IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ROBERTA BARNGROVER, Plaintiff, vs. W.W. TRANSPORT, Defendant.	**No. 3:02-cv-40020** **ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. BACKGROUND

Roberta Barngrover ("Barngrover") began working for W.W. Transport ("WW") when she was forty-six (46) years old. She worked for WW just over one year, beginning in WW's accounting department doing payroll and eventually being promoted to the position of accounting assistant. Before she had completely transferred into her new position on a full-time basis, WW terminated Barngrover's employment. Shayla D. Marti was twenty-six (26) years old when she was hired to take over Barngrover's old payroll position. Shawn Birkenstock was thirty-two (32) years old when she was hired to take over the accounting assistant position left vacant by Barngrover's termination.

On February 20, 2002, Barngrover filed suit in Iowa state court, alleging her termination violated the Family Medical Leave Act ("FMLA"), Title I of the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and provisions of the Iowa Civil Rights Act ("ICRA"). WW removed this lawsuit to the United States District Court for the Southern District of Iowa on March 11, 2002. On February

10, 2003, WW requested summary judgment on all counts. Barngrover has resisted. On April 28, 2003, the matter came on for hearing with Thomas D. Hobart appearing on behalf of Barngrover and Martha L. Shaff appearing on behalf of WW. For the reasons that follow, summary judgment on the FMLA and ADA claims will be granted; summary judgment on the ADEA and ICRA claims will be denied.

II. FACTS[1]

Defendant WW is engaged in transportation of bulk food grade commodities for flour milling companies. Incorporated in 1991 and beginning operations with only one employee, WW has experienced growth of 15 percent in each of the last four years, currently employing 145 people. Janine Clover ("Clover") was hired by WW as its accountant near the end of September, 1999. As Clover understood it, WW's prior bookkeeper had just been doing bookkeeping, and WW wanted someone with the ability to provide more financial information and ultimately financial statements for WW. Additionally, Clover was given responsibility for payroll. As part of these payroll duties, Clover's work included 401(k), payroll taxes, child support, garnishments, and health insurance deductions. Shortly after being hired, it became apparent Clover was unable to complete all the responsibilities, so Clover was authorized to hire a new person to help in accounting. Clover determined Barngrover could provide that help and in November of 1999, hired Barngrover as Clover's subordinate.

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[1] These facts are either undisputed or viewed in the light most favorable to Barngrover, the non-movant.

Clover supervised Barngrover and was responsible for assigning Barngrover's duties. WW pays its employees weekly, so its payroll has to be completely done each week. Believing payroll was the most important task needing immediate and constant attention, Clover assigned Barngrover the job of payroll.

On Sunday, October 8, 2000, Barngrover was in an automobile accident and sustained injuries which included four herniated disks in her neck, two herniated disks in her lower back, a fractured tailbone, and a caved in chest wall from the seatbelt. Although she was initially seen in the emergency room, Barngrover was not kept in the hospital. Feeling as though she could not afford to miss work, Barngrover was absent from work for a day and a half. When she did return, Barngrover provided WW with a doctor's letter indicating she was not to work more than 6-8 hours per day, five days per week. Barngrover specifically told WW that she did not need to take any time off as long as her restrictions were followed.

It is undisputed that Clover and Jeff Walters ("Walters"), President of WW, knew of Barngrover's accident and were aware of Barngrover's restrictions. It is also undisputed that, as far as Walters knew, Barngrover's restrictions did not create any problem for WW. Barngrover was able to attend every physical therapy session scheduled, and Barngrover admits Clover never told her WW would not accommodate her.

In part because of the disorganized condition of the accounting department, WW was a stressful environment in which to work. Clover testified at her deposition that when she first began working at WW, she felt very overwhelmed by the lack of organization and

all of what had to be done. Clover testified that she discussed with Barngrover, when Barngrover was initially hired, how difficult working in the accounting department might be.

During Barngrover's employment with WW, her relationship with Clover was contentious, although the parties disagree on when this first began. Walters believed Clover could be difficult to deal with because of her "moods" and difficult to work with because she was "very emotional".[2] It is undisputed that prior to Barngrover's termination, Walters had to intervene and resolve a conflict between Clover and Barngrover.

WW points to examples contained in the record which suggest the Barngrover/ Clover relationship had deteriorated prior to Barngrover's car accident. For example, Clover testified about one of the first conflicts they had, which preceded the accident, where Clover called Barngrover at work to say Clover's daughter was ill and that she would not be at work that day. While Clover did not remember precisely what Barngrover

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[2] Clover says while Barngrover worked at WW, Clover was happy in her job, but after Barngrover was gone, she became unhappy in her position as WW's accountant. See WW App. p. 33, Clover Depo. p. 52, ll. 10-25 - WW App. p. 34, Clover Depo. p. 53, ll. 1-16, wherein Clover says

> I was trying to do the best job that I could. They wanted an accounting department that ran like an accounting department, that gave them the information that they wanted, and that's what I wanted to do, is give them that type of information, and any time a person is faced with a situation where you're trying to – give a person results and you're met with resistance from people or people above you or below you, it is very frustrating, and I just decided I could not put in those type of hours any more for what I was getting.

had said, Clover believed Barngrover's reaction was not justified and ended up making other arrangements for the care of her sick daughter so she could go into work. Clover additionally asserts that prior to her accident, Barngrover had been rude to WW drivers and staff who were seeking reimbursement from petty cash for qualifying over expenses, which was available through Barngrover. According to WW, these conflicts continued after Barngrover's accident, simmering to a boil on November 17, 2000, when Clover apparently offered to help Barngrover finish payroll. According to Clover's written memorandum of the incident, Barngrover declined Clover's offer, saying that Barngrover could do payroll herself and that Clover would get cranky if she did not get her work done. Clover believed co-workers overheard this exchange and felt Barngrover's behavior was inappropriate. Clover insists she was ready to fire Barngrover for this incident but changed her mind after having thought about it over the weekend. Throughout all of this, Clover continued her efforts of trying to organize WW's accounting department more efficiently, which at times resulted in additional duties for payroll.[3] Clover asserts she tried adding responsibilities for Barngrover, with poor success. Although apparently never telling Barngrover of her apprehension, Clover testified she was afraid to ask Barngrover to do

[3] See, e.g., WW App. p. 28, Clover Depo. p. 21, ll. 11-13 (indicating Clover's belief that instead of WW using a separate person in WW's dispatch area to review and figure out time cards, a payroll clerk could do that); see also WW App. p. 34, Clover Depo. p. 55, ll. 24-25 - p. 56, ll. 1-5 (testifying "we were trying to get all payroll under [Barngrover] . . . .").

anything, unsure of the type of response Barngrover would give. According to Clover, Barngrover would suggest she could not do what Clover was asking her to do.[4]

Barngrover completely denies WW's suggestion that problems between her and Clover existed before the accident. Barngrover denies the "sick daughter" incident ever took place, denies she was ever rude to WW drivers or staff, and denies that she ever rebuffed an offer by Clover to help complete payroll around Thanksgiving of 2000. According to Barngrover's version of events, it was only after her car accident that her relationship with Clover worsened. At her deposition, Barngrover testified about a post-accident encounter with Clover where Clover said she was sorry Barngrover was in an accident, but she was not one to give much sympathy and that Barngrover still had to get all the work done. Specifically, Barngrover alleges Clover's unsympathetic attitude manifested itself by Clover becoming a less patient person and giving Barngrover duties to do which Clover had previously done herself.[5] Despite perceiving changes in Clover's attitude

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[4] Barngrover has submitted an affidavit, wherein she "den[ies] ever saying such things as, "that idea won't work" or "I can't do it."" See Barngrover App. p. 23, ¶ 24.

[5] Although not specific as to when this occurred, Walters did recall Barngrover approaching him to complain that Clover was "unfair with [Barngrover], demanding with [Barngrover] . . . [Barngrover] felt that [Clover] was just trying to give [Barngrover] all of her work, so [Clover] wouldn't have any work, and I had to explain, you know, what my function was for [Clover], is I wanted her to use her accounting degree on financial info for [WW] . . . ." See WW App. p. 19, Walters Depo. p. 24, ll. 4-10. Walters went on to acknowledge that Clover was giving Barngrover work to do which Clover previously had done, work that was in addition to the payroll duties Barngrover had been doing (although it is unclear whether the duties he was referring to were related to a promotion Barngrover received). See id., Walters Depo. p. 24, ll. 15-17; see also WW App. p. 20, Walters Depo. p. 25, ll. 5-12.

after the accident, Barngrover never complained about Clover after the accident. The Court notes that although Barngrover specifically denies she did not complain about Clover after the accident and refers the Court to her affidavit to support this assertion, a review of her affidavit demonstrates Barngrover admits she did not complain about Clover after the accident.[6]

Despite the conflicts existing between them, Clover still remained responsible for Barngrover and was responsible for determining which duties she was to perform. Having decided not to fire Barngrover in November of 2000 and, by now, recognizing that Barngrover seemed unhappy in her payroll duties, Clover suggested Barngrover take over a new accounting department position being created, that of accounting assistant,[7] and that a new person be hired to do payroll. Clover suggested the accounting assistant position,

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[6] At her deposition, Barngrover did later say that during the time she was with WW, she did complain about Clover on one or two occasions, but the record is not clear on when these complaints were made. See id. at ¶ 9. Having previously admitted that she did not complain about Clover after her accident, a reasonable inference would be that Barngrover is referring to complaints she made about Clover *before* her accident, which actually corroborates WW's own assertion that the Barngrover/Clover relationship began deteriorating *before* Barngrover's accident. See also WW App. p. 7, Barngrover Depo. p. 31, ll. 17-25 - p. 32, ll. 1-6 (showing that Barngrover complained about Clover before the accident but not after the accident).

[7] The accounting assistant apparently was going to assist Clover in order to free up more of Clover's time so that she would be able to create the financial statements WW had wanted its accounting department to be capable of producing. See WW App. p. 34, Clover Depo. p. 56, ll. 10-25 - p. 59, ll. 1-11; see also WW App. p. 39, Clover Depo. p. 73, ll. 18-22 (indicating Clover believed an accounting assistant was necessary because the accounting department needed someone that could do accounts payable, work on pay sheets, serve as backup to Clover, and assist in collecting all the information necessary to put together WW's financial statements.)

while having its own type of job stress, would not have the weekly deadlines and stress associated with payroll. Barngrover did become accounting assistant and had the choice of a small pay raise of $500 per year or an extra week of vacation. Barngrover's transition into the accounting assistant position was a promotion.

It is undisputed that after Barngrover's accident, Clover did not notice any change in the quality or quantity of Barngrover's work. Clover indicated she believed Barngrover had become more proficient in completing the payroll duties and had expected that Barngrover would be able to begin accepting random projects to transition into her new position. Therefore, while WW advertised for a new payroll person, Barngrover continued doing payroll and also began accepting new assignments from Clover related to the accounting assistant position.

Barngrover testified that when she was approached about doing the extra work, she knew the company would be seeking another person in the office to help and that she had a choice to either keep the payroll position or move into another position to do more accounting. Barngrover knew WW planned to hire someone to do either payroll or the accounting assistant position, whichever job she did not do, and acknowledged that it was not intended that Barngrover perform both jobs.

Barngrover admits she did not object to the additional work Clover gave her and was never told by anyone at WW that she must work beyond her restrictions. Instead, Barngrover alleges that the pressure she felt from Clover to get the job done resulted in her having to work beyond her restrictions. Shortly after Barngrover first received projects

related to the accounting assistant position, and while she was still simultaneously completing her old payroll duties, Clover decided she was not as comfortable with Barngrover in the accounting assistant position.[8] According to WW, because Barngrover continued to resist changes being made at WW and projected an attitude of being unwilling to be a "team player",[9] Clover again decided Barngrover needed to be terminated. Barngrover disputes this, arguing she is a person who deals well with change and that she did not get

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[8] WW insists that Barngrover projected a "can't do" attitude, and the record contains Clover's testimony that she (Clover) had tried

> to get things smooth, trying to get the financial operations, the financial department, the accounting department to run smoothly, and after – after offering her that accounting assistant and it just seemed like she wasn't wanting to go ahead and sit down with me and learn some of these new things, and I just felt that maybe it was the wrong decision to make and that we maybe needed to just look at the whole picture and make some changes, maybe this was the time to make some changes.

See WW App. p. 42, Clover Depo. p. 99, l. 25 - p. 100, ll. 1-9; see also WW App. p. 39, Clover Depo. p. 75, ll. 5-19 (Clover testifying that as she began asking Barngrover to do certain projects related to the accounting assistant position, she was met with a lot of resistance from Barngrover and came to believe Barngrover perhaps wanted to stay with payroll and that perhaps Barngrover becoming the accounting assistant was not the right decision).

[9] As an example, Clover testified that while she anticipated payroll would figure out how much money each of WW's departments had for gas, see WW App. pg. 35, Clover Depo. p. 57, ll. 20-25, she intended to have the accounting assistant, not the payroll person, "figure up like what the gas purchases are so that we could get them into a spread sheet." See id., Clover Depo. p. 59, ll. 1-8. Clover had also wanted to "go one step further and [have Barngrover as the accounting assistant] figure up – just adding on a machine how much gas purchases were on these sheets so we could cost them out at the end of the month, and it just didn't go over very well. So I think I just continued to do that until we had changed things around and had gotten another person added to the whole mix."). See id., Clover Depo. p. 57, l. 25 - p. 58, ll. 1-7.

frustrated with the changes taking place at WW. Barngrover claims she tried to be "team player" while at WW, was successful at times, and was unsuccessful only when Clover would be upset without explanation.

Clover consulted with Walters about terminating Barngrover, and on February 16, 2001, Barngrover was summoned to a meeting with Walters and Clover where she was terminated. Although the record is unclear as to what Barngrover was told when she was terminated,[10] all parties agree that Barngrover was never told she was being terminated because of her injuries or because of her age.[11] Barngrover requested and did receive a

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[10] See, e.g., WW App. p. 23, Walters Depo. p. 44, ll. 10-18 (indicating Barngrover was not provided a long explanation of why she was fired); p. 44, ll. 20-25 (remembering that, perhaps in the termination meeting, Walters told Barngrover her inability to fit in was not all her fault, and that she might fit in better in a company that did not grow as rapidly or have all the changes that WW had); WW App. p. 24, Walters Depo. p. 45, ll. 4-9 (acknowledging that Walters was unsure if he would have told Barngrover, when terminating her, that the reason was because she was not a "team player"); compared with WW App. p. 41, Clover Depo. p. 87, ll. 3-13 (indicating that Clover could not remember what was said when Barngrover was fired because Clover was "so upset and nervous"); p. 88, ll. 5-12 (highlighting Clover recalling that Barngrover was told she was fired because, despite WW's efforts, Barngrover was not being a team player and, to allow WW to go forward, changes needed to be made); and compared with Barngrover App. p. 17, Barngrover's answers to WW's first set of interrogatories (detailing Barngrover's assertion that, when she was terminated, "Janine told me that I was being terminated because I couldn't get my work done . . . She then changed her statement and informed me that I wasn't a team player. Jeff Walters told me that I needed to be in a more professional office.").

[11] The record reflects that at some undetermined time after her accident, Barngrover commented to Walters that she felt as though she were "falling apart", prompting Walters to respond that maybe Barngrover was having a "mid-life crisis." See WW App. p. 8, Barngrover Depo. p. 35, ll. 13-21. Barngrover was not sure if Walters was joking. See id., Barngrover Depo. p. 35, l. 15.

letter of recommendation, written by Clover and signed by Walters, also dated February 16, 2001.

III. SUMMARY JUDGMENT 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). Once the moving party points to those areas of the record it believes demonstrates the absence of a genuine issue of material fact, under Fed. R. Civ. P. 56(e), "the nonmoving party [must] go beyond the pleadings and [point to specifics in the record] showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." See Dose v. Buena Vista Univ., 229 F. Supp. 2d 910, 919 (N.D. Iowa 2002) (quoting Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994), which cites Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991)). This caution is mandated "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, [and] summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant." Id. (quoting Crawford, 37 F.3d at 1341). Thus, summary judgment is appropriate in employment discrimination cases in "those rare instances where there is no dispute of fact and where there exists only one conclusion." See id. (quoting Johnson, 931 F.2d at 1244). Despite this cautionary directive about

summary judgment in employment discrimination cases, the Eighth Circuit has also indicated that "the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995) (citing Reich v. Hoy Shoe Co., 32 F.3d 361, 365 (8th Cir. 1994)). While a court should cautiously approach summary judgment in the employment discrimination context, "there is no 'discrimination case exception' to . . . Fed. R. Civ. P. 56, and it remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial." Berg v. Norand Corp., 169 F.3d 1140, 1144 (8th Cir. 1999).

IV. DISCUSSION

A. Family Medical Leave Act.

In this case, it is undisputed that Barngrover never requested leave from work. Barngrover did request and was permitted time to attend physical therapy sessions, but at no time during her employment did she ever report that her physical condition had worsened and that, as a result, she required time off. Most significantly, she never told anyone at WW that she was having to work in excess of her restrictions in order to get the work done. Without any of this, says WW, Barngrover's FMLA claim fails as WW was under no duty to investigate Barngrover's injuries or her need for time off.

Acknowledging that she never complained about working past her restrictions, Barngrover argues an employee does not have to expressly assert rights under the FMLA, or even mention the FMLA, but may only state that leave is needed, citing 29 C.F.R. §

825.303(b), and that the employer will be expected to obtain any additional required information through informal means, citing 29 C.F.R. § 825.303(b). In this case, Barngrover argues the work restriction note she gave to WW provided sufficient notice of her need for time off because of a serious medical condition, thereby triggering WW's obligations under the FMLA to obtain any additional information WW felt it needed. Barngrover argues the restriction letter constitutes the same type of notice found sufficient to trigger the FMLA in Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 852 (8th Cir. 2002). Thus, in resisting WW's request for summary judgment on her FMLA claim, Barngrover argues that the existence of substantial issues of fact in relation to whether the note was sufficient notice under the FMLA and whether WW complied with the FMLA precludes summary judgment.

Replying, WW points out Barngrover initially plead she had been terminated for requesting a reduced leave schedule (which, the Court notes, Barngrover seems to have abandoned) and now alleges the FMLA has been violated. Additionally, WW argues Barngrover has not addressed how her rights have been violated, has not cited to a specific instance where she worked in excess of her restrictions after her accident,[12] cannot provide an instance where she complained to WW that she was working or being asked to work

[12] The record indicates that when Barngrover was first hired, both she and Clover were having to work 10-20 hours extra a week. See WW App. p. 4, Barngrover Depo. p. 18, ll. 1-25 - p. 19, ll. 1-16; see also Barngrover App. p. 17, Barngrover's answers to WW's first set of interrogatories (detailing Barngrover's assertion only that "[a] year ago this time I worked 45-60 hour weeks . . . ."). WW points out Barngrover has not provided evidence of her working more than forty (40) hours a week after her accident. See WW Reply, p. 2.

in excess of her restrictions, and cannot provide an instance where she was not allowed to attend physical therapy sessions. WW argues Barngrover has not shown the existence of any genuine issue of material fact in relation to her alleged FMLA violation, and, therefore, WW is entitled to judgment as a matter of law on this count.

The FMLA allows eligible employees the ability to take off a "total of 12 work weeks of leave during any 12 month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." See 29 U.S.C. § 2612(a)(1)(D). Barngrover is correct, "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means." See 29 C.F.R. § 825.303(b).

There are two different procedures for notifying an employer of the need for leave, depending on whether the employee knows leave is needed. If the need for leave is foreseeable, the employer shall be given notice of the need for leave at least 30 days before the leave is to begin. See 29 U.S.C. § 2612 (e)(2)(B). Where the need for leave is not foreseeable, the employer should be notified "of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case." See 29 C.F.R. § 825.303(a).

As it remained unclear to the Court, at oral argument the Court queried Plaintiff's counsel on whether Barngrover believed her need for leave was foreseeable or non-foreseeable. Counsel explained that WW knew Clover demanded too much of Barngrover

and that it also knew Barngrover would need physical therapy. Based on this, Plaintiff's counsel asserted Barngrover's need for FMLA leave was foreseeable. This argument, however, assumes the focus is on whether the need for leave was foreseeable to WW, when the correct focus is on whether the need for leave is foreseeable to the employee. See, e.g., 29 U.S.C. § 2612(e)(2) (discussing foreseeable leave and specifying what duties an employee has where the necessity for leave is foreseeable based on planned medical treatment).

Assuming Barngrover's need for leave was foreseeable, a higher burden of notification is required of her. See 29 U.S.C. § 2612(e)(2)(B) (indicating "the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin."); see also 29 C.F.R. § 825.302(a) (specifying "notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates . . . were initially unknown."); 29 C.F.R. § 825.302(c) (discussing "[a]n employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, *and* the anticipated timing and duration of the leave."). The record indicates Barngrover did not satisfy her burden of providing this notice. Since WW knew she was in an accident and was receiving physical therapy, Barngrover avers that if WW thought her restrictions meant she would have to work fewer hours than what they believed her work normally required, WW ought to have offered her FMLA leave for the work she was unable to complete within her restrictions. Barngrover admits she told WW as long as her restrictions were followed, she would not need leave, the implication being

that she may need leave if her restrictions were exceeded. However, the Eighth Circuit Court of Appeals has determined

> attempt[ing] to satisfy the notice requirements by an indication that [one] *might* have to be absent at some *unforeseen* time satisfies neither the requirement of notice of 'the anticipated timing and duration of the leave,' 29 C.F.R. § 825.302(c), nor the requirement of notice 'as soon as practicable if dates . . . were initially unknown.' 29 C.F.R. § 825.302(a).

See Bailey v. Amsted Indus. Inc., 172 F.3d 1041, 1046 (8th Cir. 1999) (emphasis added).

Even analyzing the possibility that Barngrover's need for FMLA leave was unforeseeable, Barngrover still has not demonstrated the existence of a genuine issue of material fact on the issue of whether Barngrover provided sufficient notice to WW in an adequate or timely fashion. See Carter v. Ford Motor Co., 121 F.3d 1146, 1148 (8th Cir. 1997) (discussing notice to employer must be both adequate and timely and interpreting the "as soon as practicable" language of 29 C.F.R. § 825.303(a) to generally mean "no more than two days after learning of the need for leave."); see also Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1049 (8th Cir. 1999) (indicating that while an employee does not need to mention the FMLA in order to fall under its auspices of protection, the employee "must state that leave is needed."). Here, the record is clear that Barngrover never told WW that she needed leave.

Before an employer's duties under the FMLA arise, the Eighth Circuit Court of Appeals has indicated that an employee must provide "enough information to put the employer on notice that the employee may be in need of FMLA leave." Browning, 178 F.3d at 1049. In this case, when WW was presented with the doctor's letter, Barngrover

explained that as long as the work restrictions were met, *she would not need any* time off. WW indicated it would honor her restrictions and further indicated it would allow her time to receive physical therapy. Barngrover never complained about any of the extra duties she was assigned and never informed WW she was exceeding her work restrictions in order to get the job done. WW, therefore, could reasonably believe that throughout the end of her employment, Barngrover was not in need of leave since, as far as it was aware, she was working within her restrictions. Barngrover's reliance on Spangler to suggest the doctor's note provided sufficient notice, thereby triggering WW's duties under the FMLA, is misplaced.

In Spangler, the plaintiff had a long and documented history of depression and dysthymia. See Spangler, 278 F.3d at 848. After being fired from work for excessive absenteeism, Spangler filed suit alleging violations of the ADA and FMLA. Id. Chief Judge Longstaff of the United States District Court for the Southern District of Iowa granted defendant's request for summary judgment on all counts. Id. On appeal, the Eighth Circuit Court of Appeals reviewed the record and observed that after a 1997 dysthymia diagnosis, Spangler took leave to be treated. Id. Employer records indicated Spangler had "a persistent pattern of absenteeism and tardiness throughout [her] employment with the Bank." Id. at 849. "Throughout 1997 and 1998, Spangler's many unscheduled absences and her persistent tardiness were routinely noted by the Bank." Id. "Her 1997 performance appraisal noted that her 21 absences that year were excessive and that absenteeism was a problem for Spangler." Id.

> In early January, Spangler again missed a string of days from work, each morning leaving messages she would not be in that day or would be late, but then not arriving at work at all. Spangler was warned and put on a six-month probation. . . . Immediately after probation ended, Spangler had four unexcused absences in July and August of 1998. . . . Spangler was again put on probation on August 31, 1998. . . . [On September 16], a Bank employee noted in a memorandum to Spangler's manager that Spangler phoned and stated she would not be in that day because it was "depression again." On September 17, when Spangler had not yet arrived at work in the middle of the morning, and had not yet called with any explanation, Spangler's manager terminated her employment.

Id. at 849-50.

On appeal, Spangler asserted that "by alerting the Bank of her need for time off due to 'depression again' the day before her dismissal, she put the Bank on notice that she would need time off that would qualify under the FMLA." Id. at 852. Addressing whether Spangler had provided enough information to put the Bank on notice of her need for FMLA leave, the Eighth Circuit noted that "the Bank . . . knew Spangler suffered from depression, knew she needed leave in the past for depression and knew from Spangler specifically on September 16, 1998, she was suffering from 'depression again.'" Id. Therefore, "[i]n construing the facts in the light most favorable to Spangler, [the Eighth Circuit] view[ed] her uncontroverted statement that it was 'depression again' as a potentially valid request for FMLA leave." Id. The Eighth Circuit Court of Appeals, therefore, reversed the district court's grant of summary judgment on the FMLA claim but affirmed the district court's summary judgment on the ADA claim. Id. at 853.

The Bank's prior knowledge of Spangler previously having taken time off for depression coupled with Spangler's indication that she was suffering from "depression

again" the day before her termination was crucial to the Eighth Circuit's decision. In stark contrast to Spangler, in this case, WW was only aware of Barngrover's accident.

Not only did Barngrover specifically say she would not require leave if her restrictions were followed, WW informed her that her restrictions would be followed. The record reflects that at no time was WW ever made aware that Barngrover's restrictions were not being followed or that she was in need of leave. Moreover, it is undisputed that, after the accident, Clover did not observe any change in the quality or quantity of Barngrover's work compared with what Barngrover had done before her accident. Without anything more in the record, this Court cannot conclude that Barngrover provided enough information to put WW on notice that Barngrover may be in need of FMLA qualifying leave. See Browning, 178 F.3d at 1049. For this reason, Barngrover's FMLA claim fails as a matter of law, and WW's request for summary judgment as to this count is granted.

B. Americans with Disability Act.

In requesting summary judgment, WW argues Barngrover is not disabled. See WW Brief, p. 10. Assuming, without deciding, that working is a major life activity under the ADA, the Eighth Circuit Court of Appeals has indicated that "[a]n employee is not substantially limited in the major life activity of working by virtue of being limited to a forty-hour work week." Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1087 (8th Cir. 2000) (citing Taylor v. Nimock's Oil Co., 214 F.3d 957, 960-61 (8th Cir. 2000)). As Barngrover can work up to 40 hours per week, WW asserts she is not disabled within the Act's meaning. WW also makes the alternative argument that even if her restrictions qualified

under the ADA, Barngrover has not proven that her work restrictions are permanent. "[T]emporary, minor injuries do not 'substantially limit' a person's major life activities." Hutchison v. United Parcel Service, Inc., 883 F. Supp. 379, 395-96 (N.D. Iowa 1995) (referring to the ADA regulations found at 29 C.F.R. § 1630.2(j); 1630 App. at 407).

In resisting WW's request for summary judgment on the ADA claim, Barngrover argues "[s]ubstantial issues" of fact exist with regard to whether she had a disability or was perceived to have a disability, whether this disability was permanent or perceived to be permanent, and whether her termination was based in part upon her work restrictions. In her brief, Barngrover asserts a genuine issue of fact as to whether WW viewed her as having a disability after the automobile accident. Barngrover has alleged she was treated differently by WW after her accident as evidenced by being given additional work to do and Clover being more demanding. Barngrover alleges WW asked that she do more and more work which could not be accomplished within the medical restrictions. Barngrover believes WW grew tired of her restrictions and was unsure how much longer these restrictions would be in place. As a result, she argues WW hired healthier employees (Marti and Birkenstock) without work restrictions to do the work in Barngrover's place. Barngrover argues that since the facts surrounding why she was terminated are "hotly contested", summary judgment is inappropriate.

Replying to these allegations, WW argues that none of Barngrover's assertions of being treated differently or being given additional work establishes she is protected under the ADA. Attacking Barngrover's attempt at establishing a prima facie case of being

protected under the ADA, WW points out Barngrover has not alleged facts showing how her injuries constitute a disability within the meaning of the ADA, nor has she pointed to facts indicating WW perceived her as being disabled. WW then reasserts that someone able to work forty (40) hours per week is not substantially limited in the major life activity of working, a point Barngrover did not address in her resistance. Lastly, WW argues the fact that Barngrover may still currently be treating her injuries does not make the injuries permanent. For these reasons, WW argues Barngrover has failed her burden of showing she is protected under the ADA, and it is, therefore, entitled to judgment as a matter of law on the ADA claim.

The ADA "provides that no covered employer 'shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge . . . and other terms, conditions and privileges of employment.'" See Sutton v. United Air Lines, Inc., 527 U.S. 471, 477-78 (1999) (quoting 42 U.S.C. § 12112(a)). "A 'qualified individual with a disability'" is defined as "'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" Id. at 478 (referencing 42 U.S.C. § 12111(8)). Under the ADA, disability is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment;[13] or (C) being regarded as having such an

[13] Barngrover has not asserted she has a "record of such impairment", and the Court does not address this definition of disability.

impairment." Id. (quoting 42 U.S.C. § 12102(2)). "[W]hether a person has a disability under the ADA is an individualized inquiry." Id. at 483.

"A plaintiff who raises a claim of disability discrimination bears the initial burden of establishing a prima facie case." Brown v. Farmland Foods, Inc., 178 F. Supp. 2d 961, 971 (N.D. Iowa 2001) (quoting Lajeunesse v. Great Atlantic & Pac. Tea Co., 160 F. Supp. 2d 324, 330 (D. Conn. 2001) (citing Ryan v. Grace & Rybicki P.C., 135 F.3d 867, 869 (2d Cir. 1998)). Establishing a prima facie case consists of Barngrover showing that "(1) she is disabled as defined by the ADA; (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation; and (3) she suffered an adverse employment action due to her disability." See Darby v. Bratch, 287 F.3d 673, 682 (8th Cir. 2002) (citing Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 948 (8th Cir. 1999)).

Barngrover asserts her injuries qualify her as disabled or, alternatively, that WW regarded her as being disabled and that she received discriminatory disparate treatment as a result, although she admits there was never any indication she was terminated because of her injuries. This Court, therefore, applies the traditional burden shifting framework of McDonnell Douglas. See Fenney v. Dakota, Minnesota & Eastern R.R. Co., 327 F.3d 707, 711-12 (8th Cir. 2003) (referencing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)); see also Stanback v. Best Diversified Prod., Inc., 180 F.3d 903, 908 (8th Cir. 1999) (discussing when "analyzing discriminatory discharge cases brought under the ADA, we apply . . . McDonnell Douglas"). Under McDonnell Douglas, initially Barngrover must establish each element of a prima facie case under the ADA. Stanback, 180

F.3d at 908. If Barngrover is able to do so, WW must rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action. Id. If WW is able to do this, then the burden shifts back to Barngrover to demonstrate that WW's non-discriminatory reason is pretextual. Id.

The Court finds that Barngrover has failed to meet her burden of establishing a prima facie case. The Court agrees with WW and finds that, as a matter of law, Barngrover has failed to sufficiently establish facts which show why her injuries qualify under the ADA. The Court notes Barngrover has not explained how one can be considered disabled under the ADA, yet still be able to work up to a forty-hour work week. See Kellogg, 233 F.3d at 1087. Furthermore, even assuming Barngrover was impaired after her car accident, this alone does not make one disabled for purposes of the ADA. See Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 195 (2002). Additionally, Barngrover has not established that receiving current treatment for her injuries equates to the injuries being permanent. An "impairment's impact must be permanent or long term" to qualify as a substantially limiting impairment within the meaning of the ADA. Id. at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2001)); see also Mellon v. Federal Express Corp., 239 F.3d 954, 957 (8th Cir. 2001) (stating "[o]nly a permanent or long-term condition will suffice" to qualify a person for the ADA's protection). For these reasons, Barngrover's actual disability claim fails as a matter of law.

In relation to her "regarded as" disabled claim, to establish this, Barngrover must show that WW perceived her as actually disabled. See Murphy v. United Parcel Service,

Inc., 527 U.S. 516, 521-22 (1999). The Supreme Court has acknowledged that an employer may regard an individual as disabled in two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." See Sutton, 527 U.S. at 489.

The Court finds that as a matter of law, Barngrover has not sufficiently demonstrated WW regarded her as disabled. The Eighth Circuit Court of Appeals has discussed

> To be regarded as substantially limited in the life activity of working, a plaintiff must be regarded as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999) (applying section 1630.2(j)(3) factors to a "regarded as [disabled]" claim). Inability to perform one particular job does not constitute a substantial limitation on working. Id. A plaintiff must show that because of her impairment she has suffered a significant reduction in meaningful employment opportunities. Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996).

See Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083, 1089 (8th Cir. 2001). In this case, although WW eventually concluded Barngrover might be better off working on other tasks at WW or even working somewhere experiencing less change than was occurring at WW, clearly, WW regarded Barngrover as capable of continuing to work as evidenced by the promotion to accounting assistant and the amount of work Barngrover was performing. The record before the Court does not indicate WW regarded Barngrover as "significantly restricted in her ability to perform a class of jobs or a broad range of jobs in various classes

as compared to the average person having comparable training, skills, and abilities." See id. at 1089 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). For these reasons, Barngrover has failed to show she was regarded as disabled by WW, and her "regarded as" disabled claim fails as a matter of law.

Moreover, under the facts of this case, even if this Court were to assume Barngrover was disabled, *and* that she suffered from disparate treatment,[14] the Court finds Barngrover cannot, as a matter of law, demonstrate she suffered an adverse employment action due to the disability. In this case, the record reflects WW perceived Barngrover to be the opposite of disabled; it believed she had become more proficient in her duties. It is undisputed that nobody at WW perceived any change in the quality or quantity of Barngrover's work after the accident as compared to before the accident. WW, in fact, promoted Barngrover to a new position with a pay raise. The record demonstrates the duties Barngrover would do as accounting assistant did not vastly differ from her payroll work, and Barngrover has not argued her benefits were reduced as a result of her changing jobs. Transferring "from one job to another is not an adverse employment action if it involves only minor changes in the employee's working conditions with no reduction in pay or benefits." See Brown v. Lester E. Cox Med. Ctrs., 286 F.3d 1040, 1045 (8th Cir.

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[14] The Court notes that although Barngrover makes the general allegation that she experienced disparate treatment, Barngrover has not provided any information about similarly situated co-employees who were not subjected to similar treatment. See generally, Cont'l Grain Co. v. Frank Seitzinger Storage, 837 F.2d 836, 838 (8th Cir. 1988) (indicating that "[t]o preclude . . . summary judgment, the nonmovant must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial.").

2002) (citing Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997)). Having failed to establish a prima facie case, no genuine issue of material fact needs to be resolved at trial. The Court finds, as a matter of law, that WW did not violate the ADA, and this claim is dismissed.[15]

C. Age Discrimination in Employment Act.

ADEA makes it unlawful to discriminate against an employee because of age. 29 U.S.C. § 623(a)(1). The protected age group consists of those aged forty or older. See id. § 631(a). Where, as here, the evidence of age discrimination is circumstantial, the previously mentioned burden shifting approach of McDonnell-Douglas must be used. See Mayer v. Nextel West Corp., 318 F.3d 803, 806 (8th Cir. 2003) (citing McDonnell Douglas, 411 U.S. at 802-04). A plaintiff must first show a prima facie case of age discrimination. See Calder v. TCI Cablevision of Missouri, Inc., 298 F.3d 723 (8th Cir. 2002). Under the ADEA, a prima facie case is demonstrated if (1) plaintiff was at least 40 (forty) years old; (2) plaintiff was terminated; (3) plaintiff was meeting WW's legitimate expectations at the time of termination; and (4) plaintiff was replaced by a younger person. See Mayer, 318 F.3d at 807 (citing McDonnell Douglas, 411 U.S. at 802). Once this is shown, the burden shifts to the employer to articulate a legitimate non-discriminatory

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[15] Without specifying what that evidence is, Barngrover makes the conclusory allegation that "[t]here is . . . evidence from which a jury could determine that the Defendant terminated Ms. Barngrover because of her work restrictions." See Barngrover Brief in Resistance, p. 8. These general allegations are not enough to survive summary judgment. See Celotex, 477 U.S. at 324 (analyzing and quoting Fed. R. Civ. P. 56(e) and indicating a party opposing summary judgment is required to designate "specific facts showing that there is a genuine issue for trial.").

reason for having taken the adverse action. Calder, 298 F.3d at 729. If WW meets this burden, Barngrover must introduce "evidence sufficient to raise a question of material fact as to whether [WW's] proffered reason was pretextual and to create a reasonable inference that age was a determinative factor in the adverse employment decision." Id. Throughout this process, the burden of persuasion remains with Barngrover. Id.

WW argues Barngrover cannot establish a prima facie case of age discrimination since she cannot establish that she was meeting the legitimate expectations of her employer. When assessing performance, "[t]he standard . . . 'is not that of the ideal employee, but rather what the employer could legitimately expect.'" Calder, 298 F.3d at 729 (quoting Keathley v. Ameritech, Corp., 187 F.3d 915, 920 (8th Cir. 1999)). That an "employee meets some expectations however, does not mean that she meets the standard if she does not meet other significant expectations." Id. WW alleges Barngrover was not meetings its expectations because (1) she was not acting as a team player; (2) employees could not approach her to obtain information; (3) she demanded things from others she herself would not give; (4) the company was growing rapidly and Barngrover was not adapting to change; and (5) the clashes with Clover continued to be a problem. As to this last point, in the Eighth Circuit, insubordination is a legitimate reason to terminate an employee. See, e.g., Miner v. Bi-State Dev. Agency, 943 F.2d 912, 913-14 (8th Cir. 1991) (employee terminated for insubordination and violating company policies). At her deposition, Clover agreed that the person that worked in payroll needed to be able to work with Clover.

Alternatively, WW argues that if Barngrover has established a prima facie case, it had legitimate reasons for having terminated Barngrover – primarily her inability to accept change or be a team player at WW while WW was expanding. According to WW, this disrupted the working atmosphere at WW. Having offered a legitimate reason for terminating Barngrover, WW argues Barngrover cannot establish its proffered reasons are pretextual. WW points out that 38 percent of its workforce is over the age of 40 and that WW's president, Walters, is over 40 (although younger than Barngrover). Regarding the one-time comment Walters made that perhaps Barngrover was having a "mid-life crisis", see footnote 11 herein, WW argues that to establish pretext under the law, Barngrover must show that people "involved in the 'decision making process [to terminate her possessed a] discriminatory attitude'" of such an extent that a jury could "'infer that the [anti-age animus] attitude was more likely than not a motivating factor in the employer's decision.'" Nelson v. J.C. Penny Co., Inc., 75 F.3d 343, 345 (8th Cir. 1996) (quoting Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 800 (8th Cir. 1994), which in turn quotes Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 182 (2d Cir. 1992)). WW asserts that Walters' one-time comment to Barngrover is the type of stray comment found insufficient to demonstrate pretext. See, e.g., Calder, 298 F.3d at 730 (referring to Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999)). In addition to the showing of pretext, Barngrover needs to demonstrate "that age was a factor in her termination." Id. at 731. According to WW, Barngrover cannot make this showing.

In resistance, Barngrover points out that of the four elements in a prima facie case under the ADEA, the issue in this case is whether Barngrover was meeting the legitimate

expectations of WW.[16] Barngrover points to her promotion in November of 2000 as accounting assistant and the letter of recommendation[17] she received after her termination as proof that she was meeting WW's expectations of performance. Attacking WW's articulated legitimate reasons for terminating her, Barngrover asserts that Walters' comment that Barngrover might be having a "mid-life crisis" is evidence of age animus. Barngrover argues that since Walters rated Barngrover's and Clover's respective abilities to be "team players" as equal, WW's current position that Barngrover was terminated for not being a team player is pretextual. Barngrover argues the record shows that Clover clearly wished to fire Barngrover in order to hire two younger employees without work restrictions and because a jury could find Barngrover was fired for age-related reasons, summary judgment on her ADEA claim is inappropriate.

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[16] Barngrover was over the age of 40 and thus within the class protected under the ADEA, was terminated, and the people hired to take over her old payroll duties and new duties as accounting assistant were younger than she.

[17] The text of the recommendation letter reads:

> To whom it may concern:
>
> I would like to highly recommend Roberta Barngrover for employment. She is a very competent and well-organized person with a variety of office skills and accounting knowledge. She has particular expertise in payroll, which she has been in charge of for our company for the past year. Her work always exhibited accuracy and attention to detail.
>
> Again, I would highly recommend Roberta Barngrover for a variety of office positions.
>
> Sincerely,
> Jeff Walters
> President

The Court finds genuine issues of material facts do exist on Barngrover's ADEA claim which necessitate trial. WW is correct that in Calder, a plaintiff alleging age discrimination pointed to a manager's comment that "she should move faster" and reported hearing another manager refer to a job applicant as "grandma", which the Eighth Circuit concluded were remarks demonstrating neither age-based animus, see Calder, 298 F.3d at 730 (citing Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 676 (8th Cir. 1998)), nor a finding of pretext. See id. (citing Simmons, 174 F.3d at 916). However, the Eighth Circuit indicated that the timing and frequency the comments are made are important to the analysis. See id. (discussing that "[b]ecause none of these remarks occurred within one year of Calder's termination and none were repeated, they do not create a triable issue on the question of pretext.").

In this case, while Walters' comment was only made one time, a reasonable inference from the record suggests it was made within four months of Barngrover being terminated; but, this one comment made approximately four months before she was terminated is not all the record contains. As indicated, shortly before her termination, Barngrover received a promotion, and, after her termination, she was provided with a letter of recommendation. The concerns which WW now argue as having prompted it to terminate Barngrover are arguably inconsistent with the tone of the letter, even though the recommendation letter is dated the same day Barngrover was terminated. Furthermore, the record contains Walters' testimony that he believed both Clover's and Barngrover's abilities to be "team players" were equal. As to Barngrover's alleged resistance to change, the Court notes that Barngrover was deemed qualified for new job responsibilities and was

beginning to transition into her new job. This would obviously bring about changes for Barngrover; yet, at her deposition, Clover responded to the question, " . . . I take it that you thought that [Barngrover] was fully qualified for this new position," by answering, "I did. That's why I recommended her – recommended it to Jeff." See WW App. p. 38, Clover Depo. p. 72, ll. 7-10. Clover further indicated that after being approached, Walters did not disagree with the idea that Barngrover was fully qualified for the new accounting assistant position. See id., Clover Depo. p. 72, ll. 11-12. Barngrover's claimed resistance to change or alleged unwillingness to be a team player does not appear to have been foremost in the minds of Clover or Walters when they believed she was qualified to change jobs. Under this record, the Court cannot conclude that a jury could only reach the conclusion that WW did not consider Barngrover's age when it terminated her. See Dose, 229 F. Supp. 2d at 919 (quoting Johnson, 931 F.2d at 1244) (citing Hillebrand, 827 F.2d at 365).

The Court notes its determination on the ADEA claim is not contrary to the Eighth Circuit's decision in Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992). The facts of Lowe are similar to the facts in this case, insofar as Lowe, like Barngrover, fell into the class protected under the ADEA when hired and fired, both only held their respective jobs for only a few years, and the same people who hired both Lowe and Barngrover terminated them. Lowe was fifty-one (51) years old when hired and fifty-three (53) when he was terminated. Id. at 174. "The same company officials who hired Lowe also made the decision to fire him." Id. "The asserted reason for his discharge was because of falsification of a petty-cash report." Id. Lowe sued, alleging a violation of the

ADEA, and the district court entered directed verdict in favor of the employer. Id. In response to the legitimate reason for having fired him, Lowe argued, among other things, that "the shortage in the petty-cash fund was small, that he was not even accused of having taken the money for himself, that his performance ratings up until the time of discharge, had been good, that less severe methods of discipline were available . . . ." Id.

In rejecting Lowe's claim on appeal, the Eighth Circuit pointed out that "[t]he evidence that plaintiff claims is inconsistent with defendant's proffered justification is thin, but perhaps sufficient, all other things being equal . . . however, all other things were not equal." Id. Significant to the Eighth Circuit was that Lowe "was a member of the protected age group both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him." Id. Pointing out the short lapse of time between Lowe being hired at the age of fifty-one (51) and being fired at the age of fifty-three (53), the Eighth Circuit found it "simply incredible, in light of the weakness of [Lowe's] evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later." Id. at 175. Concluding, the Eighth Circuit indicated "[t]he short time plaintiff worked for the defendant, his age when hired, and the identity of those who hired and fired him are, in the particular circumstances of this case, fatal to his claim." Id. In the present case, both the quality and quantity of evidence Barngrover has presented to refute WW's proffered reasons for terminating her sufficiently distinguish this case from Lowe.

Genuine issues of material fact exist regarding whether the legitimate reasons for terminating Barngrover proffered by WW are pretextual. The Court denies WW's summary judgment motion as to Barngrover's ADEA claim.

D. Iowa Civil Rights Act.

The ICRA, located at Iowa Code § 216.6, is interpreted to mirror federal law, including the ADEA. See Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919, n.2 (8th Cir. 2000) (citing Montgomery v. John Deere & Co., 169 F.3d 556, 558 n.3 (8th Cir. 1999)). Therefore, based on the Court's determination that Barngrover's ADEA claim survives summary judgment analysis, Barngrover's ICRA claim survives as well, and the Court denies WW's request for summary judgment on Barngrover's ICRA claim.

V. CONCLUSION

Defendant's motion for summary judgment on the Plaintiff's claim in Count I under the Family Medical Leave Act is **granted**. The motion for summary judgment on Plaintiff's claim in Count II under the Americans with Disabilities Act is **granted**. The motion is **denied** as to Counts III and IV.

IT IS SO ORDERED.

Dated this 24th day of July, 2003.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT