allow Ms. Welde to resign in lieu of termination is analogous to Mr. Ricks's opportunity to file a grievance of the tenure decision made by the College; it is a potential remedy to the adverse action that had already occurred, rather than an action that renders the earlier decision tentative. See Colgan, 935 F.2d at 1416 (explaining and applying Ricks).

Inasmuch as the statute of limitations is triggered "when an employee knew, or *should have known*," that an adverse action had taken place, Bailey, 279 F.3d at 198 (quoting Bouker v. CIGNA

[4]Apparently Mr. Bailey raised this argument – supported by the EEOC as amicus curiae – for the first time before the court of appeals. Because the court found that an issue of fact existed as to the date when United Airlines gave definitive and official notice to Mr. Bailey that his employment would come to an end, the court did not need to reach the question of whether the offer to resign delayed accrual of the statute, and, furthermore, the court declined to consider the merits of the argument on the grounds of waiver. Bailey, 279 F.3d at 202. However, the court nevertheless held that "the statute of limitations began to run as soon as Bailey was informed of the adverse employment decision reached by United and presented with the offer to resign or be terminated." Id.

Corp., 1994 WL 594273, at *2 (E.D. Pa. Oct. 24, 1994), aff'd, 70 F.3d 1254 (3d Cir. 1995) (emphasis added), this standard illuminates for employees that they must simultaneously consider whether to file a charge against an employer for discrimination and whether to accept an opportunity to voluntarily resign. It is clear in the context of the facts of this case, that during the December 19, 2002 meeting, Ms. Welde already suspected that her termination was connected to her knee injury; thus, Plaintiff was aware from this date not only of the alleged harm itself, but also of Defendants' allegedly prohibited motive.

IV. CONCLUSION

Because Ms. Welde has not met her burden of coming forward with specific evidence to contradict the substantial amount of evidence submitted by the Defendants in this case indicating that Ms. Welde learned, at the latest, on December 19, 2002, of the finality of NDRI's decision to end her employment, the Court concludes that her charge of disability discrimination is time-barred and will grant the motion for summary judgment. An appropriate order follows.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

ROBIN WELDE,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
v.	**:**	
	:	
NATIONAL DISEASE RESEARCH	**:**	
INTERCHANGE, et al.,	**:**	
Defendants.	**:**	**NO. 04-5905**

ORDER

AND NOW, this 25th day of April 2007, upon consideration of Defendants' Motion for Summary Judgment, and further submissions in support of the Motion, (Docket Nos. 30, 33, 38), and Plaintiff's Response and Supplemental Memoranda, (Docket Nos. 32, 36), **IT IS HEREBY ORDERED** that Defendants' Motion (Docket No. 30) is **GRANTED** and summary judgment is entered in favor of Defendants.

The Clerk of the Court shall mark this case **CLOSED** for statistical, and all other purposes.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE