

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

SANDRA VENDETTA, : CIVIL ACTION  
 : NO. 97-4838  
 Plaintiff, :  
 :  
 v. :  
 :  
 BELL ATLANTIC CORPORATION, :  
 :  
 Defendant. :

M E M O R A N D U M

BUCKWALTER, J.

September 8, 1998

Before the Court is defendant's motion for the entry of judgment as a matter of law on plaintiff's claims for employment discrimination based on gender and disability, in violation of the Civil Rights Act of 1964, and the Americans with Disabilities Act, and for the creation of a hostile work environment in violation of both of these acts. For the reasons that follow, I will enter judgment for defendant as to both of plaintiff's gender discrimination claims. I will deny defendant's motion for judgment on plaintiff's claim that she suffered a specific act of employment discrimination in violation of the ADA, and that she suffered from a hostile work environment in violation of the ADA.<sup>1</sup>

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<sup>1</sup> Vendetta's Response derides Bell Atlantic's motion as containing merely legal arguments. In an apparent effort to demonstrate that a large amount of evidence does in fact support her claims, Vendetta has submitted 9 volumes of supporting exhibits, including, e.g., Exhibits B & H, which are comprised of hundreds of pages of diary entries and workplace documents, in

**I. Background**

**A. Vendetta's employment at Bell**

Plaintiff Sandra Vendetta has been employed by Defendant Bell Atlantic Corporation (Bell), since 1966, and she has worked there as a Switching Employment Technician (SET) since 1978. In December 1993, she took disability leave from Bell to be treated for an illness later diagnosed as Hodgkin's Disease, a potentially fatal form of cancer.

Vendetta received chemotherapy and other treatment, and her illness went into remission in September 1994. Bell informed Vendetta that the conditions of her leave -- full pay and benefits -- would expire in January 1995, and she returned to work at Bell on January 6, 1995.

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roughly chronological order, but with no other internal organization. Where, as here, the defendant effectively challenges the legal sufficiency of the evidence to support plaintiff's claims, plaintiff bears the burden of pointing, specifically, to evidence supporting each and every element of her claims. These standards are more than familiar. Yet, rather than specifically respond to Bell Atlantic's legal arguments, Vendetta's lengthy and disjointed brief contains many allegations which, while relevant to Vendetta's claims, are either not supported by the exhibits to which they refer, or which are anchored by blanket references to, e.g., deposition testimony exceeding one hundred pages, with no "pinpoint" cite. While one purpose of summary judgment is to ascertain the existence of plaintiff's evidence, its ultimate goal is to determine whether that evidence supports plaintiff's claims as a matter of law. The near-complete dearth of caselaw -- with the exception of one citation -- in plaintiff's 46-page Response is thus somewhat surprising. The court also notes with some dismay that Plaintiff has not seen fit to address the actual elements of the gender and disability-based discrimination claims at issue in this litigation, and that defendant's otherwise-excellent briefs treat these standards somewhat cursorily. The omission is particularly glaring in this case, where plaintiff is advancing a hostile environment claim under the ADA, the existence of which has not been addressed, let alone determined, by either the statute itself, the Supreme Court, or our court of appeals. While the Court assures Ms. Vendetta that it has independently reviewed the record for evidence that supports her claims, it reminds counsel that it is they, rather than the Court, who shoulder the different burdens assigned by Rule 56.

**Work restrictions.** In consultation with her treating physician, Bell's medical department imposed a half-day work restriction on Vendetta. (Vendetta Exh. D). Vendetta believed that she would be paid a full day's wage for a half day's work, but when told otherwise, she received a note from her physician lifting the half-day restriction. Vendetta's physician then set other medical restrictions, including barring her from lifting more than eight ounces or performing repetitive tasks. Her physician eased the weight limitation to two pounds in March 1995. Vendetta's exact medical condition in 1995 is not clear from the record, which indicates that she suffered from an "arthritis flare-up," continued fatigue and fatigue-related illnesses from her chemotherapy.

**Early transfer to Race Street.** Around the time Vendetta returned to work, Bell began preparing to transfer her entire workgroup from Fort Washington, Pennsylvania, to a facility in Philadelphia at 900 Race Street. These preparations included inventorying and physically moving items from the Fort Washington office. In February 1995, her supervisor, Pauline Jusino, informed Vendetta that she would be relocated to the Race Street location before the others in her work group. Vendetta has not contested that the rest of her workgroup was indeed engaged in physical labor, including the person who also inventoried the Fort Washington facility. (Vendetta Dep. at 44-

46). Vendetta began working at the Race Street location on March 6, 1995, and the rest of her workgroup joined her six weeks later.

**Anthony Zikesh.** It is undisputed that if Vendetta remained at work for 13 weeks after rejoining Bell in January 1995, her disability "clock" would be "reset," that is, she could again go out on one year's full medical leave. Additionally, the record reveals that, in a period of downsizing at Bell, the manager of Vendetta's work unit, Anthony Zikesh, was concerned that if Vendetta again went out on medical leave, Bell would not replace her, but would leave her position open. Further, Zikesh admitted to believing that Vendetta's condition was worse than he had been told. (Zikesh dep. at 67-68; 98-101). Vendetta alleges that Zikesh attempted to force her out of Bell before her disability clock "reset," or before she reached her 30-year employment anniversary, which made her eligible for Bell's pension. While Vendetta concedes that Zikesh was unsuccessful in either of these alleged efforts -- she continues to work at Bell -- she nonetheless points to several things Zikesh and others did to force her out.

For example, she alleges that on March 9, 1995, Tony Zikesh mocked her weight restriction; referred to "downsizing"; asked if her cancer were in remission; indicated that he did not have full access to her medical papers; and asked if she

supported herself. She claims that this abusive treatment caused her visit to a hospital emergency room later that day for chest pains, and that it also has caused patches of her hair to fall out and left her susceptible to viruses. She states that she has been receiving therapy and medication for work-related stress since February 1995.

Zikesh convened a meeting of Bell's Reasonable Accommodation Committee (RAC) to discuss Vendetta's condition, but she alleges that Zikesh's aim was not to accommodate her, but to increase pressure on her to leave Bell. The record shows that at this meeting, Zikesh stated his concern that Vendetta's condition was so bad that it might affect her or her co-worker's safety; that he imposed a driving restriction on her based on his belief that if she couldn't lift a one-half pound weight, she couldn't drive a company car; and his general concern that medical information was kept from management. Jusino stated that she felt Zikesh was treating Vendetta unfairly, and that he had admitted to "some frustration" with Vendetta (Jusino Dep. at 111.)

**Transfer requests.** Working in Philadelphia rather than Fort Washington involved a significantly longer commute, and Vendetta requested a lateral transfer to another SET position on April 3, 1995. She applied through both Bell's Liberty Transfer program and its RAMP program; Bell employee Robin Toner stated

that any transfer to another SET position within the Philadelphia area, including Wayne, would have to have been within the Liberty Transfer program and not via RAMP, but that a non "title-to-title" transfer, that is, from a SET position to a non-SET position, would have been through RAMP. (Toner Dep. at 105-108).

Under the collective bargaining agreement governing her employment, a Bell employee may choose up to four facilities for a lateral transfer.<sup>2</sup> (Toner Decl. at ¶¶ 10). Employees requesting to transfer to the same facility are ranked in reverse chronological order based on the date of their application. Currently, Vendetta has four transfer requests pending: to King of Prussia and Harleysville, dated April 3, 1995 and to Lansdale and North Wales, from August 16, 1996.

Vendetta testified that her reasons for seeking a transfer were that a shorter commute would allow her to sleep longer, and that she did not like the Race Street facility, which she found "depressing." (Vendetta Dep. at 137-38). Her doctor also believed, and apparently made Bell aware, that the longer commute would hinder her recovery. It also appears that Vendetta's bout of arthritis was a factor in seeking transfer;

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<sup>2</sup> Bell argues that the collective bargaining agreement precluded it from transferring Vendetta ahead of other employees, and that under Kralik v. Durbin, such an action would have been an unreasonable accommodation per se. 130 F.3d 76 (3d Cir. 1997). I reject this argument, not only because Kralik's sweeping holding extends far beyond the facts of the case and seems to conflict with the ADA itself, see, id. at 84-88 (Mansmann, J., dissenting), but because Vendetta has demonstrated a fact issue as to whether her proposed accommodation would in fact violate the applicable collective bargaining agreement. Cf., id. at 81.

she stated that on April 6, 1995, she told Ms. Jusino that the conditions at Race Street aggravated her joint condition.

Vendetta alleges that her transfer requests were intentionally mishandled; that her personnel records, which were crucial to her transfer applications, were intentionally misplaced; that due to this mishandling she could not access transfer information; that her personnel files were purged of favorable information; and, that employee James Nulty noted her Hodgkin's Disease on her transfer application, in order to hinder her application, not, as he claimed, to help her. Bell maintains that Vendetta was not eligible for immediate transfer, because, within the applicable transfer program, her application was ranked behind other employees who had applied earlier.

From July 24 to August 12, 1995, Vendetta was "loaned" to Bell's Wayne facility to perform a "circuit inventory," but she alleges that Zikesh ordered her returned to Philadelphia before the project was completed. Her supervisor there confirmed this, and he stated that it would have been possible to circumvent Bell's formal transfer process and return her to Wayne. (Bell Dep. at 25-29; 46-51). It is not clear, however, whether there would have been continued work for Vendetta at Wayne once the circuit inventory was completed.

**Medical appointments.** Vendetta also asserts that Bell stigmatized her need for frequent medical appointments.

Specifically, she alleges that Bell required her to submit doctor's notes for each medical appointment. Bell does not dispute that it required these notes, but it replies that it allowed Vendetta, unlike other employees, to leave work for her appointments without either drawing on her fund of vacation time or taking a non-paid absence, and that other employees either had appointments on their own time or charged the absence to sick leave or vacation time. (Figuro Dec. at ¶ 5). Vendetta does not dispute this, but she nonetheless contends that the requirement that she obtain a doctor's note was intended to harass her.

**Jay Martin.** Additionally, Vendetta notes several instances in which she was treated differently than co-worker Jay Martin, another SET employee in her work unit, who apparently suffered from a brain tumor. While she has made unsupported allegations that Martin often took medical leave without providing a doctor's note, she has not documented that the terms of his leave differed from hers. Additionally, she states that Bell did not transfer Martin to the Race Street workplace as early as it did her, nor did it impose driving restrictions on him, so that he was allowed to drive a company car. Vendetta cites no evidence, however, beyond her secondhand knowledge about the limitations of people with brain tumors, that Martin could not, in fact, drive or perform physical labor, and she has in

fact admitted that Martin performed physical labor at Fort Washington in connection with the transfer to Race Street. (Vendetta Dep. at 45).

Vendetta further alleges that, despite her seniority over Martin, Zikesh allowed him to take an unposted night tour that she desired. By her own admission, however, Vendetta was permitted to work this night tour with Martin. More importantly, she has not claimed that she in fact sought this position before learning that Martin had it, nor has she offered any reason why the night shift would be more favorable to her disability than a day shift. Finally, she contends that Martin slept on the job but was not disciplined for it, and that Zikesh investigated her rather than Martin for suspected thefts, but that when it developed that Martin was the culprit, he was not reprimanded.

**Skills test.** It is uncontested that in March 1995 Zikesh required Vendetta to take an employee skills test (UTB) on extremely short notice, despite the fact that Bell generally provides tested employees with a 13-week preparation course. Although there is dispute over whether the test was canceled after Vendetta's union intervened on her behalf or after the results of an Individual Medical Examination, Vendetta was not required to take the test.

**Write-ups.** Additionally, Vendetta argues that she often received unfavorable "write-ups," including one for her

last-minute cancellation of a class at "data kit school." (Which she admits she did in order to help a friend sell American flags). She was also "written up" more than once for mistakes she made with the computer system and in connection with the scheduling of a medical appointment.<sup>3</sup>

**Sexually-offensive materials.** Vendetta also alleges that sexually-offensive materials were permitted in the work place, and she has submitted photographs of a male co-workers's work station decorated with photographs of scantily-clad women.

#### **B. This litigation**

On December 12, 1995, with the assistance of counsel, Vendetta filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). (Bell Exh. K). The Charge alleged that, since her transfer to the Race Street facility, Vendetta had been subjected to:

differential treatment with regards to the terms and conditions of my employment by Mr. Anthony Zikesh, Manager, a male, and his subordinates, i.e., James Nulty and Pauline Jusino. He (and his subordinates) has consistently scrutinized my work, denied my request(s) for transfer to vacant positions at other facilities as an accommodation for my disability, requires more documentation from me than male employees with no disability in order that I may take leave

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<sup>3</sup> She also alleges that, although he wasn't a supervisor, her co-worker Jay Martin was allowed to place "write-ups" in her file. Examination of the record, however, indicates that these were merely summaries of computer-related tasks in which Martin had instructed Vendetta and were not in any way disciplinary. Contrary to Vendetta's characterization of this as highly unusual, the record indicates that it was standard for a person who instructed another in a given task to memorialize that in a "write-up." Thus, despite Vendetta's use of the term "write-up" in strictly menacing tones, its meaning is not uniformly disciplinary at Bell.

for doctor appointments, and reprimands me and does not reprimand other male employees - who are not disabled - and who are in the same and/or similar circumstance. In addition, [Bell Atlantic] makes improper notations on my employment records referencing to [sic] my disability.

(Bell Exh. K.)

Vendetta alleged that Zikesh took other actions against her on the basis of her disability and gender in violation of Americans with Disabilities act, 42 U.S.C. § 12101, et seq., (ADA), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII), and that she experienced a "hostile workplace environment" under both laws.

The EEOC issued Vendetta a right to sue letter on April 29, 1997, and she then filed this suit under Title VII and the ADA. Bell Atlantic now moves for summary judgment, arguing that Vendetta has not demonstrated that she suffered any materially adverse employment action; that its failure to transfer Vendetta from the Race Street location did not violate the ADA; and that Vendetta can not establish that she was subjected to a hostile environment based either on her gender or her disability.

## **II. Discussion**

### **A. Summary Judgment**

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). A fact is material if it might affect the outcome of the case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A disputed factual matter presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255.

The movant seeking summary judgment has the initial burden of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P. 56(c). Once that burden has been met, however, the non-moving party "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256.

**B. Vendetta's claims.**

**1. Title VII.**

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer:

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1).

A plaintiff asserting employment discrimination under Title VII must thus demonstrate that: the employer took an adverse employment action against her; that the facts of the case support a discriminatory motive animating the employment action; and that the employer is unable to provide an alternative nondiscriminatory reason for its action, or that its reason is false. Marzano v. Computer Science Corp. Inc., 91 F.3d 497, 508 (3d Cir. 1996).

**a. Neither Vendetta's early transfer nor her denied transfers violated Title VII.**

When analyzing the order and allocation of proof in discrimination claims under Title VII, courts apply the three-step burden shifting framework articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993), and clarified in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). Under this framework:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a

preponderance of evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting McDonnell Douglas, 411 U.S. at 802).

While Vendetta's vague discussion of her gender claims does not directly address either the necessary elements of a Title VII claim or the burden-shifting frameworks, she appears to assert that Bell discriminated against her twice on the basis of her gender: when it transferred her from Fort Washington to Philadelphia ahead of the rest of her workgroup, and when it failed to transfer her out of Philadelphia. Lacking direct evidence of discriminatory intent, Vendetta must rely on indirect evidence to establish a prima facie case.

Assuming, arguendo, that Bell's actions in transferring her to Philadelphia early, unlike her male colleagues, constituted action sufficient to make out a prima facie case of gender discrimination, I still find it appropriate to enter summary judgment for Bell. Bell has met its burden under Title VII to articulate a non-discriminatory reason for its action. The uncontradicted testimony is that, with her medical restriction, the only work Vendetta could have performed at the Fort Washington office was nonphysical labor. The record shows that the shift in offices involved almost exclusively physical labor, and that the male employee who was assigned to perform nonphysical task of inventory at Fort Washington, was also

capable of performing, and did perform, manual labor. Vendetta has failed to refute this reasonable, legitimate explanation.

As for Bell's alleged failure to transfer Vendetta, she has failed to point to any evidence that her gender played any role in her transfer applications, or that similarly-situated male employees were granted transfer requests that she was denied, and she has thus failed to establish a prima facie case of gender discrimination.

**b. Vendetta has failed to support her Title VII hostile environment claims.**

Vendetta argues that she can nonetheless demonstrate a fact issue regarding a Title VII claim because she has also been subjected to a hostile work environment based upon her gender.<sup>4</sup> In addition to specific, actionable employment decisions, an employer may be found guilty of sex discrimination where sexual harassment is so "severe or pervasive" that it may be said to

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<sup>4</sup> Defendant argues that Vendetta did not specifically allege that she had been subjected to a hostile work environment, and that the "continuing action" box on her Charge marked. (The allegedly discriminatory conduct was alleged to have occurred between March 6, 1995 and December 15, 1995, the date of her charge.) Nevertheless, Vendetta asserts that a hostile work environment continued after the date of her EEOC charge, as did the disparate treatment. Title VII plaintiffs -- and by extension ADA plaintiffs -- are generally precluded from bringing claims in a lawsuit that were not included in an EEOC charge. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). While this doctrine has some flexibility, suing on matter outside the charge frustrates two policies of the EEOC process: allowing conciliation between employer and employee at a relatively early stage of the process, and giving the defendant fair notice of its allegedly discriminatory actions. Id. at 44. I find that the Vendetta's charge did provide fair notice of the hostile environment claims, as it was not, as Defendant implies, limited simply to the actual EEOC charge, but also incorporated Vendetta's affidavit, which was put before both the EEOC and Bell, and which alleged that, inter alia, her work "environment" was detrimentally altered. (Vendetta Exh. J).

have altered the work environment such that the plaintiff is subject to an hostile work environment. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). To succeed on a hostile environment claim under Title VII, Vendetta would need to plead and demonstrate: 1) that she suffered intentional discrimination because she is a woman; 2) that the discrimination was pervasive and regular; 3) that the discrimination detrimentally affected her; 4) that the discrimination would have detrimentally affected a reasonable woman in her position; and 5) the existence of respondeat superior liability. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Reyes v. McDonald Pontiac GMC Truck, Inc., 997 F. Supp. 614, 617 (D.N.J. 1998).

That Vendetta experienced her workplace as a hostile one seems clear from the record, and it is quite possible that a jury would deem her workplace unpleasant, if not hostile. Yet, all of the relevant evidence in the record -- including the write-ups; the accommodation difficulties; the purported comments -- relates to her disability and not her gender. Vendetta points to no evidence that defendants created or sanctioned a hostile work environment on the basis of her gender, with the exception of her co-worker's workstation, which was apparently decorated with pictures of scantily-clad women. The photographs, however, will not alone support the existence of a fact issue as to whether Bell maintained a workplace in which gender-based

discrimination was severe and pervasive. Accordingly, I will enter judgment for Bell on Vendetta's Title VII claims.

## **2. The Americans With Disabilities Act**

Under the ADA:

[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

42 U.S.C. § 12112 (a).

A prima facie case under the ADA thus requires proof that the plaintiff is disabled within the meaning of the ADA; that she is a "qualified individual," i.e., that she is otherwise qualified to perform the essential functions of her job, with or without reasonable accommodations by her employer; and, that she has suffered an adverse employment decision as a result of discrimination. Deane v. Pocono Medical Center, 142 F.3d 138, 142, 145 (3d Cir. 1998).

Courts analyzing ADA claims look to the principles guiding the interpretation and application of Title VII. See Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 157 (3d Cir. 1995). I will accordingly apply the same McDonnell Douglas burden-shifting framework I applied to Vendetta's Title VII claims. Thus, if she has demonstrated her entitlement to a reasonable accommodation, the burden shifts to

Bell Atlantic to "demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]." 42 U.S.C. § 12112(b)(5)(A).

Initially, Bell asserts that Vendetta's testimony establishes that she was not "disabled" within the meaning of the ADA, and was thus not entitled to an accommodation. An individual is considered to have a "disability" under the ADA if she has:

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) [is] regarded as having such an impairment.

42 U.S.C. § 12102(2)(A)-(C); 29 C.F.R. § 1630.2(I).

Vendetta has not expressly answered Bell's argument, and the contours of her standing to press an ADA claim are unclear, but I note that her EEOC Charge alleged discrimination based on disability and perceived disability. It is undisputed that she suffered from cancer, but the record establishes that her cancer was in remission during the time period at issue in her Complaint. The record also states, however, that Vendetta continued to suffer from the effects of her cancer treatment, particularly chemotherapy, and that the greatest effect was fatigue. Additionally, Vendetta experienced a severe bout of arthritis around the time she returned to Bell. Accordingly, I find that the record supports the existence of a fact issue as to whether Vendetta was indeed disabled within the meaning of the

ADA.

Additionally, the record strongly evinces a fact issue as to whether Vendetta was "regarded as" disabled by defendants, 42 U.S.C. § 12102 (2)(C), and whether she suffered the ill effects of that perception, or misperception. Supporting evidence includes, but is not limited to, the comments allegedly made by Zikesh regarding Vendetta's health, and the very convening of the Reasonable Accommodations Committee.

I find, however, that Vendetta's early transfer from the Fort Washington facility to the Race Street facility is not significant enough to support a disparate treatment claim under the ADA. Even assuming that it did, Bell's actions cannot be characterized as a failure to accommodate Vendetta. The uncontradicted testimony is that the only work Vendetta could have performed at the Fort Washington office was nonphysical labor. The record shows that the shift in offices involved almost exclusively physical labor, and that the male employee who was assigned to perform the nonphysical task of inventory at Fort Washington, Jay Martin, was also capable of performing, and did perform, manual labor. See Mengine, 114 F.3d at 419 ("[A]n employer is not required to create a job for a disabled employee.").

I find that there is a fact issue, however, as to whether Bell's failure to transfer her away from the Philadelphia

office constituted a failure to accommodate her disability. The ADA defines "reasonable accommodation" as:

Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations for individuals with disabilities.

Id. § 12111 (9).

Bell argues that such a failure would not, in itself, constitute a failure to accommodate. Moreover, Bell argues that it did not deny Vendetta's requests, but that it merely ranked them behind those of other employees who had earlier sought transfers, in accordance with company policy. While the record appears to support Bell's contention that a title-to-title transfer would have been difficult, it also appears that the obstacles to such a transfer could have been overcome by invocation of Bell's own procedures which gave preferred transfer status to disabled employees.<sup>5</sup> (Vendetta Exh. G). Moreover, there a fact issue exists as to whether transfer to a non-SET position could have been achieved. Our court of appeals requires a demonstration "that there were vacant, funded positions whose

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<sup>5</sup> Additionally, Bell supports its argument by documenting Vendetta's ranking for her four current requests. Vendetta, however, changed her transfer requests in 1996, effectively replacing two of her 1995 requests. (Exh. I at ¶¶ 15-17). Thus, while Bell has demonstrated her low priority for transfer to two of her 1995 requests -- King of Prussia and Harleysville -- her priority for the other two -- Lansdale and North Wales -- is not relevant to her priority in 1995, the time period during which she alleges the discriminatory denial of transfer requests occurred. The record does not demonstrate her relative standing for a transfer to either Fort Washington or Norristown, the two other 1995 transfer requests.

essential duties he was capable of performing, with or without reasonable accommodation, and that these positions were at an equivalent level or position as [his former job].'" Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998), quoting Shiring v. Runyon, 90 F.3d 827, 832 (3d Cir. 1996).

While it is Vendetta's burden to "identify a position appropriate for reassignment." Mengine v. Runyon, 114 F.3d 415, 416 (3d Cir. 1997), the process of accommodation should be a joint undertaking, or "interactive process," between the disabled employee seeking accommodation and her employer. Id. at 420. Accordingly, while the employee has the burden to identify a vacant position, the court of appeals has rejected the notion "that the employee has the burden of identifying an open position before the employer's duty of accommodation is triggered." Id. The employer thus has a duty to make a good faith effort in the accommodation process by identifying any open position. Id.

I find that Vendetta has established the existence of a fact issue as to whether Bell undertook that effort in good faith. Although Bell employee Robin Toner stated in her deposition that it was Bell policy for the RAC to seek input from the disabled employee regarding any accommodations, Zikesh admitted that he did not seek Vendetta's input, as he did not think it would be helpful. Moreover, Nulty's delay in processing her forms may have hindered Vendetta from becoming aware of other

positions. Finally, there is sufficient dispute over whether Vendetta could have been continued at Wayne for a significant period of time -- as distinct from merely long enough to complete the discreet project in which she was engaged -- and whether such transfer could have been effected either outside the Liberty region transfer program, or simply by virtue of her disabled status. Taken together, these factors are sufficient to allow Vendetta's ADA claim to go to a jury.

The ADA supports a claim for hostile work environment

Vendetta also alleges that defendant's actions created a hostile workplace based upon her disability. As I noted earlier, neither the Supreme Court nor the Court of Appeals for the Third Circuit has determined whether the ADA even permits a hostile environment claim. Because the Supreme Court has read a cause of action for hostile work environment into Title VII, however, and because Congress has expressly directed that the ADA is to be guided by the principles which guide Title VII, courts confronting the issue have generally allowed such a claim, see Presta v. Septa, 1998 WL 310735, \*13 (No. CIV.A. 97-cv-2338)(E.D. Pa. June 11, 1998) (Yohn, J.) (assuming without deciding that ADA plaintiff may bring hostile work environment claim and collecting cases), and I find that the ADA prohibits a hostile workplace based upon a person's disability, and that the elements of a prima facie case are the same as one advanced under Title VII.

Accordingly, Vendetta must show that: 1) she is a qualified individual with a disability under the ADA; 2) she was subject to unwelcome harassment; 3) the harassment was based on her disability or a request for an accommodation; 4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and 5) Bell Atlantic knew or should have known of the harassment and failed to take prompt effective remedial action.<sup>6</sup> Id. "The hostility of the work environment must be determined by considering factors such as the frequency, severity, or threatening nature of the purportedly harassing conduct." Id.

The question is whether Vendetta has shown that any of

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<sup>6</sup> I will also assume that the determination of respondeat superior should also track Title VII. The Supreme Court has recently held that:

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . .

Faragher v. City of Boca Raton, 118 S.Ct. 2275, 1998 WL 336322, at \*19 (1998). Thus, an employer may be shielded from vicarious liability where it has established "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." Id. Defendant argues that it should benefit from Vendetta's "unreasonabl[e] fail[ure] to avail herself of [Bell]'s preventative or remedial apparatus." Id. Because I will enter judgment for defendant on Vendetta's Title VII claims, the issue is moot as to her gender-based hostile workplace claims. As to her ADA claims, however, the record here makes clear that, while Vendetta may not have utilized Bell's formal complaint mechanisms, she certainly made her concerns known to her immediate supervisors and to their immediate supervisors. This is thus not a case in which a defendant employer may be said to have had no notice of the elements of the allegedly hostile environment. Moreover, defendant's argument also assumes "no tangible employment action," while I have found that there is at least a fact question as to whether she suffered specific discriminatory acts, which would render the affirmative defense inapplicable.

the acts she regards as comprising her claim of a "hostile" work environment can, in fact, be fairly related to her claims of discrimination based on disability. I find support in the record for Vendetta's hostile workplace claims in the following areas: comments made to her directly by Anthony Zikesh; the processing of her transfer requests, including any requests for documents; the handling of her accommodation requests by Zikesh and by Bell's Reasonable Accommodations Committee; the requirement that she take the work skills (UTB) test. I find that the following do not support a hostile workplace claim and may not be considered for such: Vendetta's early transfer to the Race Street workplace; the placement of "write-ups" in her file, none of which is alleged to be false, and each of which seems entirely justified, e.g. for failing to notify officials about a computer malfunction, (Vendetta Exh. B.), see Shabat v. Blue Cross Blue Shield of Rochester Area, 925 F.Supp. 977, 989 (W.D.N.Y. 1996) (write-ups placed in personnel file "too inconsequential to support an action under Title VII."), aff'd, 108 F.3d 1370 (2d Cir. 1997)<sup>7</sup>; the requirement that she provide documentation for medical appointments; and Bell's payment to her of a half day's

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<sup>7</sup> Further, although one "write-up" deals with the scheduling of a doctor's appointment, the record indicates, and Vendetta does not contest, that she did in fact make that doctor's appointment

pay for a half day's work.<sup>8</sup>

I will thus dismiss Vendetta's Title VII claims and allow her ADA claims to proceed to trial. An order follows.

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<sup>8</sup> In her Response to Bell's summary judgment motion, Vendetta alleges that, in May 1997, Zikesh protected her co-worker Robert Haynes from being disciplined for his repeated menacing behavior. Bell challenges these claims because they are based on incidents occurring after the EEOC closed its file. Vendetta has since backed away from characterizing these alleged incidents as proof of a hostile workplace, (Surreply at 6 n. 2), but rather to "emphasize the credibility issues with respect to Mr. Zikesh." Accordingly, Haynes' alleged behavior will not be considered in evaluating Vendetta's hostile workplace claims; even if true, Vendetta has not linked it to either gender or disability discrimination.

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

SANDRA VENDETTA, : CIVIL ACTION  
 : NO. 97-4838  
Plaintiff, :  
 :  
v. :  
 :  
BELL ATLANTIC CORPORATION, :  
 :  
Defendant. :

O R D E R

AND NOW, this 8th day of September 1998, upon consideration of Defendant's Motion for Summary Judgment (Dkt. # 5); Plaintiff's Response; Defendant's Reply and Plaintiff's Surreply, it is **HEREBY ORDERED** that, in accordance with the accompanying memorandum, Defendant's motion is **GRANTED IN PART and DENIED IN PART**, and judgment will be entered for Defendant on Plaintiff's Title VII claims, but not on her ADA claims.

BY THE COURT:

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RONALD L. BUCKWALTER, J.