

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

SUSAN FLODEN,

Plaintiff,

vs.

DES MOINES INDEPENDENT  
COMMUNITY SCHOOL DISTRICT,

Defendant.

No. 4:07cv00177- JAJ

**ORDER**

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This matter comes before the court pursuant to defendant's June 2, 2008 motion for summary judgment [dkt. 20]. Plaintiff resisted defendant's motion on June 30, 2008 [dkt. 21]. Defendant filed its reply on July 11, 2008 [dkt. 22].

The plaintiff, Susan Floden ("Floden"), claims that the defendant (her former employer) constructively discharged her because of her disability in violation of the Americans with Disabilities Act, 42 U.S.C. §12010 et seq. ("ADA"), retaliated against her in violation of the ADA, and retaliated against her in violation of the Family and Medical Leave Act, 29 U.S.C. §1615 et seq. ("FMLA"). Defendant moves for summary judgment on all of Floden's claims. As set forth below, defendant's motion for summary judgment is granted.

**SUMMARY JUDGMENT**

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations

or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact.” Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although “direct proof is not required to create a jury question, . . . to avoid summary judgment, ‘the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.’” Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although it has been stated that summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case. Helfter v. UPS, Inc., 115 F.3d 613, 615-16 (8th Cir. 1997). The standard for the plaintiff to survive summary judgment requires only that the plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant’s motive, even if that evidence did not directly contradict or disprove defendant’s articulated reasons for its actions. O’Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995). To avoid summary judgment, the plaintiff’s evidence must show that the stated reasons were not the real reasons for the plaintiff’s discharge and that sex or other prohibited discrimination was the real reason for the plaintiff’s discharge.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (quoting the district court's jury instructions).

### **STATEMENT OF MATERIAL FACTS**<sup>1</sup>

Floden worked for the defendant from approximately August 27, 1998 to March 31, 2005. Floden's first job with the defendant was as an hourly food service employee. She then applied for and became a substitute associate. Almost immediately thereafter, she became a special education associate at Central Campus. Floden does not complain about how she was treated in those positions.

As Floden remembers it, Central Campus Director Gary McClanahan ("McClanahan") approached Floden in the spring of 2001 as they were riding in an elevator about a new Cashier/Clerk position at Central Campus. Floden accepted the job because it paid better, provided more secure hours, and the skill set was of interest to her. Floden's new position as Cashier/Clerk for Central Campus became effective on May 24, 2001 and lasted until the end of the 2003-2004 school year.

Floden's duties as a Clerk/Cashier included receiving and counting money when the bookkeeper was absent, entering purchase orders and Central Stores orders, checking in merchandise, receiving purchase orders, typing check requests, troubleshooting invoices, answering the telephones, greeting and helping visitors and students, and covering in the attendance office for breaks and lunches. According to McClanahan, attending work on a prompt and regular basis and maintaining a satisfactory and

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<sup>1</sup> Floden filed no response disputing defendant's Statement of Material Facts in support of its motion for summary judgment. See Local Rule 56.1.b.2. Thus, the court has reviewed both parties' appendices in determining whether the facts as alleged by the defendant were disputed. The court further notes that Floden's Statement of Facts had a number of citations to the record that did not support the statement of "fact," and that several statements contained no citation to the record at all. See Local Rule 56.1.b.4 and 56.1.e.

harmonious working relationship with the public, students, and other employees, were two of the most important essential functions of Floden's job.

During the 2003-2004 school year, McClanahan received complaints from the other staff in his office that Floden's absences were causing a problem with their work. McClanahan also received complaints about Floden improperly intruding on their personal business and gossiping, overstepping her bounds in terms of appropriate office conduct, being aggressive with people, and her people skills in general.

Floden testified that she believed her relationship with McClanahan changed in approximately July 2003 when she was notified via e-mail that her work hours would be changing from 7:00 a.m. to 3:00 p.m. to 8:00 a.m. to 4:00 p.m. Floden called McClanahan regarding the change, the two went "back and forth a couple of different times" and they eventually reached an agreement that her hours would be changed either to 7:30 a.m. to 3:30 p.m. or to 7:45 a.m. to 3:45 p.m. This exchange occurred months before Floden was diagnosed with asthma on December 23, 2004.

In January 2004, McClanahan talked to Floden about her absences, telling her to "watch them" and that she needed doctor's notes to support her absences. Floden filed a request for intermittent FMLA leave on February 23, 2004, which the defendant granted.

In April 2004 Floden was notified that the Cashier/Clerk position at Central Campus was being eliminated due to budget cuts. According to Floden, McClanahan was mad about having to let her go due to the budget cuts, and McClanahan said the district would help her find another position if there were openings.

Tom Mitchell was the Deputy Director of Human Resource Management for the defendant. Mitchell met with Floden to discuss what she wanted to do in terms of a new position with the defendant. Mitchell informed Floden that she had a right to a similar clerk position with equal pay and benefits. Floden and Mitchell also discussed whether she would, instead, want an associate position, because it would give her more days off during

the school year and provide her a less stressful situation. Mitchell make it clear to Floden that, as an associate, she would receive less pay and benefits. In early May 2004, Floden decided to take the library associate position at Hoover High School.

Floden further testified that on May 28, 2004, after she had secured her position at Hoover, she entered McClanahan's office to present him with a check request and, twice, he said something to the effect that he should have "fired [her] ass" for your absences instead of letting you transfer. During the 2003-2004 school year, Floden missed almost 40 days out of a 220 day contract, not including vacation time taken in July or paid holidays.

Floden started as a library associate on August 25, 2004 and held the position until March 31, 2005. As a library associate, Floden's job responsibilities included helping the students on the computers, finding books for the students, checking books in and out, and ordering magazines. Her direct supervisor at Hoover was Pam Pelcher, the librarian. Floden testified that she got along well with Pelcher and has no complaints about Pelcher. Connie Cook was the principal at Hoover. Floden testified that she got along well with Cook until she starting having acid reflux problems. Cook received numerous complaints from Pelcher, the librarian, about Floden and needing additional coverage. Floden's absences were a problem in that, if the librarian had to be at Meredith Middle School, the other school she was responsible for, or away from the library for any reason, there would be no one to staff the Hoover library and it would have to be closed.

Through the fall of 2004, Floden testified that Cook would comment "off and on" about Floden's absences, saying "I can't believe you're gone again, what was it now?" Cook never changed Floden's pay or job responsibilities. Cook did this four or five times during the 2004-2005 school year. Cook admits she met with Floden on a few occasions to discuss her absences.

During the 2004-2005 school year, Mitchell received complaints from the faculty and staff at Hoover that Floden was not getting her work done. Floden exhausted her FMLA leave by the end of January 2005 and was on short-term disability until either the 13th or 17th of February, 2005. On March 1, 2005, Floden met with Mitchell to discuss her absences. Floden was accompanied to the meeting by a union representative as well as another person who was in charge of the associates at Hoover. According to Floden, Mitchell told her to watch her absences. Also, Mitchell asked Floden what the defendant could do to support her. Mitchell told her that there was nothing the defendant could do. Subsequently, Mitchell sent Floden written correspondence stating, as characterized by Floden in her deposition, that if she missed much, if any time, she would probably be terminated. During the 2004-2005 school year, Floden was on a 195-day contract and missed even more days than she did in the 2003-2004 school year, even though she resigned approximately two months prior to the end of her contract.

Floden resigned on March 31, 2005, in a letter to Cook. Floden testified that she felt as if she had no choice but to resign because she did not want to be fired and she did not know if she was going to miss additional days in the future as a result of her asthma and acid reflux. Floden testified that she resigned because she was in constant fear of losing her job. Floden did not discuss her decision to resign with the defendant before resigning.

### **CONCLUSIONS OF LAW**

#### **Disability Discrimination - Constructive Discharge**

In Count I of her complaint, Floden alleges that she was constructively discharged in violation of the ADA. The defendant argues that summary judgment should enter on this claim because Floden cannot establish a prima facie case of disability discrimination

or, to the extent she could, rebut the defendant's legitimate, non-discriminatory reasons for its actions.

Floden has produced no direct evidence of disability discrimination. Thus, her ADA claims are evaluated under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1044 (8<sup>th</sup> Cir. 2005). Floden must first establish a prima facie case of discrimination, *i.e.*, (1) an ADA-qualifying disability; (2) qualifications to perform the essential functions of her position with or without a reasonable accommodation; and (3) an adverse action due to her disability. Id. (citing McDonnell Douglas Corp., 411 U.S. at 802-04). If Floden establishes a prima facie case, the defendant must then proffer a legitimate, nondiscriminatory reason for the adverse employment action. Id. If the defendant proffers such a reason, the burden shifts back to Floden to demonstrate pretext. Id.

A constructive discharge is an adverse employment which occurs "when an employer deliberately renders the employee's working conditions intolerable and thus forces [her] to quit [her] job." Thompson v. Bi-State Development Agency, 463 F.3d 821, 825 (8<sup>th</sup> Cir. 2006) (quoting Smith v. World Ins. Co., 38 F.3d 1456, 1460 (8<sup>th</sup> Cir. 1994)). To constitute a constructive discharge, "[a]n employee may not be unreasonably sensitive to her working environment." West v. Marion Merrell Dow, Inc., 54 F.3d 493, 497 (8<sup>th</sup> Cir. 2006). "A constructive discharge takes place only when a reasonable person would find working conditions intolerable." Thompson, 463 F.3d at 1460. An employee is obligated to be reasonable and not assume the worst and jump to conclusions. Id. "An employee who quits without giving her employer a chance to work out a problem is not constructively discharged." West, 54 F.3d at 497.

Based upon this standard, the court finds, as a matter of law, that Floden was not constructively discharged and, therefore, has not demonstrated an adverse employment action. The undisputed facts demonstrate that Floden's transfer from Central Campus to

Hoover was due to budget cuts, and that Floden herself believes the tension with McClanahan was a result of their disagreement over her working hours.

Q: Do you feel that the school district or Mr. Clanahan or Ms. Cook ever retaliated against you for anything?

A: Mr. McClanahan might have because of – okay. He might have because of me arguing or disagreeing with him as far as the hours, you know, when they wanted to change my hours. And that could be why he acted different towards me that school year. That would be the only thing I could think of right offhand. . . . but once we went through this argument here as far as our difference of opinion, whatever you want to say, the time – things just changed between him and I.

Q: That's where you feel like your relationship with Mr. McClanahan changed?

A: Yes.

Q: Is that when you sort of had these discussions with him about your hours?

A: Uh-huh.

Q: And that was – I know you've told me and I apologize. When was that?

A: June of '03, July of '03, something like that.

Q: July of '03, so right before that 2003-2004 school year?

A: Yes.

Q: And you think that's what might have, for lack of a better term, soured your relationship with Mr. McClanahan?

A: Yes.

. . .

Q: When you were sort of negotiating these new hours. Is that fair to say?

A: Yeah.

Q: And that's why you think that it was really these negotiations over the change of time that changed your relationship with Mr. McClanahan?

A: That's the only thing I can think of. If it was something else, I have no idea.

Q: And you think that's why he started treating you differently in the '03-'04 school year?

A: Yes.

Q: You don't think – so, in other words, you don't think he was necessarily treating you differently because of your absences, but you think it was maybe this something else?

A: Yeah, because it started before.

Q: Before your absences?

A: Yes.

Q: So I'm clear, he started treating you differently before you started having a lot of absences?

A: Yes.

...

Q: Any other way that you feel that Mr. McClanahan retaliated against you or any other reason he might have retaliated against you?

A: No.

Q: Let me ask you about the subsequent school year. That would have been the '04-'05 school year.

A: Yes.

Q: And you're at Hoover at this time?

A: Correct.

Q: Is there any way that you feel anyone at Hoover or anyone at the school district treated you differently than other employees based on your medical conditions?

A: No.

See Floden deposition, pp. 87-93.

Moreover, the evidence does not support a finding that Cook deliberately rendered Floden's working conditions at Hoover so intolerable that it forced Floden to quit. Floden was afforded all of the FMLA leave to which she was entitled and was placed on short-term disability. Floden does not dispute that regular attendance was an essential function of her job. Floden likewise does not dispute that the operations of the library were negatively impacted by her absences. The fact that Cook commented on Floden's absences on several occasions does not amount to constructive discharge. Floden's own resignation letter, dated March 31, 2005, belies such a conclusion.

Dear Ms. Cook,

I am writing to inform you that I am resigning my position as Library Associate immediately.

As you know, I have been unwell for some time now; with the ill health that my Grandmother has, my responsibilities to care for her has increased. As a consequence, I feel that I am unable to work full time for the Des Moines Independent School District. Unfortunately, the stress that has been put on me for my illness makes it extremely difficult to get myself on the right track.

I have really enjoyed working with the students and staff at Hoover High School. I wish both you and Hoover good fortune and I would like to thank you for having me as part of your team.

Sincerely,

Sue Floden

As the undisputed facts demonstrate that Floden was not constructively discharged, she cannot establish a prima facie case of disability discrimination. Summary judgment is appropriate.

#### ADA Retaliation

In Count II of her complaint, Floden alleges that she was discharged in retaliation for engaging in a protected activity, *i.e.*, requesting an accommodation for her chronic health problems. Defendant argues that summary judgment should enter on this claim as the evidence demonstrates that she never requested any accommodation for her alleged disability.

“The McDonnell Douglas framework governs the order and allocation of proof for retaliation claims.” Kratzer, 398 F.3d at 1048 (citations omitted). To establish a prima facie case of retaliation, Floden must show (1) that she engaged in a statutorily protected activity, (2) that she sustained an adverse employment action, and (3) a causal connection between the two. Id. Once established, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its actions sufficient to dispel the inference of retaliation. Id. Finally, the burden shifts to Floden to establish that the reason articulated by the defendant is pretext. Id. See also Stewart v. Independent School Dist. No. 196, 481 F.3d 1034, 1043 (8<sup>th</sup> Cir. 2007) (“If the defendant can show a legitimate, non-retaliatory reason for its actions, the burden returns to the plaintiff who is then obligated to present evidence that (1) creates a question of fact as to whether [defendant’s] reason was pretextual and (2) creates a reasonable inference that [defendant ] acted in retaliation.”) (internal quotations omitted).

As set forth above, the undisputed facts do not support that Floden was constructively discharged. Further, Floden’s deposition testimony contradicts any claim that she requested an accommodation, aside from the FMLA leave which was granted.

Q: Next I wanted to ask you about accommodations. This I’m a little unclear about. Do you ever feel that you had requested some

sort of accommodation from Central Campus or Mr. McClanahan or the school district for your asthma or acid reflux?

A: I don't – I guess I don't know what you mean?

Q: By accommodation?

A: Yeah.

Q: Okay. Did you ever ask anyone at the school district for anything that could have helped you do your job better because of problems you were having with asthma or acid reflux?

A: No.

Q: So your – your complaints with the school district in this lawsuit, they're not about asking for something that would have helped you do your job better and them not giving it to you?

A: No.

See Floden Deposition, pp. 85-86.

Defendant's motion for summary judgment on Floden's ADA retaliation claim are granted.

#### FMLA

In Count III of her complaint, Floden alleges that the defendant violated the FLMA by refusing to provide her with 12 weeks of leave and then retain her in her original or substantially equivalent position. Defendant argues that summary judgment should enter on Floden's FMLA claim because she sustained no adverse employment action.

To establish a prima facie case of retaliation under the FMLA, Floden must show that she exercised rights afforded by the Act, that she suffered an adverse employment action, and that there was a causal connection between her exercise of rights and the adverse employment action." McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998, 1003 (8<sup>th</sup> Cir. 2005).

As previously decided, the evidence does not support Floden's constructive discharge claim. Thus, she suffered no adverse employment action. Moreover, Floden does not dispute that she was given all of the time off she was entitled to under the FMLA. Floden's claim for FMLA retaliation must fail, as a matter of law.

Upon the foregoing,

**IT IS ORDERED** that the defendant's motion for summary judgment is granted. [dkt. 22] The clerk shall enter judgment in favor of defendant, dismissing this case with prejudice.

**DATED** this 27th day of August, 2008.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA