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

DEBRA JANE BURKE, Plaintiff, v. IOWA METHODIST MEDICAL CENTER (IMMC) and IOWA HEALTH SYSTEM, (IHS), Defendants.	)))))))))))	Civil No. 4-99-cv-30634 RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

This matter is before the Court on defendants' motion for summary judgment (#12). Plaintiff Debra Burke filed her complaint on November 8, 1999, alleging termination of her employment in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102, et seq., and in violation of the Iowa Civil Rights Act (ICRA), Iowa Code Ch. 216A, on the basis of her disability. Plaintiff seeks compensatory damages.

Jurisdiction is predicated on 28 U.S.C. §§ 1331 and 1367, 42 U.S.C. § 2000e-5(f)(3) and 42 U.S.C. § 12117. The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on March 22, 2000. See 28 U.S.C. § 636(c).

Defendants filed the present motion on August 28, 2000. Plaintiff resists. The matter is fully submitted.[1]

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[1] The parties provided supplemental argument and authorities to the Court by letters dated February 21, 2001 and February 14, 2001 respectively. The Court has considered these additional submissions and they have been filed.

I.

Defendants are entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [movant] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

> Although we view the facts in a light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-moving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

Carter v. St. Louis University, 167 F.3d 398, 400 (8th Cir. 1999). It has been said that motions for summary judgment in employment cases should be approached with caution because such cases "often depend on inferences rather than on direct evidence." Mems v. City of St. Paul, 224 F.3d 735, 738 (8th Cir. 2000)(citing Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)). See also Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1016 (8th Cir. 2000); Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999). This admonition has somewhat diminished impact in this case because the principal summary judgment issue involves an alleged failure of the employer to accommodate Ms. Burke's disability, not motivation for an adverse employment action. In any event, summary judgment "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.), cert. denied, 120 S. Ct. 174 (1999); see Snow v. Ridgeview Medical Ctr., 128 F.3d 1201, 1205 (8th Cir. 1997)("summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case").

II.

Plaintiff Debra Burke has a degree in nursing and is a registered nurse. She was employed at Iowa Methodist Medical Center (IMMC)[2] on two occasions, the last period of employment spanning from approximately 1985 to October 1998. (Pl. Ex. A at 5, 8-9; Def. Ex. A at 57).[3] From about 1985 until May or June 1993 Burke provided patient care on the neurosurgery unit. (Pl. Ex. A at 9-10).

On February 19, 1993, Burke was exposed to the HIV virus during the course of her employment. (Id.) In approximately May 1993 she was transferred to a non-patient care position due to her positive HIV status. (Id. at 13-14). By that time she had "full blown AIDS." (Def. Ex. G). She does not believe it was improper for her to have been transferred to such a position. (Pl. Ex. A at 13-

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[2] All further references to the employer are to IMMC only. The hospital is an affiliate of defendant Iowa Health Systems.

[3] The parties have separately submitted designated portions of Ms. Burke's deposition, both designated Ex. A. For purposes of this motion, the Court references the deposition excerpts as Pl. Ex. A and Def. Ex. A, depending on the portion cited.

14). Between June 1993 and May 1995 Burke worked part-time doing pre-surgical assessments over the phone (Id. at 14-15). After that she worked part-time in human resources doing clerical work. (Id. at 30).[4]

In March 1996 Burke went on medical disability leave due to a major depressive disorder associated with her HIV status which prevented her from working. (Def. Ex. A at 35-36; Def. Ex. H). She received workers' compensation benefits. (Def. Ex. A at 36).

In September 1996 Burke applied for, and received, long-term disability and social security disability benefits. (Id. at 37-38).[5] In October 1999, shortly before this action was filed, Burke submitted a statement of continuing disability for social security benefits in which she stated she was unable to return to work. (Def. Ex. B). On her 1996 disability insurance benefits claim form Burke represented she was "wholly unable to work." (Def. Ex. C). Burke admits that when she applied for long-term disability and social security disability she had a good faith belief that she could no longer work, (Def. Ex. A at 37) and that she has represented to the government she is incapable of working as recently as the October 1999 social security statement. (Id. at

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[4] The Court accepts counsel's characterization of these jobs as involving part-time work.

[5] She so testified, though the Court notes the long-term disability benefits claim is dated December 23, 1996. (Def. Ex. C).

70-71). As of the date of her deposition on April 7, 2000, Burke was still receiving long-term disability and social security disability benefits. (Id. at 38).

On September 25, 1998, defendants' long-term disability carrier, The Hartford, notified Burke that it was discontinuing her benefits based on medical notes which it interpreted as reflecting a change in her medical condition sufficient to allow her to work. (Pl. Ex. C). In response to that notice, Burke's physicians prepared letters on her behalf attesting to her continued total disability and inability to work (Def. Exs. E and F).

When it received a copy of The Hartford's letter IMMC reviewed Burke's claim and employment status. On October 19, 1998, IMMC sent Burke a letter, notifying her she had exhausted her unpaid leave and, under its personnel policies, should have been terminated over two years before. She had been unable to return to work since March 7, 1996, well over the twenty-six weeks leave provided by IMMC's employment policy. (Def. Ex. G). Noting that Burke had continued to receive health insurance during that time and "[i]n an effort to provide [her] with as many alternatives to termination as possible," IMMC offered her the position of Outreach Education Instructor, a job created for Burke which would enable her to remain eligible for continued employee benefits. (Id.) The position was structured for 32 hours per week and considered full-

time. (Id.; Def. Ex. A at 54). According to the job description forwarded with the letter the work was considered light to medium but would require Burke to be on her feet four to six hours per day. It involved the development of community-based educational programs dealing with health issues. (Def. Ex. G). The letter concluded:

> Ms. Burke, this is obviously a significant decision for you and you probably have a number of issues to consider and questions to ask. We will, therefore, keep this alternative available to you for thirty (30) days from the date of this letter and are available to answer any questions or concerns you might have. If you would like to meet with anyone to discuss the employment opportunity available to you, your insurance coverage or any other matters, please feel free to call me [Mike Tebo] (241-2036) or Cindie Book (241-8166). If we hear nothing further, however, or are unable to work out an arrangement for continuing employment, your employment with CIHS will terminate thirty days from the date of this letter.

Burke never personally discussed the position with anyone at IMMC and never told anyone at IMMC that she was interested in any other position. (Def. Ex. A at 55). Her response to the offer was through her workers' compensation attorney, who wrote: "I do not believe my client can perform the full-time position described by you." (Def. Ex. H). The attorney enclosed copies of the letters written by Burke's physicians in response to The Hartford's notice, including one from her AIDS doctor stating she was "totally

disabled." (Def. Ex. E). Neither Burke nor her attorney inquired into other positions that may have been available to plaintiff or were suitable for her. (Def. Ex. A at 87, 99). Because Burke did not accept the position of Outreach Education Instructor, her employment was terminated. (Id. at 57).

Burke has admitted she cannot perform the essential job functions of her former neurosurgery nursing position, or any other full-time job with defendants requiring a 40-hour work week, (Pl. Ex. A at 40-41), but states she could have worked part-time, possibly 20 hours a week. (Id. at 42). Her doctors now say that in September and October 1998 Ms. Burke could have worked at a part-time, low-stress job involving paperwork or telephone communications. (Pl. Exs. J and K).

III.

Defendants argue (1) Burke cannot establish the second element of an ADA prima facie case that she was able to perform the essential functions of any relevant job with or without reasonable accommodation, and (2) she failed to participate in the interactive process because she did not request or identify a reasonable accommodation.

Prima Facie Case

To establish an ADA claim or a disability discrimination claim under ICRA,[6] plaintiff must prove (1) that she is disabled within the meaning of the ADA; (2) that she is qualified to perform the essential functions of the job with or without reasonable accommodation and (3) that she suffered an adverse employment action because of her disability. Treanor v. MCI Telecommunications Corp., 200 F.3d 570, 574 (8th Cir. 2000); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 948 (8th Cir. 1999); Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1216 (8th Cir. 1999); see Howell v. Merritt Co., 585 N.W.2d 278, 280 (Iowa 1998). Defendants argue plaintiff cannot prove the second element of her prima facie case because she has made claims of total disability and inability to work to both the Social Security Administration and the long-term disability insurance carrier, claims which logically negate the proposition that she is qualified to perform the essential functions of a relevant job with or without reasonable accommodation.

It is now clear in the case law that representations of disability to obtain disability benefits do not through the

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[6] The Iowa Supreme Court "look[s] to the ADA and underlying federal regulations in developing standards under ICRA for disability discrimination claims." Bearshield v. John Morrell & Co., 570 N.W.2d 915, 918 (Iowa 1997).

doctrine of judicial estoppel preclude an ADA plaintiff from proving that he/she can perform the essential functions of his/her job with a reasonable accommodation. See Hill v. Kansas City Area Transportation Authority, 181 F.3d 891, 893 (8th Cir. 1999)(citing Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 802 (1999)). This is because the definition of "disability" differs between the ADA and Social Security Act reflective of the fact that each serves different purposes. Feldman v. American Mem. Life Ins. Co., 196 F.3d 783, 790 (7th Cir. 1999).

> First, SSDI [Social Security Disability Insurance] provides a welfare safety net for those who are unable to work, regardless of employers' willingness to accommodate their disabilities, whereas the ADA serves a remedial purpose in opening work opportunities for the disabled by forcing employers to accommodate employees' disabilities so long as that does not impose an undue burden. The ADA only protects the disabled who can work with or without reasonable accommodation while SSDI does not consider reasonable accommodation at all in defining disability. Thus, an individual might be able to work with reasonable accommodation and therefore be a "qualified individual" under the ADA, but be unable to work without reasonable accommodation and thus "totally disabled" under SSDI as well.
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> Second, SSDI utilizes broad administrative definitions designed to process masses of claimants with only a general inquiry into each applicant's individual situation. The SSA categorically considers certain conditions to be disabilities without consideration of the individual's actual level of impairment. See

> 20 C.F.R. §§ 404.1520(d), 404.1525(a). In contrast, the ADA delves into the facts of each plaintiff's case within a litigation context to determine whether the plaintiff was unable to perform her particular job with or without reasonable accommodations for her condition. An individual might have a condition that the SSA considers categorically disabling, but be able to perform her job with or without reasonable accommodation because her condition is not terribly severe or disabling in fact.
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> Third, the severity of a disability may change over time such that an individual was totally disabled when she applied for SSDI, then later was a qualified individual at the time of the employment decision disputed in an ADA suit. Even though the underlying disability is the same, the SSDI application and the ADA suit might reference quite different points in time between which an improvement or deterioration in the plaintiff's disability may have transpired.

Id.

However, it is incumbent on the ADA plaintiff to explain the apparent inconsistency.

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

Cleveland, 526 U.S. at 807; see Lloyd v. Hardin County, Iowa, 207 F.3d 1080, 1085 (8th Cir. 2000); Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 847 (8th Cir. 1999).

The explanation Burke offers is in her deposition testimony that she could have performed the essential functions of part-time jobs, possibly up to twenty hours per week, like those she had after the onset of AIDS and before she took medical leave (Pl. Ex. A at 42), and her doctors' affidavits that she could have worked in some type of unspecified low-stress clerical or telephone communication job on a part-time basis. Viewing the record favorably to Burke as the Court must, it appears that despite her limitations Ms. Burke had been doing some community outreach work on a volunteer basis similar to what she would have performed as Outreach Education Instructor, indeed her volunteer work seems to have been what IMMC had in mind when it created the position for Ms. Burke. (See Def. Ex. D at 2: " . . . you would be doing much of what you are doing now on a volunteer basis"). Burke's disability affected her stamina and attentiveness, not her ability to perform work of the type she had been doing on a volunteer basis. It was the truth that she could not do any work at all without accommodation for her weakened condition and stress intolerance. Social security disability does not concern itself with accommodations and it is not clear what role, if any,

accommodations play in Burke's entitlement to disability insurance benefits. Assuming the truth of, or Ms. Burke's good faith belief in, her statements that she was totally disabled for social security and insurance disability purposes, the jury might conclude that she was nonetheless capable of performing the essential functions of some type of low-stress, part-time work similar to that she had performed before. IMMC does not dispute that such a job might have been available. Ms. Burke is therefore not out of court because of her receipt of disability benefits.

Assuming that Burke has made a prima facie case, the reason for her discharge is clear. Burke had been on leave for longer than allowed by IMMC's lawful employment policies and had rejected the offer of employment in the Outreach Education Instructor position. Her discharge for these reasons was not discriminatory under the ADA unless IMMC failed to make reasonable accommodations for her disability, the thrust of her complaint.

Accommodation

In her complaint, Ms. Burke alleges that her employer knew or should have known she was in need of reasonable accommodations to perform the essential functions of her job, and failed to make accommodations (Complaint ¶¶ 42, 43). The accommodation she maintains should have been provided is a non-

patient contact part-time job. (Complaint ¶¶ 26, 27; see Pl. Brief at 8, 11-12).

The ADA defines unlawful discrimination to include:

> . . .not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . .employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . ..

42 U.S.C. § 12112(b)(5)(A). By statute, reasonable accommodation may include "job restructuring, part-time or modified work schedules . . . ." Id. § 12111(9)(B). Each side criticizes the other for not participating in the interactive process which the ADA contemplates employers and employees will engage in to determine the availability and suitability of reasonable accommodations. See Fjellestad, 188 F.3d at 952. IMMC argues that its letter offering the Outreach Education Instructor position it had created for Burke was an invitation to engage in the interactive process which Burke, through her attorney, rejected. Burke describes the letter as a "take it or leave it offer" of employment she could not perform, an offer which should not be considered a good faith effort to explore accommodation.

In view of the facts that IMMC created the position for Burke,[7] expressed a willingness to meet with her to discuss the offer, and advised her that termination would follow if they were "unable to work out an arrangement for continuing employment" it is difficult to reasonably view the letter as a "take it or leave it" rejection of interaction toward any other accommodation. However, before the analysis reaches the point of assessing the sufficiency of the parties' participation in the interactive process, the obligation to do so must have arisen. "[O]nce the employer knows of an employee's disability and the employee or the employee's representative has requested accommodation, the employer's obligation to participate in the interactive process has been triggered." Id. (citing Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 158-59 (3d Cir.), vacated, 184 F.3d 296, 302 (3d Cir. 1999))[8]; see Cravens, 214 F.3d at 1021. Unless the necessary accommodations are "open, obvious and apparent to the employer . . . the initial burden rests primarily upon the employee . . . to specifically identify the disability and the resulting limitations, and to suggest the reasonable accommodations." Wallin v. Minnesota Dept.

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[7] Reasonable accommodation does not require an employer to create a new position. Cravens, 214 F.3d at 1019.

[8] The Taylor panel's substituted opinion repeated this same principle: ". . . [T]he employer must know of both the disability and the employee's desire for accommodations for that disability." 184 F.3d at 313.

of Corrections, 153 F.3d 681, 689 (8th Cir. 1998) (quoting Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir.), cert. denied, 519 U.S. 1029 (1996)) (emphasis original to Eighth Circuit); see Moore, 187 F.3d at 848; Mole, 165 F.3d at 1217; 29 C.F.R. app. § 1630.9 (2000)("In general . . .it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed"). The employee cannot "expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation [then] sue the employer for not providing it." Mole, 165 F.3d at 1218 (quoting Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995).

IMMC knew about Burke's disability; she had taken disability leave. There is no evidence in the summary judgment record, however, that she, or her attorney, requested or communicated a desire for any accommodation, part-time employment or otherwise. The record also would not reasonably support a finding that part-time work was an accommodation which should have been apparent to IMMC without any request from Ms. Burke. Burke had stopped working part-time in March 1996 because of her disability and did not afterward express any interest in returning to similar work. She applied for and received social security and long term disability benefits. The Hartford's decision to discontinue Ms. Burke's benefits two and a half years after Burke went on leave

prompted IMMC to review her situation. The only response to its letter concerning the Outreach Education Instructor was that she could not perform the job and remained totally disabled. With this information in hand, IMMC had no reason to believe part-time employment was a reasonable accommodation. Accordingly, reasonable jurors could not find that IMMC failed to participate in the interactive process, Cravens, 214 F.3d at 1021; Fjellestad, 188 F.3d at 952, or, it follows, that it unlawfully discriminated by not making a reasonable accommodation. See Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1500 (N.D. Iowa 1997)("If the employee fails to request an accommodation, the employer cannot be liable for failing to provide one," citing Taylor, 93 F.3d at 165).[9]

V.

Defendant's motion for summary judgment is **granted**. The Clerk shall enter judgment dismissing plaintiff's complaint.

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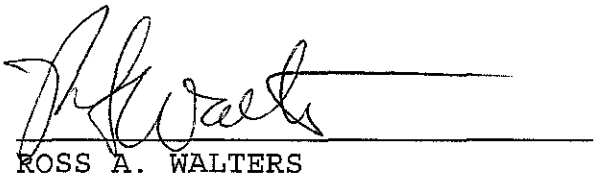
[9] Burke suggests she should be excused from requesting accommodation from IMMC by what the Tenth Circuit has referred to as the "futile gesture doctrine." Davoll v. Webb, 194 F.3d 1116, 1132-33 (10th Cir. 1999). The Davoll court also said that the doctrine, derived from Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977), applies "[o]nly in the rare case where an employer has essentially foreclosed the interactive process through its policies or explicit actions. . . ." Davoll, 194 F.3d at 1133. IMMC's letter cannot be seen as foreclosing the interactive process.

IT IS SO ORDERED.

Dated this 22nd day of February, 2001.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE