UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOAN NADINE FREDERICKS
PLAINTIFF

CASE No.: 1:06-CV-113
Magistrate Judge Hogan

V.

JOHN POTTER, et. al.
DEFENDANT

ORDER

Before the Court are the Motion for Summary Judgment of Defendant, John E. Potter, United States Postmaster General (Doc. 45); Plaintiff's Response in Opposition to the Motion for Summary Judgment (Doc. 52); and the Defendant's Reply to the Response in Opposition to the Motion for Summary Judgment (Doc. 61)[1]. For the reasons which follow, the Court recommends that Defendant's motion be denied.

FACTUAL BACKGROUND

Plaintiff began working for the Cincinnati Bulk Mail Center ("Post Office") in 1998. (Deposition of Joan Fredericks, at p. 14). In 2002, she was diagnosed with a severe knee condition called chondromalcia patellae. Because of her injury, Plaintiff could not work and received Worker's Compensation administered by the Department of Labor ("DOL"). (Id. at pp. 23, 34). Upon her return, Plaintiff worked under restrictions. (Deposition of Elizabeth Adams, Ex. 4). Plaintiff alleges that she was relieved of her duties without any explanation. (Id. at Ex. 5). Defendant, on the other hand, alleges that Plaintiff was relieved of her duties upon determination of the lack of work suitable for her restrictions. (Fredericks Dep. at p. 36).

[1] While docketed as a Reply in support of Defendants' Motion for Summary Judgment, this brief (Doc. 61) is an exact copy of Defendants' previously filed Reply in Support of Defendants' Partial Motion to Dismiss (Doc. 44).

Plaintiff received Worker's Compensation for six months until she was reinstated by the Post Office. She was given a "limited duty" job which accommodated her medical restrictions. (Adams Dep. at Ex. 4).

In the Spring of 2003, the DOL requested that the Post Office create a modified job for Plaintiff because Plaintiff's medical examinations determined that her knee impairment was permanent. (Id. at Ex. 25). Plaintiff alleges that the Post Office did not respond to these requests. Defendant claims that, in September 2003, Elizabeth Adams of the Postal Service's Shared Services Office in Pittsburgh, requested that the Post Office find a job for Plaintiff that would meet Plaintiff's medical restrictions. (Adams Dep. at Ex. 22).

In October 2003, the Post Office reassigned Plaintiff to third shift and removed her from her limited duty job. (Adams Dep. at Ex. 21). Plaintiff asked her supervisor about accommodations. Her supervisor told her to ask her manager on the evening shift. (Fredericks Dep. pp. 60-61). Thereafter, in November 2003, Adams indicated that "[w]e are attempting to provide Ms. Fredericks with suitable work within her restrictions." (Adams Dep., Ex. 23). Plaintiff claims that the Post Office repeatedly offered her jobs on the small parcel bundle sorter machine which required her to climb 3 stairs several times per shift. Plaintiff rejected this job offer because it did not comport with her medical restrictions. The DOL told the Post Office that a job with steps was unsuitable for Plaintiff. (Adams Dep. at Ex. 24-28). Defendant claims that the Post Office was unable to find a job that could meet Plaintiff's restrictions. (Deposition of George Graves, at p. 35).

By February 2004, the Post Office considered building a ramp so Plaintiff could get to the sorter machine without climbing any stairs. (Adams Dep. at Ex. 25-28). The ramp was never installed and the DOL placed Plaintiff on periodic rolls. (Id. at Ex. 25, 27). Plaintiff believed the DOL was working with the Post Office in 2004 to find her a job that accommodated her. Meanwhile, at the DOL's direction, Plaintiff reported for outplacement training eight hours a day, five days a week, for nine months. (Fredericks Dep. at pp. 67-69).

In January 2005, Plaintiff sent a formal request to the Disability Reasonable Accommodations Committee (DRAC) for a reasonable accommodation. (Deposition of Joey Bramlage, Exs. 37, 38). The parties dispute whether DRAC met, or communicated, with Plaintiff before January 20th, 2006. Plaintiff alleges that, upon learning from the DOL that the

Post Office was not going to accommodate her, she commenced the EEO administrative complaint process and filed a grievance in early October 2005.

Ultimately on January 20th, 2006, DRAC concluded that Plaintiff was not disabled. (Fredericks Dep., Ex. E; Bramlage Dep., Ex. 51). In February 2006, Plaintiff was notified that she was being separated from the Post Office. (Deposition of Richard Hohenstatt, at p. 99, Ex. 61). As a result, Plaintiff filed a second EEO administrative complaint alleging retaliation. (Fredericks Dep., Ex. G).

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgment motion. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes v. Runyon*, 912 F. Supp. 280, 283 (S.D. Ohio 1995)(Spiegel, J.). "[A]fter a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be

created by filing an affidavit contradicting [one's own] earlier deposition testimony." *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes*, 912 F. Supp. at 283. *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Plaintiff Timely Filed Her EEO Action

A federal employee must exhaust all administrative remedies before bringing an employment discrimination suit in federal district court. *Horton v. Potter*, 369 F.3d 906, 910 (6th Cir. 2004). In order for a postal employee to exhaust all administrative remedies, the "aggrieved person must initiate contact with [an EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). If the matter is not resolved informally, the plaintiff must file an individual complaint within 15 days of receipt of notice of the right to file a formal complaint. 29 C.F.R. § 1614.106(b). Once the formal complaint is filed, an investigation is commenced and an investigatory file is prepared and furnished to the plaintiff. 29 C.F.R. § 1614.108. The plaintiff may then either request a final agency decision or a hearing before an EEOC administrative judge. 29 C.F.R. § 1614.108(f).

The United States Supreme Court has held that the statute of limitations for an

employment discrimination claim does not begin to run "until an employer makes and communicates a final decision to the employee." *E.E.O.C. v. United Parcel Service, Inc.*, 249 F.3d 557, 561-562 (6th Cir. 2001) (citing *Delaware State College v. Ricks,* 449 U.S. 250, 258, (1980)). "Once the employee is aware or reasonably should be aware of the employer's decision, the limitations period commences." *Id; see also Dixon v. Anderson,* 928 F.2d 212, 218 (6th Cir. 1991). A plaintiff cannot render a claim of failure to accommodate timely by requesting the same accommodation that had been previously denied outside of the statutory limitations period. *Hall v. The Scotts Co.*, 2005 WL 3499933 (S.D. Ohio 2005)(unpublished decision).

In denying Defendant's Partial Motion to Dismiss, the district court stated that "it is not clear from the pleadings when the Post Office made and communicated the decision to deny an accommodation to Plaintiff or when Plaintiff reasonably should have been aware of the Post Office's decision to deny her requests." (Doc. 20). However, now that discovery has concluded, it still remains unclear from the evidence submitted when the Post Office made and communicated it's decision to deny Plaintiff's requested accommodation, and when Plaintiff should have reasonably been aware of the Post Office's decision to deny her requests.

Defendant claims that it is clear after discovery that Plaintiff did not timely commence her EEO action. He bases these claims on Plaintiff's testimony that she asked for reasonable accommodations at the time she was being moved to the evening shift. He claims that those requests were ignored by the Post Office, constituting rejection of the requests; therefore, her EEO action did not fall within the 45-day period of the action. In fact, Defendant alleges that Plaintiff brought her action two years late.

In contrast, Plaintiff argues that she was unaware that Defendant intended to deny her reasonable accommodations requests. Plaintiff testified that she sent a formal reasonable accommodations request in January 2005, however, the DRAC did not meet with her for over a year. Instead, the Post Office requested Plaintiff's medical records. Although Plaintiff submitted all the requested documents, she heard nothing from the Post Office until the DRAC set up a meeting on her request in January 2006. Furthermore, Plaintiff alleges that while she was receiving worker's compensation, the DOL was trying to get the Post Office to accommodate her. She further claims that it was not until the DOL notified her, in late

September 2005, that the Post Office was not going to accommodate her that she realized the intentions of the Post Office; then she immediately filed her EEO complaint in early October 2005. Finally, Plaintiff argues that she did not receive a final decision denying the reasonable accommodations request until January 2006.

Construing the evidence, and the inferences to be drawn therefrom, in a light most favorable to Plaintiff, we find that dismissal of Plaintiff's claim for failure to exhaust is inappropriate. While Defendant argues that ignoring Plaintiff's oral requests for accommodations constituted a final decision to deny, this Court does not agree. When Plaintiff orally requested accommodations from her supervisor, he merely delegated the duty to accommodate onto the evening shift's manager. We do not believe that a reasonable person would have understood that ignoring the request, or rather, delegating the decision to another manager, constituted a final decision to deny that request. Moreover, the Post Office made several attempts to accommodate Plaintiff during the time prior to formally denying her accommodation request. The Post Office also worked with the DOL to find a reasonable accommodation for Plaintiff. We find that the interaction between the parties would lead the reasonable person to believe that she was engaging in an on-going process towards finding and accommodation. As such, taking all inferences in favor of Plaintiff, we find that Plaintiff's EEO action was timely filed and find summary judgment on this issue to be inappropriate.

Plaintiff's Prima Facie Case

The Rehabilitation Act prohibits employers from discriminating against their employees on the basis of a disability. 29 U.S.C. § 794(a). If the employer relied on the plaintiff's disability in making an adverse employment action that can be shown through direct evidence, the plaintiff must prove that she is disabled. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir.1996). If, however, the plaintiff seeks to establish her case indirectly, the plaintiff may establish a prima facie case of discrimination by showing that: 1) she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) the employer knew or had reason to know of the plaintiff's disability; and 5) the plaintiff was treated

differently than a similarly situated non-disabled individual or was replaced by such a person. *Dicarlo v. Potter*, 358 F.3d 408, 418 (6th Cir. 2004).[2]

"Otherwise qualified" means that the plaintiff is able to perform all the essential functions of the job. *School Bd. Of Nassau County, Fla. V. Airline*, 480 U.S. 273, 288 (1987). When a disabled person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation will help the disabled person perform those functions. *Id.* at 288 n. 17. The Sixth Circuit uses a burden-shifting framework for deciding whether a proposed accommodation is reasonable or whether it presents an undue hardship. When the disabled employee requests a reasonable accommodation, she must establish that the accommodation is feasible. The disabled employee bears the burden to prove that she is qualified for the position with such reasonable accommodation. If the employee establishes that a reasonable accommodation is feasible, the employer then bears the burden of proving that such reasonable accommodation would impose an undue hardship. *Monette,* 90 F.3d at 1186 n. 12 (6th Cir.1996).

The essential functions of Plaintiff's job are in dispute. Defendant alleges that although Plaintiff could perform modified versions of her the clerk's job, walking, climbing steps, and standing were essential functions of her job that she could not perform. Defendant also claims that the SBPS position offered to Plaintiff was a modified version of the job and did not possess all essential functions of the SBPS. Furthermore, Defendant alleges that Plaintiff's rejection of the SBPS position rendered the Post Office with no other jobs within Plaintiff's restrictions to offer. Thus, Defendant contends that Plaintiff was not a qualified employee under the Act.

In contrast, Plaintiff argues that standing, climbing stairs, and walking are not essential functions of the SBPS job based on the position description furnished by Defendant. She further argues that the regular duties include using a keyboard and performing other clerical duties. Also, Plaintiff claims that the sorter job offered to her required keying, which involved sitting for 2 hours, sweeping which required standing and walking, and stand-by for 1 hour. All these duties fell well within Plaintiff's medical restrictions. Moreover, as Plaintiff points out that the head of the Reasonable Accommodations Committee, admitted that the DRAC members found that she

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[2] As the parties have offered no arguments with respect to the last two elements of Plaintiff's prima facie case, our decision today does not reach such.

could perform the essential functions of the sorter job, with the accommodation of a ramp to enable her to get to the sorter machine. As such, we find that sufficient evidence exists from which a reasonable jury could find Plaintiff capable of performing the essential functions of her job such that summary judgment is not appropriate.

Neither party has offered an argument with respect to whether the accommodation, namely installing a ramp, posed an undue hardship for Defendant. As such, our decision today does not reach this issue but rather reserves such for trial.

To be disabled under the Rehabilitation Act, the plaintiff must (1) have a physical or mental impairment which substantially limits her in at least one major life activity, (2) have a record of such an impairment, or (3) be regarded as having such an impairment." *Mahon v. Crowell*, 295 F.3d 585, 589 (6th Cir.2002). Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* at 590.

Furthermore, the federal regulations define "substantially limits" as: (I) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, the court should consider the: (I) nature and severity of the impairment; (ii) duration or expected duration of the impairment; and (iii) permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2). In addition, the Supreme Court has stated that whether a person has a disability under the ADA is an individualized inquiry. *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 483 (1999). If the plaintiff submits sufficient evidence to create a question of fact, summary judgment should be denied. *Clark v. Whirlpool Corp.*, 109 Fed.Appx. 750, 754 (6th Cir. 2004).

First, Plaintiff must demonstrate that she is disabled within the meaning of the Act. Although Defendant concedes that Plaintiff has a permanent impairment to her knee that will not improve with surgery, the DRAC determined that Plaintiff was not a disabled individual. At

issue is whether Plaintiff's chondromalacia patella substantially limits a major life activity. Because Plaintiff is able to walk up seven steps to her residence, drive, shop, take care of herself, and was unable to articulate a major life activity that is substantially limited by her injury, Defendant argues that she is not disabled. To support the DRAC's decision, Defendant cites to *Penny v. United Parcel Service*, wherein the Appellate Court for the Sixth Circuit concluded that "moderate difficulty or pain while walking does not rise to the level of a disability." 128 F.3d 408 (6th Cir. 1997). However, *Penny* is distinguishable on its facts. While the plaintiff in *Penny* suffered an impairment that affected to some degree his ability to walk, the Court concluded that he did not produce sufficient evidence from which a factfinder could reasonably conclude that "the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population." *Id.* at 415. In *Amann v. Potter*, however, the ALJ found that the plaintiff who suffered from chondromalacia patellae was a qualified individual with a disability whom the USPS was able to accommodate. 105 Fed. Appx. 802, 804 n. 2 (Ohio 2004)(summary judgment granted on other grounds). *See also Baumgardner v. County of Cook*, 2001 WL 881246 (N.D. Ill. 2001).

Plaintiff argues that her knee injury limits her major life activities of walking, standing, sitting, climbing stairs, stooping, and bending. Plaintiff submitted medical documents from her physician which were corroborated by a second physician which indicated that she is restricted in the aforementioned activities. These physicians also furnished the Post Office with medical documents that permanently restricted Plaintiff. Furthermore, Plaintiff alleges that the average use of her right knee causes her excessive swelling and pain, followed with instability. Plaintiff testified that she is required to wear a knee brace every day and that she moved into a one level home because she could not climb stairs without her knee swelling and buckling. She further testified that, because she cannot walk, she asks people to bring her groceries and has only been to the grocery store three times in the past year. Further, she constantly postpones her chores because of the pain which such activities will produce. (Fredericks Dep., at 135-37).

When viewing the evidence in Plaintiff's favor, we find that it is reasonable to conclude that she is "restricted as to the condition, manner or duration" in performing a major life activity as compared to the condition, manner, or duration that the average person in the general population can perform. Because the evidence is sufficient to create a genuine issue of material

fact with respect to whether Plaintiff is a disabled individual who is otherwise qualified with or without accommodation, summary judgment is inappropriate.

Plaintiff's Retaliation Claim

In order to establish a prima facie case of retaliatory discharge, plaintiff must prove (1) that she engaged in an a protected activity; (2) that this exercise of her protected civil rights was known to defendant; (3) that defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight Systems, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

Once the plaintiff has established a prima facie case, the burden of production of evidence shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802 (1973). If the defendant is able to articulate nondiscriminatory reasons then the plaintiff, who bears the burden of persuasion throughout the entire process, must demonstrate "that the proffered reason was not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

It is undisputed that Plaintiff engaged in a protected activity and that the decision to separate Plaintiff from the Post Office was an action adverse to Plaintiff. It is, however, disputed whether the exercise of Plaintiff's protected civil rights was known to Defendant and whether there was a causal connection between the protected activity and the adverse action[3].

Defendant denies that any of the relevant actors knew of the protected activity when they acted. Although Defendant concedes that Graves, the Plant Manager, knew about the protected activity, Defendant argues that there is no evidence that Graves had any role in the reasonable accommodations denial by the DRAC. Plaintiff, on the other hand, relying on depositions and testimony, lists names of people who were aware of Plaintiff's action. Among these listed are the Manager of Labor Relations, and Graves. Although Graves was not a member of the DRAC,

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[3] Defendant focuses his argument on whether Defendant knew of Plaintiff's protected activity and whether the reasons for terminating her were legitimate business reasons. Thus, for purposes of this summary judgment motion, Defendant has waived argument with respect to the other elements of Plaintiff's *prima facie* case.

Plaintiff alleges that Graves forwarded Plaintiff's request for a reasonable accommodation to the DRAC on October 6, 2005. Furthermore, Plaintiff argues that since Graves was listed on the EEO complaint as the person responsible for the discrimination, a reasonable juror could infer that Graves told Bramlage, the DRAC chair, about the protected activity in light of the close proximity of the time between his communication with Bramlage and the protected activity. Plaintiff also alleges that the DRAC members knew of her protected activity because they did not respond to her January 2005 request until she filed her grievance in October 2005. She testified that the DRAC members kept delaying the meeting with Plaintiff and they met together without her prior to the January 20th, 2006 DRAC meeting. Thus, we find that a genuine factual issue exist as to whether the Defendant knew of Plaintiff's protected activity.

Once Plaintiff establishes a prima facie case of retaliation, Defendant has the burden to articulate some legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802 (1973). If Defendant is able to articulate nondiscriminatory reasons then Plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. *Burdine*, 450 U.S. at 256 (1981).

Defendant claims that Plaintiff was separated from her job because it is common practice to separate employees who have been on leave for more than a year. Defendant further argues that separation saves the Post Office money. Plaintiff, on the other hand, argues that, if the Post Office's concern was to save money, the Post Office would have separated Plaintiff in October 2004, a year after Plaintiff left her job. Instead, Defendant separated Plaintiff in February 2006, a few months after the EEO claim was filed.

Although Defendant was able to state a legitimate, nondiscriminatory reason for its actions, Plaintiff casts doubt on the proffered reason as not being the true reason for the decision. Because Plaintiff's separation came only a few months after her EEO action, and two years after Plaintiff's leave without pay, a factfinder could reasonably infer that Defendant's actions were discriminatory. Because genuine factual issues exist as to whether Defendant knew of Plaintiff's protected activity at the time he decided to terminate her, and whether Defendant's stated reason for Plaintiff's termination was a legitimate business reason or a pretext for discrimination, summary judgment is not appropriate and is therefore denied.

IT IS THEREFORE ORDERED THAT

1) Defendant's Motion for Summary Judgment (Doc. 45) be DENIED.

Date 12/4/07

Timothy S. Hogan
United States Magistrate Judge