

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

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LUCINDA DALTON,

Plaintiff,

vs.

MANOR CARE OF WEST DES MOINES IA, LLC;  
MANORCARE HEALTH SERVICES, LLC; HCR  
MANORCARE, INC.; HEARTLAND EMPLOY-  
MENT SERVICES, LLC; and HOLLY BENEDICT,  
DEAN HAGEN, and SCOTT KEEFER, Individually  
and in their Corporate Capacities,

Defendants.

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**No. 4:12-cv-00172 – JEG**

**ORDER**

This matter comes before the Court on Cross Motions for Summary Judgment. Defendants Manor Care of West Des Moines Iowa, LLC (WDM Manor Care), ManorCare Health Services, LLC (MHS), HCR ManorCare, Inc. (HCR), Heartland Employment Services, LLC (HES), Holly Benedict (Benedict), Dean Hagen (Hagen), and Scott Keefer (Keefer) (collectively, Defendants), filed a Motion for Summary Judgment, which Plaintiff Lucinda Dalton (Dalton) resists. Dalton filed a Motion for Partial Summary Judgment, which Defendants resist. Also before the Court is Dalton's Motion to Strike Defendants' Reply filed in response to Dalton's Resistance to Defendants' Statement of Undisputed Facts. The Court held a hearing on the motions on September 6, 2013. Attorney Melissa Hasso appeared on behalf of Dalton; attorney George Wood appeared on behalf of Defendants. The matter is fully submitted and ready for disposition.

**I. JURISDICTION**

On April 26, 2013, Defendants removed this action to federal court asserting federal question jurisdiction based on Dalton's claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq. This Court has original jurisdiction over Dalton's federal claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Dalton's state law claims pursuant to 28 U.S.C. § 1367.

## II. BACKGROUND

### A. Factual Background<sup>1</sup>

Dalton was an employee of WDM Manor Care and HES; the parties dispute whether Dalton was also an employee of HCR and MHS. Benedict was the Administrative Director of Nursing Services (ADNS) at WDM Manor Care, and Dalton reported directly to Benedict while Dalton worked as a Director of Care Delivery (DCD) from September 1, 2010, to March 3, 2011. Keefer was Administrator and Hagen was Assistant Administrator at WDM Manor Care during the time Dalton worked there.

HCR is a privately-held company incorporated under the laws of the State of Delaware, with its principal place of business in Toledo, Ohio. HCR is a holding company and the parent company of many subsidiary companies, with nearly 60,000 employees working in over 500 locations nationwide. HCR is one of the nation's leading providers of long-term skilled, specialty, and subacute medical care; rehabilitation programs; and hospice and home health care services. HES is a wholly-owned subsidiary of HCR. HCR operates under the familiar trade names: Heartland Employment Services, LLC; Manor Care of West Des Moines IA, LLC; and Arden Courts. WDM Manor Care is a separate legal entity from HCR that operates a skilled nursing facility located at 5010 Grand Ridge Drive, West Des Moines, Iowa. WDM Manor Care leases its employees from HES.

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<sup>1</sup> The facts set forth are either undisputed or viewed in the light most favorable to the non-moving party and afford that party all reasonable inferences. See O'Neil v. City of Iowa City, Iowa, 496 F.3d 915, 916 n.1 (8th Cir. 2007); Lexicon, Inc. v. ACE Am. Ins. Co., 634 F.3d 423, 425 (8th Cir. 2011); see also Scott v. Harris, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Employees at the individual facilities are employees of HES,<sup>2</sup> with facility administrators reporting to regional directors of operations. There are approximately 350 HCR subsidiaries, including WDM Manor Care. There is normally a separate company for each care facility, the vast majority of which are LLCs. The directors and officers of the facility companies overlap, including those at WDM Manor Care.

The policies and procedures at the subsidiary facilities, including WDM Manor Care, come to the facility through the HCR corporate structure. The HCR ManorCare Employee Handbook (Handbook) describes to the employees the general policies – including FMLA policies – of the company and is used at all of the individual facilities. The name “HCR ManorCare” appears on the cover of the Handbook and throughout the Handbook. Emp. Handbook, Pl.’s App. 115-31, ECF No. 76-5. A supervisory handbook sets forth guidelines for management to follow relative to what is in the Handbook.

On May 20, 2009, HCR sent Dalton a letter confirming Dalton’s acceptance as a registered nurse with HCR ManorCare. Only the president of HCR has authority to enter into any employment contract with any employee working at a Manor Care facility. HCR provided Dalton with a Handbook that set forth HCR policies, which Dalton twice acknowledged receiving.

Tara Jenson (Jenson) was HCR ManorCare’s Regional Human Resources Manager. One of Jenson’s responsibilities was to answer questions from the facilities in her region regarding disability discrimination in the workplace as well as questions about the FMLA. Jenson conducted training at WDM Manor Care regarding personnel policies that came from the corporate HCR office in Ohio, and she was usually involved in suspension and termination decisions for employees at WDM Manor Care.

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<sup>2</sup> Dalton denies any allegation that she and other WDM Manor Care facility employees and administrators were not also HCR employees.

As Administrator of WDM Manor Care, Keefer oversaw the day-to-day operations of the facility and reported directly to Cindy Taplin (Taplin), the Regional Director of Operations for HCR ManorCare. The members of the governing body for WDM Manor Care were Keefer, Taplin, and Linda Newman (Newman), General Manager of WDM Manor Care. Newman was also General Manager of HCR's Midwest Division.

Dalton is a registered nurse licensed by the State of Iowa since 2003. On April 28, 2009, Dalton completed an application for a nursing position at WDM Manor Care. WDM Manor Care hired Dalton as a registered nurse on May 20, 2009. Dalton's nursing license was suspended in 2009 for reasons unrelated to her employment at WDM Manor Care; as a result of the suspension, WDM Manor Care terminated Dalton's employment on July 15, 2009. On March 11, 2010, after Dalton's license was reinstated, Dalton re-applied for a nursing position with WDM Manor Care. WDM Manor Care re-hired Dalton as a nurse on or about March 31, 2010. Benedict was involved in the decision to re-hire Dalton. Dalton was promoted to the position of DCD at WDM Manor Care in September 2010. As a DCD, which is a managerial role, Dalton was responsible for overseeing the work of staff nurses, and she was required to work whatever hours were necessary to complete her job duties – even if that meant working on evenings or weekends. By January 2011, Benedict had a number of concerns about Dalton's performance as a DCD.

On July 19, 2010, Dalton sought medical treatment from Karen Heffernan, P.A.-C (Heffernan), a physician's assistant (PA) at Parks Area Family Physicians complaining of edema.<sup>3</sup> Heffernan has seen Dalton as a patient since May of 2010. Dalton visited Heffernan on

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<sup>3</sup> Edema is a symptom, rather than an illness, and is defined as the "accumulation of an excessive amount of watery fluid in cells or intercellular tissues." Stedmans Medical Dictionary 612 (28th ed. 2006).

October 20, 2010, complaining that she was feeling exhausted and tired, and that she had felt much worse over the last couple of weeks.

On December 23, 2010, Dalton again visited Heffernan, complaining about fluid retention, shortness of breath, and itching. Heffernan noted that Dalton had gained fourteen pounds in the last couple of days and had “pitting edema” on both lower extremities. Defs.’ Resp. to Pl.’s Statement of Undisputed Facts ¶ 21, ECF No. 83-1. Heffernan prescribed Dalton medication for fluid retention. Heffernan saw Dalton again on December 29, 2010, as a follow-up to her leg swelling. Heffernan noted that Dalton was not doing any better, was short of breath, and had not lost any weight, causing Heffernan concern. Heffernan ordered a comprehensive metabolic profile and noted that Dalton had increased her use of pain medication due to increased joint pain and muscle pain.

On January 4, 2011, Dalton visited Penn Avenue Internal Medicine (Penn Avenue) upon Heffernan’s referral. Dalton’s examination that day indicated she was experiencing weight gain and edema of uncertain etiology. Dalton underwent laboratory testing at Penn Avenue to check her kidney function and thyroid. On February 10, 2011, Dalton had another appointment with Heffernan, at which time Heffernan noted that Dalton had gained forty pounds of fluid. Dalton called in sick to work on February 10 and February 11, 2011, per Heffernan’s instructions.

On January 25, 2011, Dalton went to see a kidney specialist, Robert H. Leisy, D.O. (Dr. Leisy), for an initial consultation for her edema. At that time, Dr. Leisy noted that Dalton had been suffering with edema for the past two to three months in both of her legs, her abdomen, and her face, with an estimated thirty-pound weight gain. Dr. Leisy diagnosed Dalton as having stage one chronic kidney disease (Stage One CKD). Dr. Leisy explained that at Stage One CKD, the kidneys function at a normal to above normal level. Dr. Leisy saw Dalton at a follow-up visit on February 15, 2011, noting that Dalton’s edema continued, but that she had modest improvement and had lost five pounds. Dr. Leisy instructed Dalton to follow up in two weeks.

According to Dalton, she began discussing her sudden significant weight gain, shortness of breath, and exhaustion with Benedict in October 2010. Benedict inquired about Dalton's test results, as Dalton explained that her medical providers were working to find a definitive diagnosis. Upon Dalton's request, Benedict granted Dalton some flexibility in her work schedule to attend medical appointments, as long as advanced notice was provided.

The only co-worker who testified having noticed Dalton's swelling was another DCD, Kathy Wood, who said she noticed it after Dalton removed her shoe and showed Wood. Wood also noticed that Dalton's hands and face were puffy. Wood knew Dalton was absent several times and testified that when Dalton would return to work, Dalton would inform Wood that she had been at a doctor's appointment regarding her edema. Dalton openly talked about her symptoms with many of the nurses. Dalton admitted that she never spoke with Keefer about her condition and does not recall speaking with Hagen about it.<sup>4</sup> Dalton occasionally spoke with Benedict about her symptoms and admits that Benedict never made negative comments about Dalton's conditions and appeared to be sympathetic.

In January and early February 2011, Dalton left work early once and came to work late once due to doctors' appointments, was late once due to illness, and called in absent three times due to illness.

On or about February 17, 2011, three WDM Manor Care nurses called Benedict to report three issues concerning Dalton.<sup>5</sup> The nurses told Benedict that Dalton engaged in a loud, inappropriate conversation at the nurses' station in front of patients and told them that she did not like her job and that "she does the crap work." Benedict Dep. 67:23-67:24, Defs.' MSJ App.

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<sup>4</sup> Wood, not Dalton, testified that she believed Hagen was in the conference room on one occasion when Dalton was discussing her edema.

<sup>5</sup> Dalton admits that the nurses may have made the complaints to Benedict, but disputes the accuracy of the accusations.

49, ECF No. 75-6. The nurses also reported that on February 15, 2011, Dalton failed to attend a staff meeting Dalton had set up and that Dalton failed to notify staff members that the meeting was cancelled; the staff members had driven to the facility and clocked in specifically for this meeting. The nurses further reported to Benedict that on February 17, 2011, during the time when Dalton was responsible for attending care conferences,<sup>6</sup> Dalton left the facility for an extended lunch break. Other managers also called Benedict to report Dalton's failure to attend the care conferences that day. Two of Dalton's co-workers reportedly placed bets on whether Dalton would show up for work on any given day.

Benedict and Memorea Schrader (Schrader), the Human Resources Director at WDM Manor Care,<sup>7</sup> met with Dalton on February 21, 2011, to discuss attendance and performance issues. At that meeting, Dalton was issued her "Third/Final Written Warning" for "Violation of Work Rule Commitment"<sup>8</sup> citing Dalton's (1) inappropriate comments at the nurses' station on February 17, 2011; (2) failure to attend or notify staff members about the cancellation of the February 15, 2011, staff meeting; and (3) extended lunch break and failure to attend the care

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<sup>6</sup> Benedict explained that a care conference is a meeting attended by nursing, dietary, and therapy staff members along with the patient and the patient's family, to discuss the patient's progress and goals.

<sup>7</sup> Schrader testified that she was the full-time Human Resources Director at WDM Manor Care from approximately October 2010 through November 2011.

<sup>8</sup> The Handbook contains disciplinary policies and sets forth a disciplinary system by which all employees can be placed on first, second, or third warnings, or terminated, for violating certain work rules set forth in the Handbook. Work rule violations are classified as Minor/Type C; Major/Type B; and Critical/Type A. For first offenses-Type C violations, employees are given a "First Written Warning;" second offenses result in a "Second Written Warning;" third offenses, a "Final Written Warning;" and fourth offenses, termination or escalation into a First Type B Offense. Emp. Handbook pp. 37-42, Pl.'s MSJ App. 122-25, ECF No. 76-5; Defs.' Resp. to Pl.'s Statement of Material Facts ¶ 97, ECF No. 98-1. For Type B violations, which are considered to be very serious, a first offense results in a "Final Written Warning;" a second offense of any kind may result in termination. Defs.' Resp. to Pl.'s Statement of Material Facts ¶¶ 98-99, ECF No. 98-1. Violations of Critical/Type A work rules may result in immediate termination.

conferences on February 17, 2011. Employee Warning Notice–Third/Final Written Warning (Feb. 21, 2011), Pl.’s Resist. 2 P. App. 85, ECF No. 85-5. Dalton responded to the report qualifying that she never talked about not liking her position, the staff meeting was cancelled because another staff member was not there, and her lunch was long on February 17, 2011, because she was at a doctor’s appointment. Dalton understood that based on this final warning, a single additional performance-related issue could cause her employment to be terminated. It is undisputed that Benedict did not say anything to Dalton about having an alleged disability during the meeting on February 21, 2011, and that Dalton’s performance issues cited in the final warning were not caused by Dalton’s alleged disabilities. Neither Keefer nor Hagen was present at the meeting, and Dalton had no reason to believe either one was involved in the decision to discipline her.

At the February 21, 2011, meeting, Dalton was also issued a “First Written Warning” for “Absenteeism/Tardiness,” which recorded that between January 18, 2011, and February 18, 2011, Dalton had been late to work six times, absent three times, and left early once. Employee Warning Notice–First Written Warning (Feb. 21, 2011), Pl.’s Resist. 2 P. App. 80, ECF No. 85-5. Dalton discussed her chronic health problem and the need for continued medical treatment with Schrader and Benedict. Although Dalton did not write a comment on the First Written Warning form, Dalton testified that she believed her absences for medical appointments and sick days had been excused, based on Dalton’s conversations with Benedict.

Dalton asked Schrader and Benedict if she would be eligible for FMLA protection due to her health condition. Schrader told Dalton she was not eligible for FMLA leave because she had not been employed by WDM Manor Care for at least twelve months. Schrader testified that at the time she answered Dalton’s question about FMLA leave, Schrader did not realize that the twelve months of employment need not be consecutive for an employee to be eligible for FMLA

leave. Dalton's question about FMLA leave was in regard to FMLA protection going forward as she had not previously requested FMLA leave.

At the February 21 meeting, Benedict also presented Dalton with a performance improvement plan and scheduled a meeting on or about February 28, 2011, to talk about Dalton's progress with respect to the plan.

DCDs were responsible for ensuring patient care plans and patient skin sweeps<sup>9</sup> were completed by the end of each month. Dalton was responsible for completing twelve to fourteen patient skin sweeps by the end of each month. Dalton acknowledged that performing skin sweeps was important to ensure "that there's nothing else wrong with the patient." Dalton Dep. 15:13-16:6, Defs.' MSJ App. A004, ECF No. 75-5. In February 2011, Dalton was handling a total of twelve to fourteen patients. By contrast, Wood, another DCD, had between forty and sixty patients. Each skin sweep would take approximately 5 to 10 minutes, for a total of 60 to 120 minutes for all of Dalton's patients. On February 25, 2011, Dalton still had five to seven skin sweeps left to complete that month, which would have taken her between 35 and 65 minutes to complete. Benedict admits that Dalton could have performed her remaining skin sweeps on Monday, February 28, 2011, if Dalton had not been ill that day.

Dalton, as a DCD, was also responsible for investigating and completing a report for every patient call light that was on for more than fifteen minutes. Benedict asked Dalton to investigate two late call light responses on February 25, 2011. At the time, Benedict did not believe Dalton had finished her patient call light reports by the end of the day on February 25, 2011.<sup>10</sup>

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<sup>9</sup> Dalton explained that a skin sweep is a "once-over head to toe" assessment of a patient's skin to look for abnormalities. Dalton Dep. 15:13-15:16, Defs.' MSJ App. A004, ECF No. 75-5.

<sup>10</sup> At her deposition, Benedict conceded that it was possible that Dalton had completed the call light investigations as she was instructed, but testified that Dalton did not turn in the completed call light investigation forms to Benedict.

Dalton was also responsible for ensuring that patient care plans were completed by the nurses reporting to her by the end of each month. If the patient arrived on a Friday after the DCD left for the day, the DCD would review the admission paperwork the following Monday.

As of the end of the day on Friday, February 25, 2011, Dalton had not completed her assigned skin sweeps, care plans, or medical charting. According to Dalton, Benedict gave Dalton until Monday to complete those tasks.<sup>11</sup>

Dalton testified that before leaving work on Friday, February 25, 2011, Dalton asked Benedict if she would like Dalton to come in over the weekend to do anything. Benedict declined, telling Dalton that Wood was already coming in over the weekend, and since the next day was Dalton's birthday, she should go home and enjoy the weekend. Later that afternoon, Benedict attempted to check with Dalton about her progress with respect to the call lights, skin sweeps, and patient care plans, but discovered that Dalton had already left for the day. Benedict also discovered that Dalton had failed to resolve her past-due care plans. Dalton asserts that she had completed the call light reports but admits that she had not completed the skin sweeps or the patient care plans by the end of the day on February 25, 2011, asserting those were not due until the following Monday.

On February 25, 2011, while looking through documents in Dalton's work area at the nurses' station after Dalton left for the day, Benedict found, mixed in among Dalton's paperwork, a patient's outdated lab report with abnormal results, which had not been passed along to the nurse responsible for that patient. Dalton testified that if a patient's lab results were normal, the nurse manager, not the DCD, would file them and no additional action was needed; if the results were abnormal, the nurse would call the patient's doctor.

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<sup>11</sup> Although Defendants dispute that Benedict told Dalton she had until Monday, February 28, 2011, they concede that it is Dalton's testimony that Benedict did so. Defendants assert, however, that this fact is irrelevant to Dalton's claims.

As of February 25, 2011, Dalton had also failed to complete her medication and treatment records (Mars and Tars) for the month of February. Benedict then assigned them to Wood, and it took Wood eight hours on one day over the weekend of February 26 and 27 to complete Dalton's Mars and Tars.

Dalton's health worsened over the weekend of February 26 and 27. At around 6:30 a.m. on Monday, February 28, 2011, Dalton called Benedict and told Benedict she was having chest pains and was going to the emergency room. Dalton then went to the Iowa Lutheran Hospital Emergency Department (Iowa Lutheran ED) with complaints of chest pain, shortness of breath, edema, and weight gain. The Iowa Lutheran ED physicians were unable to pinpoint the cause of Dalton's chest pain, discharged Dalton instructing her to follow-up with Dr. Leisy or with John C. Heffernan, M.D., and gave Dalton a note indicating that she should be off work until March 2, 2011.

Dalton called Benedict after leaving Iowa Lutheran ED and told Benedict she was having more of the same swelling she had been experiencing before and that the doctors had found atypical chest pain but were not sure what was going on, they had done blood work, and had excused her from work until March 2, 2011. Without making any derogatory comments about Dalton's health, Benedict asked Dalton if the doctors thought Dalton's chest pain was related to everything else Dalton was dealing with. It is undisputed that Benedict never told Dalton that she could not take off work on February 28 and March 1, 2011.

Dalton and Benedict spoke again on Tuesday, March 1, 2011, at which time Benedict instructed Dalton to report to work the next day, March 2, at 1:00 p.m. When Dalton arrived, she met with Benedict and Schrader. As Human Resources Director, Schrader reviewed all disciplinary actions before they were given to employees and sat in as a witness during the disciplinary process. Benedict testified that it was her typical procedure to discuss every employee disciplinary action with Schrader. At the meeting, Dalton was advised that she was

suspended pending an investigation for failing to perform her job functions. Dalton admitted failing to perform two of her job functions – skin sweeps and care plan reviews – that were to be completed by February 28, 2011. Dalton again asked about her FMLA eligibility; Schrader responded that Dalton was not eligible for FMLA leave. Dalton was not allowed to return to work.

At the March 2, 2011, meeting, Benedict completed two “Statement of Witness” forms; one identifying Dalton as the witness and describing the events surrounding Dalton’s suspension as well as Dalton’s responses and a second naming herself as a witness and Dalton as a “resident.”

Benedict had to have Jenson and Schrader’s approval for any termination. The process for terminating a nurse was for the director of nursing to consult with the human resources director and review all documentation regarding previous education and disciplinary actions for the employee. Benedict and Schrader would then call Jenson, review the situation with her, and if Jenson approved, they would terminate the employee.

On March 3, 2011, Benedict met with Dalton to advise her of the decision to terminate her employment. In terminating Dalton on March 3, 2011, Benedict informed Dalton she had committed a Minor/Type C violation while having a prior Final Written Warning already on file. Dalton was told that her employment was being terminated because of her performance issues on February 25, 2011. Neither Dalton’s health condition nor the fact that she had been absent for two days were discussed during the meeting. Keefer testified that when Benedict reported Dalton’s termination to Keefer, she mentioned that Dalton had been experiencing health problems recently.

## **B. Procedural Background**

After her termination, Dalton filed a claim with the Iowa Civil Rights Commission (ICRC) and the Equal Employment Opportunity Commission (EEOC) alleging discrimination under the

Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq.; the Iowa Civil Rights Act (ICRA), Iowa Code Chapter 216; and the Americans with Disabilities Amendment Act of 2008 (ADAAA), 42 U.S.C. § 12101, et seq.

Dalton received her right to sue letter from the ICRC on February 28, 2012, and filed a petition in the Iowa District Court for Polk County on April 12, 2012, alleging violation of the ICRA and the FMLA against the corporate defendants, HES, MHS, and HCR, as well as the individually named defendants, Benedict, Hagen, and Keefer, in their corporate and individual capacities. Defendants timely removed the action on April 26, 2012.<sup>12</sup> Dalton twice amended her Complaint adding Defendant WDM Manor Care and a third count, which charged the corporate defendants, HES, WDM Manor Care, MHS, and HCR, with disability discrimination under the ADAAA. Dalton alleges that in February 2011, she was disabled due to Stage One CKD and fibromyalgia.

On June 24, 2013, Defendants filed a Motion for Summary Judgment and Dalton filed a Motion for Partial Summary Judgment. On August 5, 2013, Dalton also filed a Motion to Strike Defendants' Reply to Dalton's Response to Defendants' Statement of Undisputed Material Facts (Reply). All motions are resisted. A hearing was held in this matter on September 6, 2013.

Defendants argue they are entitled to summary judgment on all of Dalton's claims because Dalton has failed to prove the required elements of any of those claims. Dalton argues she is entitled to partial summary judgment because there are no genuine issues of material fact on the following issues: Dalton was an eligible employee under the FMLA, Dalton had a serious health condition under the FMLA, Dalton is a qualified individual within the meaning of the ADAAA with regard to her accommodation claim, and HCR ManorCare was Dalton's employer.

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<sup>12</sup> Dalton received her right to sue letter from the EEOC on May 18, 2012.

### **III. DISCUSSION**

#### **A. Motion to Strike**

Dalton moves pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(d) to strike Defendants' Reply. Dalton contends that the Reply is unnecessary and that it "needlessly increased the volume of filings in this already voluminous case, simply in an effort to have the last parting shot on disputed factual issues." Mot. to Strike ¶ 7, ECF No. 104. Defendants respond that the Reply is useful to the Court by attempting to narrow the issues on which the Court should focus in deciding the present motions.

Rule 56 does not address the filing of the type of reply at issue. Local Rule 56(d) states that "[t]he moving party must, within 7 days after service of the resisting party's statement of additional facts, file a reply in which the moving party expressly admits, denies, or qualifies each of the resisting party's numbered statements of additional fact," and "[a]t the option of the moving party, the moving party also may, without leave of court, file a reply brief." LR 56(d). There is no reference in the local rule that contemplates the filing of a reply to the resistance to the statement of undisputed facts.

District courts enjoy considerable discretion when ruling on a motion to strike. See Nationwide Ins. Co. v. Cent. Mo. Electric Coop., Inc., 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f)."). The Reply is not explicitly allowed under the applicable rules, and the Court finds it unnecessary in deciding the present motions. Thus, under the narrow circumstances presented herein, Dalton's Motion to Strike is **granted**.

#### **B. Defendants' Motion for Summary Judgment**

##### **1. Summary Judgment Standard**

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must support its contention by pointing to "the record, including

depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” to demonstrate that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c)(1)(A). The evidence must be “viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” Scott v. Harris, 550 U.S. 372, 380 (2007) (quoting Fed. R. Civ. P. 56(c)).

The initial burden falls on the movant to “inform[] the district court of the basis for its motion and identify[] those portions of the record which show a lack of a genuine issue.” Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992). However, it is the nonmovant’s burden to “produce sufficient evidence to support a verdict in his favor based on more than speculation, conjecture, or fantasy.” Doe v. Dep’t of Veterans Affairs of the U.S., 519 F.3d 456, 460 (8th Cir. 2008) (citation and internal quotation marks omitted). “A party cannot defeat a summary judgment motion by asserting ‘the mere existence of *some* alleged factual dispute between the parties’; the party must assert that there is a ‘*genuine issue of material fact*.’” Quinn v. St. Louis Cnty., 653 F.3d 745, 751 (8th Cir. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)) (emphasis in original). The fact must be material so that it “might affect the outcome of the suit under the governing law.” Anderson, 477 U.S. at 248. The grant of summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” In re Baycol Prods. Litig., 596 F.3d 884, 888-89 (8th Cir. 2010) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). “In sum, the evidence must be ‘such that a reasonable jury could return a verdict for the nonmoving party,’” for the non-moving party to succeed in defeating the motion. Reed v. City of St. Charles, Mo., 561 F.3d 788, 791 (8th Cir. 2009) (quoting Anderson, 477 U.S. at 248).

## 2. FMLA Claim

Title 29 U.S.C. § 2615(a)(1) “makes it unlawful for an employer to ‘interfere with, restrain, or deny the exercise of or the attempt to exercise’ rights provided under the FMLA.” Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1005 (8th Cir. 2012) (quoting 29 U.S.C. § 2615(a)(1)). It also makes it unlawful for “any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful.” Id. (quoting 29 U.S.C. § 2615(a)(2)). These two subsections refer to two types of claims under the FMLA: interference (or entitlement) and retaliation.<sup>13</sup> See id.; Ballato v. Comcast Corp., 676 F.3d 768, 772 (2012). An employee’s FMLA absences cannot be counted against her under an employer’s “no fault” attendance policy. 29 C.F.R. § 825.220(c).

Dalton asserts in her brief, and confirmed at the hearing, that she is bringing an interference claim. An interference claim arises “where an employer refuses to authorize leave under the FMLA or takes other action to avoid responsibilities under the Act.” Pulczynski, 691 F.3d at 1005. “An employee can prevail under an interference theory if [s]he was denied substantive rights under the FMLA for a reason connected with [her] FMLA leave.” Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006). “Interference also includes ‘manipulation by a covered employer to avoid responsibilities under FMLA.’” Ballato, 676 F.3d at 772 (quoting 29 C.F.R. § 825.220(b)).

The burden of proof for an interference claim under the FMLA is on Dalton to show that she was entitled to the FMLA benefits denied by her employer. Stallings, 447 F.3d at 1050. “For an interference claim, the employer’s intent is immaterial.” Ballato, 676 F.3d at 772 (citing Stallings, 447 F.3d at 1050). To meet her prima facie burden of FMLA interference, Dalton must establish the following: (1) Dalton was an eligible employee; (2) Defendants were her employer under the FMLA; (3) Dalton was entitled to FMLA leave; (4) Dalton gave notice of

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<sup>13</sup> This Court will use the term “interference” to describe Dalton’s claim in this Order.

her intent to take FMLA leave; and (5) Defendants denied Dalton FMLA benefits to which she was entitled. See Beatty v. Custom-Pak, Inc., 624 F. Supp. 2d 1045, 1052 (S.D. Iowa 2009).

**a. Eligible Employee and Employer under the FMLA**

Defendants concede Dalton was an “eligible employee” and that WDM Manor Care and HES were her “employer” under the FMLA. Defendants, however, argue that Dalton did not suffer from a serious health condition in February or March of 2011, so she was not qualified to receive FMLA leave. Defendants also argue Dalton failed to present any evidence that her absences on February 10, 11, 28, and March 1, 2011, were due to or caused by her Stage One CKD or fibromyalgia.

Therefore, to make a prima facie case, Dalton must show that (1) she was entitled to FMLA leave due to a serious health condition, (2) she provided Defendants adequate notice of her need for FMLA leave, and (3) Defendants improperly denied her FMLA benefits to which she was entitled. See Beatty, 624 F. Supp. 2d at 1052.

**b. Serious Health Condition**

In order to be entitled to FMLA leave, Dalton must show that she had a “serious health condition” that made her “unable to perform the functions of [her] position . . . .” 29 U.S.C. § 2612(a)(1)(D). A “‘serious health condition’ means an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” 29 U.S.C. § 2611(11). “An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.” 29 C.F.R. § 825.123(a). “Treatment” includes “examinations to

determine if a serious health condition exists and evaluation of the condition.” 29 C.F.R. § 825.113(c).<sup>14</sup>

Although Dalton contends she qualified for FMLA leave due to her fibromyalgia, she fails to present any evidence that she suffered from fibromyalgia before January 2012 aside from Heffernan opining that Dalton *could* have had fibromyalgia as early as October 2010. While the question was not couched in terms of a reasonable degree of medical certainty, Heffernan clearly could not opine that Dalton in fact suffered from fibromyalgia at a time sufficiently early to be material herein. Therefore, other than Dalton’s own testimony, Dalton provides absolutely no evidentiary support for the assertion that she suffered from fibromyalgia in the winter or spring of 2011. Thus, this Court finds that Dalton has not demonstrated that there is a genuine issue of fact precluding summary judgment on this issue. Because of the manner in which Dalton presents the question of a “serious health condition” in regard to the Stage One CKD diagnosis, that condition is addressed in the following section.

#### **i. Inpatient Care**

“Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.” 29 C.F.R. § 825.114. “[I]ncapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” 29 C.F.R. § 825.113(b). Dalton alleges she was unable to work on February 10, 11, 28, and March 1, 2011, for purposes of treatment of her Stage One CKD symptoms, and therefore satisfies the definition of “incapacity” as defined under “inpatient care.” The record does not support this assertion.

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<sup>14</sup> “Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.” 29 C.F.R. § 825.113(d).

“Where absences are not attributable to a ‘serious health condition,’ . . . FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences.” Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1147 (8th Cir. 2001); see also Ballato, 676 F.3d at 772 (holding that FMLA leave must be provided if the employee’s condition is both a “serious health condition” and it “makes them unable to perform the functions of their position” (citing 29 U.S.C. § 2612(a)(1)(D))). The stated medical reason by the employee, in an attempt to receive FMLA leave, must be related to her alleged serious health condition; any absences for other medical appointments cannot be counted in the FMLA-protected absences. See Bailey v. Amsted Indus., Inc., 172 F.3d 1041, 1045 (8th Cir. 1999) (finding that because most of the employee’s medical absences were not related to his alleged serious health condition, the employee was not entitled to FMLA protection from his employer’s disciplinary action, and his discharge for excessive absenteeism did not violate the FMLA).

Dalton was referred to Dr. Leisy to determine the cause of Dalton’s edema. During her visit with Dr. Leisy on January 25, 2011, Dr. Leisy diagnosed Dalton with Stage One CKD. At that visit, Dr. Leisy gave Dalton medication for the edema and instructed Dalton to follow up in three weeks. Dr. Leisy explained during his deposition that CKD is a process that is brought on to the kidneys by other factors, such as a patient’s weight and blood sugars. Dr. Leisy said that CKD is described in five stages, but that patients like Dalton, who are diagnosed at Stage One CKD, generally have no symptoms, and that with weight loss and controlled blood sugars, may never progress to a higher stage. Dr. Leisy testified that the tests performed revealed no damage to Dalton’s kidneys. Dalton returned to see Dr. Leisy for a routine follow-up on February 15, at which time Dr. Leisy noted modest improvement with the edema and instructed Dalton to continue on the medication and to follow up in two weeks. Dr. Leisy denied placing any work restrictions on Dalton. Dalton never returned to see Dr. Leisy.

Dalton's February 10 and 11, 2011, absences were due to a sore throat, chest congestion, a raspy voice, and the worsening of a rash Dalton had been experiencing. There is no medical evidence indicating that Dalton's absences on February 10 and 11 were for diagnosis or treatment of her Stage One CKD. Similarly, on February 28, 2011, when Dalton visited the Iowa Lutheran ED, her complaint was chest pain. Dalton admits that the Iowa Lutheran ED physicians were unable to pinpoint a cause. In fact, following her visit on February 28, Dalton told Benedict that the Iowa Lutheran ED physicians found atypical chest pain, observed the same swelling that Dalton had been experiencing previously, were not sure what was going on, and told Dalton to follow up with Dr. Leisy or Dr. John Heffernan. Dalton failed to provide any medical records showing or suggesting that her February 28 Iowa Lutheran ED visit was for treatment of her Stage One CKD, and it is undisputed that Dalton never followed up with Dr. Leisy, who is a kidney specialist.

Although Heffernan noted that Dalton's fluid retention had increased at Dalton's February 10, 2011, visit, this notation did not constitute a diagnosis or record of treatment for a "serious health condition" at that appointment – to find otherwise would effectively allow *any* visit to the doctor to qualify for FMLA protection, which directly conflicts with the statutory and regulatory scheme setting boundaries on what types of medical conditions, treatments, and appointments are protected by the FMLA. See Rankin, 246 F.3d at 1147 ("Where absences are not attributable to a 'serious health condition,' however, FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences.").

Dalton has not met her burden of generating a material issue of fact that her absences on February 10, 11, 28, or March 1, 2011, qualified for protection under the FMLA under the "inpatient care" section of the statute.

**ii. Continuing Treatment: Incapacity and Treatment**

Under 29 C.F.R. § 825, “[a] serious health condition involving continuing treatment by a health care provider” includes the following: (a) incapacity and treatment, (b) pregnancy and prenatal care, (c) chronic conditions, (d) permanent or long-term conditions, (e) conditions requiring multiple treatments, and (f) absences attributable to incapacity under subsections (b) or (c). 29 C.F.R. § 825.115. Under subsection (a), “incapacity” means “[a] period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves” one of five enumerated types of treatment. 29 C.F.R. § 825.115(a).

Dalton has not alleged any period of incapacity that lasted three or more consecutive full calendar days; therefore, she fails to meet the statutory prerequisites for a “serious health condition” that involves “continuing treatment” under subsection (a) dealing with incapacity and treatment, as a matter of law.

**iii. Continuing Treatment: Chronic Condition**

Under subsection (c), a chronic condition is defined as “[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition,” and a “chronic serious health condition” is defined as one that

- (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.115(c).

As discussed with regard to the inpatient care criteria, even if Dalton’s Stage One CKD satisfied the definition of a “chronic condition” under subsection (c), Dalton fails to demonstrate how her absences on February 28 and March 1, 2011, were related to her Stage One CKD such

that they could constitute a “period of incapacity or treatment for such incapacity due to a chronic serious health condition.” See id.; see also Bailey, 172 F.3d at 1045. Dalton has therefore failed to provide evidence she suffered from a serious health condition that made her unable to perform the functions of her position.

**c. Notice**

Even if the Court could assume Dalton had demonstrated that she suffered from a serious health condition, for her absences to be protected under the FMLA, Dalton “must notify her employer that she may need FMLA leave.” Murphy v. FedEx Nat. LTL, Inc., 618 F.3d 893, 900 (8th Cir. 2010). “To permit otherwise would enable an employee to blind-side her employer by taking a generic leave request and retroactively transforming it into an FMLA claim.” Id. The employee need not name the FMLA when requesting leave under the statute, but she “must provide information to suggest that [her] health condition could be serious.” Woods v. Daimler Chrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005). “Employees thus have an ‘affirmative duty to indicate both the need and the reason for the leave,’ and must let employers know when they anticipate returning to their position.” Id. at 990-91 (quoting Sanders v. May Dep’t Stores Co., 315 F.3d 940, 944 (8th Cir. 2003) (citing 29 C.F.R. § 825.302(c))).

“The FMLA also requires that an employee’s notice be timely in order for [her] leave to be covered by the Act.” Id. at 991. “The statute demands ‘such notice as is practicable’ unless the need for medical leave is foreseeable, when thirty days advance notice must be given.” Id. (quoting 29 U.S.C. § 2612(e)(2)(B)). “A claim under the FMLA cannot succeed unless the plaintiff can show that [s]he gave [her] employer adequate and timely notice of [her] need for leave, and an employer has the right to request supporting information from the employee.” Id.

In Woods v. DaimlerChrysler Corp., the employee failed to provide any information to his employer to indicate that he was absent due to a serious health condition; rather, he informed his employer that he was out sick, and his doctor’s note reflected that he was simply “to remain off

work until” a specified date. Id. at 992. The Eighth Circuit found that the employee failed “to submit adequate information to his employer to indicate he had a qualifying medical condition” for purposes of the FMLA, so his employer “had no knowledge of any serious health condition suffered by [the employee].” Id. at 993. The court further reasoned that the employee “did not specify any serious health condition preventing him from performing his work or the duration of his absence, and . . . presented no evidence that it would have been impracticable to provide more detailed information after he was notified by [his employer] that his absence was unsubstantiated.” Id. The Eighth Circuit thus affirmed the district court’s grant of summary judgment in favor of the employer on the employee’s FMLA entitlement claim. Id. at 994.

On the other hand, in Phillips v. Mathews, 547 F.3d 905, 909 (8th Cir. 2008), the Eighth Circuit held that the employee “satisfied the notice requirement because she put [her employer] on notice that her doctor visit was related to her prior accident and could result in a need for additional treatment and time off from work.” Id. at 910. Thus, both the employee and employer “were aware of the *possibility* that such time could be needed” for the employee to remain off work. Id. (emphasis in original). The court also noted that an employee’s “doctor’s appointment to diagnose and treat that condition was covered by the FMLA,” even if the employee did not at that time have a serious health condition. Id.; see also Caldwell v. Holland of Tex., Inc., 208 F.3d 671, 676-77 (8th Cir. 2000) (“[An] employer does not avoid liability by discharging an employee who takes leave in order to seek treatment for a condition that is later held to be covered by the FMLA.”). Thus, if the employer has notice that their employee’s medical appointment could potentially be covered by the FMLA, “they do not escape liability by simply terminating her before she could inform them of the results of her appointment;” rather, they bear “the risk that the health condition in question later develop[s] into a serious health condition.” Phillips, 547 F.3d at 910 (citation and internal quotation marks omitted).

Not every “routine visit to a doctor constitutes notice to an employer of a potential serious health condition, which in turn prohibits an employer from taking action against an employee in close temporal proximity to that visit,” but if the employer is on notice this is a non-routine medical appointment related to a possible FMLA-covered health condition, the notice is sufficient. Id. at 910-11. “Where absences are not attributable to a ‘serious health condition,’ however, FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences.” Rankin, 246 F.3d at 1147; see also Ballato, 676 F.3d at 772 (stating that the FMLA provides leave if the employee’s condition is both a “serious health condition” and it “makes them unable to perform the functions of their position.” (citing 29 U.S.C. § 2612(a)(1)(D))); Johnson v. Dollar Gen., 880 F. Supp. 2d 967, 986 (N.D. Iowa 2012) (noting that an employee must show he or she suffered from a serious health condition and that the absence at issue was attributable to such condition for an FMLA interference claim to survive).

To have FMLA protection, Dalton needed to “apprise her employer of the specifics of her health condition in a way that [made] it reasonably plain that it [was] serious and [have told] her employer that this [was] why she [would] be absent.” Rask v. Fresenius Med. Care Ctr. N. Am., 509 F.3d 466, 474 (8th Cir. 2007). Defendants “would then have the duty to investigate whether [Dalton] [was] entitled to FMLA leave.” Id. “Whether an employee gave sufficient information to put his or her employer on notice that an absence may be covered by the FMLA is a question of fact for the jury.” Phillips, 547 F.3d at 909.

According to Dalton, prior to her visit to the Iowa Lutheran ED on February 28, 2011, Dalton had discussed her sudden weight gain, shortness of breath, and exhaustion with Benedict, and Benedict appeared sympathetic and followed up to see whether she had a definitive diagnosis.<sup>15</sup> Dalton also testified that she had previously discussed the swelling in her legs and feet with Wood and Hagen. As a DCD, Dalton had flexibility in her work schedule to allow her to

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<sup>15</sup> Benedict denies ever noticing or commenting about Dalton’s symptoms.

attend medical appointments as needed, so long as Dalton gave Benedict notice of the days and times she needed to be absent. Dalton never spoke with Keefer about her condition and, other than the swelling noted above, does not recall speaking with Hagen about it.

Additionally, Dalton discussed her health problems with Schrader and Benedict on February 21, 2011, when they placed her on a first written warning for attendance. Dalton asked Schrader and Benedict during her disciplinary meeting if she would be eligible for FMLA leave due to her health condition. Schrader told Dalton she was not eligible for FMLA leave because she had not been employed by WDM Manor Care for at least twelve months.

On February 28, Dalton left a voicemail message for Benedict at 6:30 a.m., informing Benedict that she was going to the emergency room because she was experiencing chest pains. Dalton then followed up with Benedict to let her know after her emergency room visit that the doctors had determined Dalton had atypical chest pain and was experiencing more of the same type of swelling she had been experiencing previously. She also let Benedict know that the Iowa Lutheran ED physician instructed her to stay home from work until March 2, 2011.

Based on the evidence in the record, it appears that Benedict had knowledge that Dalton was suffering from sudden weight gain, shortness of breath, and exhaustion. She was also on notice after Dalton's message on February 28, 2011, that Dalton was experiencing chest pain that morning and needed to visit the emergency room for treatment on that date. After their meeting with Dalton on February 21, 2011, Benedict and Schrader were on notice that Dalton believed she was eligible for FMLA leave due to her health problems, though, as this Court concluded above, Dalton's absences on February 28 and March 1, 2011, were not FMLA-protected. Although Dalton had informed Benedict and Schrader about symptoms she was experiencing, she failed to place them on the required notice that she was going to be absent on February 28 and March 1, 2011, for a medical condition protected by the FMLA.

**d. Denied FMLA Benefits**

Again, even if the Court assumes Dalton had demonstrated that she suffered from a serious health condition and had provided Defendants notice of her need for time off for treatment of such a condition, to make her prima facie case, Dalton would still be required to present evidence that Defendants failed to give her the time off that she requested. This she does not do.

“[T]he FMLA does not impose strict liability on employers for interference claims,” so “[i]f there exists a showing of interference, the burden shifts to the employer to prove there was a reason unrelated to the employee’s exercise of FMLA rights for terminating the employee.” Ballato, 676 F.3d at 772 (citations omitted). This is because “[a]n employee who requests FMLA leave has no greater protection against termination for reasons unrelated to the FMLA than she did before taking the leave.” Estrada v. Cypress Semiconductor (Minn.) Inc., 616 F.3d 866, 871 (8th Cir. 2010). “If the employer can prove that it would have terminated the employee had the employee not exercised FMLA rights, the employer will not be liable.” Ballato, 676 F.3d at 772. Additionally, “[t]he employer is . . . not bound strictly to the reason provided to the employee for the termination,” so they can change their rationale to some extent. Id.

Dalton admits that Defendants gave her the requested time off on February 28 and March 1, 2011, and did not hold those days against her under their attendance policy when they discussed her performance deficiencies at her termination meeting. Rather, her termination meeting focused on her performance deficiencies, all of which occurred on or before Friday, February 25, 2011, which was three days *before* her Monday, February 28, visit to the Iowa Lutheran ED, where Dalton received the two-day work excuse. Nonetheless, even if Defendants did interfere with Dalton’s use of benefits under the FMLA, they have an affirmative defense that they would have terminated her anyway, based on reasons unrelated to her need for FMLA leave.

The performance problems cited by Defendants are:

- (1) Dalton's failure to complete patient skin sweeps for the month of February.
- (2) Dalton's failure to investigate and complete two late call light responses on February 25.
- (3) Dalton's failure to confirm that patient care plans were completed for February by the nurses who reported to her.
- (4) Dalton's failure to complete her medical records and treatment records (Mars and Tars) for the month of February.
- (5) Dalton's failure to complete past-due care plans.
- (6) Dalton's failure to pass along outdated lab reports with abnormal results to the nurse responsible for the patient.

Dalton's patient skin sweeps, patient care plans, and Mars and Tars duties were all due by the end of February, which meant Dalton had until February 28, 2011, to complete those tasks. It is unclear whether the decision to terminate Dalton's employment was made on Friday, February 25, or sometime the following week.

The record reflects Defendants had reason to believe at the time they terminated Dalton's employment that she had failed to complete acts requested (and required) of Dalton in her position as DCD – to investigate and complete two late call light responses on February 25, 2011, to complete past-due care plans, and to properly deal with abnormal lab results. Dalton contends that Benedict erroneously believed that Dalton had failed to investigate the call light responses or complete the past-due care plans, but she admits that Benedict may have believed she discovered such failures on February 25, 2011.<sup>16</sup> Dalton does not provide any argument that she failed to properly pass along the abnormal lab result. Defendants provided at least three reasons for terminating Dalton's employment, none of which had anything to do with Dalton's alleged serious health condition. It does not matter whether some of those decisions were based upon misinformation, as Dalton contends. See Pulczinski, 691 F.3d at 1004 (“It is not our province to determine whether the employer's investigation of alleged employee misconduct

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<sup>16</sup> At her deposition, Benedict acknowledged that while *it was possible* Dalton *may* have performed the late call light investigations, Dalton failed to complete the call light investigation forms and turn them in to Benedict as required. Benedict Dep. 90:23-91:8, Defs.' MSJ App. A055, ECF No. 75-6.

reached the correct result, so long as it truly was the reason for the plaintiff's termination.”) (citing Wilking v. Cnty. of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998)).

As the Eighth Circuit has repeatedly held, the court is not “a ‘super-personnel department’ with the power to second-guess employers’ business decisions,” Evance v. Trumann Health Servs., LLC, 719 F.3d 673, 678 (8th Cir. 2013) (quoting Russell v. TG Mo. Corp., 340 F.3d 735, 746 (8th Cir. 2003)), nor is it “unlawful for a company to make employment decisions based upon erroneous information and evaluations,” id. (quoting Allen v. City of Pocahontas, Ark., 340 F.3d 551, 558 n.6 (8th Cir. 2003)); see also Bone v. G4S Youth Servs., LLC, 686 F.3d 948, 955 (8th Cir. 2012) (“[W]e do not ‘sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.’” (quoting Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 854 (8th Cir. 2005))). This Court “may not second-guess an employer’s personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully.” Haigh v. Gelita USA, Inc., 632 F.3d 464, 471 (8th Cir. 2011) (quoting Hanebrink v. Brown Shoe Co., 110 F.3d 644, 646 (8th Cir. 1997)).

Accordingly, this Court will only look at whether Defendants have offered a reason or multiple reasons for terminating Dalton’s employment that are unrelated to her alleged “serious health condition.” It is undisputed that Dalton had exhibited at least three separate performance deficiencies as of February 25, 2011; regardless of whether the termination decision was made on or after February 25, Dalton’s noted performance deficiencies detailed on her Final Written Warning of February 21, 2011, support Defendants’ decision to terminate Dalton’s employment. Defendants have provided legitimate, business-related reasons, unrelated to Dalton’s alleged health problems or absences, which support their decision to terminate her employment. Dalton has not demonstrated that there is a genuine issue of fact precluding summary judgment.

### 3. Disability Discrimination Claims: ADAAA and ICRA

In ADAAA cases, in the absence of direct evidence of disability discrimination, the Court applies the three-part, burden-shifting test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Torgerson v. City of Rochester, 643 F.3d 1031, 1046 (8th Cir. 2011). Under the McDonnell Douglas framework, Dalton must first establish a prima facie case of disability discrimination. Id. Defendants then bear the burden of production to “articulate a legitimate, nondiscriminatory reason” for terminating Dalton’s employment. Id. (quoting Dixon v. Pulaski Cnty. Special Sch. Dist., 578 F.3d 862, 867-68 (8th Cir. 2009)). Dalton’s burden to show that the Defendants’ proffered nondiscriminatory reason is “mere pretext for intentional discrimination” merges with her “ultimate burden of persuading the court that [she was] the victim of intentional discrimination.” Id. (citations and internal quotation marks omitted). At all times, Dalton bears the ultimate burden of proof and persuasion that Defendants discriminated against her. Id. “[D]isability claims under the ICRA are generally analyzed in accord with the ADA.” Kallail v. Alliant Energy Corp. Servs., Inc., 691 F.3d 925, 930 (8th Cir. 2012) (quoting Gretillat v. Care Initiatives, 481 F.3d 649, 652 (8th Cir. 2007)).<sup>17</sup>

#### a. Prima Facie Case

To make out a prima facie case of disability discrimination, Dalton must establish that (1) her condition qualifies as a disability; (2) she was qualified to perform the essential functions of her job, either with or without accommodation; and (3) she suffered an adverse employment action due to her disability. See 42 U.S.C. § 12101; Iowa Code Chapter 216. Dalton “may raise

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<sup>17</sup> Whether Iowa courts will continue looking to federal law for guidance in all instances in interpreting ICRA disability discrimination claims following the 2008 amendment to the ADA, which expands the definition of disability, see 42 U.S.C. § 12102, is currently before the Iowa Supreme Court, see Goodpaster v. Schwan’s Home Serv., No. 13-0010 (Iowa Sup. Ct.). The parties herein agree to the Court’s application of the ADAAA standard for both the ADAAA and the ICRA claims.

an inference of unlawful discrimination by showing that [s]he was treated less favorably than other similarly situated employees who are not disabled.” Bailey, 172 F.3d at 1044-45 (citing Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996)). Under current law, this Court’s analysis of Dalton’s claim under the ADAAA can be applied to her ICRA claim as well. Soto v. John Morrell & Co., 285 F. Supp. 2d 1146, 1177-78 (N.D. Iowa 2003); Bearshield v. John Morrell & Co., 570 N.W.2d 915, 918 (Iowa 1997); Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989).

Dalton argues that in the fall of 2010 she suffered from Stage One CKD and fibromyalgia and that they are both disabilities under the ADAAA. Defendants counter that neither Dalton’s Stage One CKD nor her fibromyalgia constituted a limitation on a major life activity in February through March of 2011.

The definition of “disability” for the ADAAA means, “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (c) being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A)-(C). Dalton is only seeking to prove subsection (A) – that she actually suffered from a physical impairment<sup>18</sup> that substantially limited<sup>19</sup> a major life activity.<sup>20</sup>

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<sup>18</sup> “[P]hysical or mental impairment means – (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . .” 29 C.F.R. § 1630.2(h)(1).

<sup>19</sup> “[S]ubstantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.” 29 C.F.R. § 1630.2(j)(1)(i). “An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” 29 C.F.R. § 1630.2(j)(1)(ii). “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” Id. “Nonetheless, not every impairment will constitute a disability within the meaning of this section.” Id.

<sup>20</sup> “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning,

“[W]hether an individual has a qualifying disability requires an individualized analysis of the claimed disability.” Didier v. Schwan Food Co., 465 F.3d 838, 841 (8th Cir. 2006) (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999)). “Major life activities under the ADA are basic activities that the average person can perform with little or no difficulty,” as well as the functioning of the major systems of the body. Id. at 842.

Dalton asserts that the regulations support a broad construction of the term “substantially limits” in favor of expanding ADAAA protection to more individuals. See 42 U.S.C. § 12102(4)(A) (“The definition of ‘disability’ in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”). She argues that the operation of a major bodily function includes the operation of a single organ under 29 C.F.R. § 1630.2(i)(1)(ii) and that her Stage One CKD impacts the normal functioning of her kidneys by altering the normal excretion of fluid from her body, which, therefore, constitutes a substantial limitation on a major bodily function as defined in 42 U.S.C. § 12102(2)(B).

The 2008 amendments to the ADA may have broadened the interpretation of “substantially limits,” but its text still includes the word “substantially,” thus indicating a heightened threshold for someone’s impairment to qualify as a disability.<sup>21</sup> Defendants contend that the undisputed

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reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A). “[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive systems.” 42 U.S.C. § 12102(2)(B). “The operation of a major bodily function includes the operation of an individual organ within a body system.” 29 C.F.R. § 1630.2(i)(1)(ii). “Whether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’” 29 C.F.R. § 1630.2(i)(2).

<sup>21</sup> “[T]he threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.” Id. “The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.” 29 C.F.R. § 1630.2(j)(1)(iv). “However, in making this assessment, the term ‘substantially limits’ shall be

record evidence shows Dalton did not suffer any kidney dysfunction during the material period, so she has not shown any major life activity that was limited – let alone substantially limited. Defendants further assert that Dalton was not diagnosed with fibromyalgia until January 2012, almost a year *after* her termination from WDM Manor Care.

Without citation to the record, Dalton proffers that Dr. Leisy testified that her kidneys were not functioning “properly.” Here, Dalton overstates Dr. Leisy’s testimony. Dr. Leisy testified that with weight loss and controlled blood sugars, Dalton’s Stage One CKD may never progress to a higher stage and that Dalton’s kidney function tests revealed no damage to Dalton’s kidneys. After her two initial visits with Dr. Leisy, Dalton never returned for treatment of her Stage One CKD. See Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249, 254-55 (4th Cir. 2006) (finding that the plaintiff, who suffered from end-stage renal disease that rendered his kidneys inoperative and required dialysis, was substantially limited in the major life activity of elimination of bodily waste); Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378 (3d Cir. 2004) (finding that the plaintiff, who suffered from end-stage renal disease requiring dialysis, was substantially limited in the major life activity of eliminating bodily waste); EEOC v. Reliv Int’l, Inc., No. 4:07CV1051 SNLJ, 2009 WL 537063, at \*3 (E.D. Mo. Mar. 3, 2009) (finding that kidney disease requiring dialysis constituted a disability within the meaning of the ADA, noting that “the Eighth Circuit has found that kidney function in the cleaning of one’s own blood cells is an activity ‘of central importance to a person’s life,’ in other words, a major life activity”) (quoting KammueLLer v. Loomis, Fargo & Co., 383 F.3d 779, 785 (8th Cir. 2004) (finding polycystic kidney disease requiring dialysis to be disabling)). Dalton asserts that Stage One CKD *may*

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interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.” Id. “In determining whether an individual has a disability under the ‘actual disability [prong] . . . the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve.” 29 C.F.R. § 1630.2(j)(4)(iii).

substantially limit the major life activity of cleaning the individual's blood. All three cases are conspicuously distinguishable because in each of those cases the plaintiff suffered end stage kidney disease, which required dialysis to cleanse the blood by mechanical means because the kidneys could no longer do so. Dr. Leisy testified that many people with Stage One CKD have no symptoms. There is no genuine issue on this record – including Dr. Leisy's testimony as well as Dalton's own allegations – whether Dalton's Stage One CKD substantially limited a major life activity. In fact, the record is contrary to the assertion.

In support of the contention that her fibromyalgia constitutes a qualifying disability, Dalton merely asserts that fibromyalgia is a disability under the broad ADAAA definition. Dalton was not diagnosed with fibromyalgia until January 2012. Contrary to Dalton's assertion, Heffernan did not testify that Dalton *did* suffer from fibromyalgia as far back as the fall of 2010. At Heffernan's deposition, Dalton's counsel asked Heffernan if she had an opinion as to whether Dalton actually had fibromyalgia as far back as the fall of 2010, to which Heffernan testified that Dalton *could* have had fibromyalgia at that time. When questioned by Defendants' counsel, Heffernan conceded that in looking at Dalton's records, she *could not say* that Dalton actually had fibromyalgia at that time. Dalton's counsel then obtained testimony from Heffernan that her ultimate 2012 diagnosis of fibromyalgia was based on symptoms of pain, numbness, and fatigue that Dalton was experiencing since 2010, thus inviting a conclusion that Heffernan had previously been unwilling to reach. The testimony read in full does not generate a question of fact. Therefore, other than her own testimony, which is unsupported by the available medical evidence, Dalton provides absolutely no evidentiary support for the assertion that she suffered from fibromyalgia in February and March 2011.

Dalton has failed to provide evidence she suffered a qualifying disability and therefore cannot establish a prima facie case of discrimination under the ADAAA.

**b. Pretext Analysis**

Defendants further argue that Dalton has failed to prove Defendants' proffered reason for terminating Dalton was pretext for illegal discrimination. Dalton argues that Defendants' proffered reasons were pretextual because Defendants treated other employees more leniently than Dalton, Defendants deviated from their own disciplinary policies, and Defendants' stated reasons for terminating Dalton are unworthy of credence.

Under the McDonnell-Douglas burden-shifting analysis, there are at least two ways Dalton can demonstrate a material question of fact regarding pretext: (1) that Defendants' "explanation is unworthy of credence . . . because it has no basis in fact," or (2) "by persuading the court that a [prohibited] reason more likely motivated the employer." Torgerson, 643 F.3d at 1047 (alterations in original) (citation and internal quotation marks omitted).

Defendants allege that they terminated Dalton's employment for at least three performance failures on February 25, 2011: (1) failing to investigate and complete two late call light responses on February 25, (2) failing to complete past-due care plans, and (3) failing to properly deal with abnormal lab results. Dalton contends that Benedict erroneously believed Dalton had failed to investigate the call light responses or complete the past-due care plans but admits that Benedict may have believed she discovered such failures on February 25, 2011. Dalton does not address the failure to properly pass along the abnormal lab result. Dalton has failed to prove that Defendants' beliefs regarding her performance deficiencies on February 25, 2011, were unreasonable in any way and therefore has not met the first Torgerson option for proving Defendants' reasons for terminating her employment were pretext for disability discrimination.

Dalton argues that when compared to disciplinary actions taken against other employees at WDM Manor Care, it is evident that Defendants' termination of Dalton's employment was motivated by a discriminatory intent.

An employee can demonstrate pretext by showing that it was unlikely an employer would have acted on the basis of the proffered reason. This does not mean that the

employee must show that the proffered explanation had no basis in fact and was only conjured out of thin air. The employee may demonstrate pretext by showing that it was not the employer's policy or practice to respond to such problems in the way it responded in the plaintiff's case.

Ridout v. JBS USA, LLC, 716 F.3d 1079, 1084 (8th Cir. 2013) (citations and internal quotation marks omitted). This can be done by showing that employees similarly situated to Dalton who did not have a disability were treated differently than Dalton. "What is relevant [in determining whether two employees are similarly situated] is that two employees are involved in or accused of the same offense and are disciplined in different ways." Chappell v. Bilco Co., 675 F.3d 1110, 1118 (8th Cir. 2012) (alteration in original) (citation and internal quotation marks omitted). "The employee can prove pretext by showing that the employer varied from its normal policy or practice to address the employee's situation." Hite v. Vermeer Mfg. Co., 446 F.3d 858, 867 (8th Cir. 2006). "For example, the employee could show that the employer routinely treated similarly situated employees who were not in the protected class more leniently. Likewise, the employee could demonstrate that she was discharged pursuant to an inconsistent policy." Id. (internal citation omitted).

The "similarly situated" test was more recently defined as establishing that the plaintiff "was treated differently than other employees whose violations were of *comparable seriousness*." Ridout, 716 F.3d at 1085 (emphasis in original) (citation and internal quotation marks omitted). The offense need not be shown to have been "the exact same offense," but the offenses must be similar enough to infer discrimination if the two individuals at issue were not treated similarly by the employer. Id. (citation and internal quotation marks omitted). "[T]he ideal comparator will match the characteristics of the plaintiff employee in as many respects as possible . . . [so] the probative value of comparator evidence will be greatest when the circumstances faced by the putative comparators are most similar to the plaintiff's." Id. "Where evidence demonstrates that a comparator engaged in acts of 'comparable seriousness' but was

disciplined differently, a factfinder may decide whether the differential treatment is attributable to discrimination or some other cause.” Id.

In arguing her Final Written Warning given on February 21, 2011, was for discriminatory reasons, Dalton first suggests her discipline should have been classified as a Minor/Type C work violation because other WDM Manor Care employees were not given such harsh discipline for similar issues. In making this assertion, Dalton minimizes her conduct. She was written up for three different policy infractions: (1) complaining about her job in front of staff members and patients at the nurse’s station, (2) missing a staff meeting that she was supposed to run, and (3) taking a long lunch break that resulted in her missing a patient care meeting. Other employees received a single written warning when they committed a single violation of policy. Thus, although each individual infraction may meet the Minor/Type C violation parameters, all three could reasonably have been considered a Major/Type B violation necessitating a Third/ Final Written Warning on February 21, 2011. Then, following her disciplinary meeting on February 21, Benedict found what she believed to be at least three performance failures by Dalton on February 25, 2011.

Dalton fails to direct this Court to any employees at WDM Manor Care who committed four to six policy violations in a two-week period of time and were *not* terminated. She provides sealed disciplinary records for several employees at WDM Manor Care, including information about several nurses who committed one Major/Type B violation and were given a First Written Warning.<sup>22</sup> She asks this Court to find her situation similar to those nurses, even though she was disciplined on February 21, 2011, for *three* performance deficiencies and was given a Third/ Final Written Warning, after which time she had at least *three* more performance deficiencies on

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<sup>22</sup> Dalton provides the Court with specific instances of discipline regarding other employees, which the Court has reviewed in detail. Because this information is in a sealed document and constitutes personnel actions involving persons other than Dalton, this Order references the material in a general fashion.

February 25. Her situation is distinct enough from all of the employee disciplinary situations she provides such that she cannot use the “similarly situated” employee test to create an inference of discrimination by Defendants. The “comparable seriousness” of one act versus her multiple acts changes the discipline Defendants could have found reasonable.

Without a showing that Defendants’ proffered reasons for terminating Dalton’s employment were pretext for discrimination, Dalton fails to raise an inference of disability discrimination under the ADAAA and ICRA. See Ridout, 716 F.3d at 1086-87 (“While a prima facie case and evidence of pretext is not always sufficient to send a case to a jury, we have concluded that it is enough ‘unless the evidence of pretext . . . is, standing alone, inconsistent with a reasonable inference of . . . discrimination.’” (quoting Maschka v. Genuine Parts Co., 122 F.3d 566, 571 (8th Cir. 1997)); compare Rothmeier v. Inv. Advisors, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996) (affirmed summary judgment for the employer because the plaintiff’s proffered evidence of pretext showed that the plaintiff was fired for a reason unrelated to his protected class and not based upon illegal discrimination), with Ridout, 716 F.3d at 1087 (reversing the grant of summary judgment reasoning the plaintiff’s proffered evidence that during a reduction in force, nearly all terminated employees were over forty was *not* inconsistent with an inference of age discrimination).

In order to survive summary judgment, the plaintiff “must adduce enough admissible evidence to raise genuine doubt as to the legitimacy of a defendant’s motive, even if that evidence does not directly contradict or disprove a defendant’s articulated reasons for its actions.” Chappell, 675 F.3d at 1120 (quoting Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1111 (8th Cir. 2001)). In Chappell v. Bilco Co., the court affirmed summary judgment on the plaintiff’s race discrimination claim reasoning that the plaintiff failed to show the defendants were motivated by racial animus where the plaintiff admitted under oath that any negative racial

comments in the workplace had ceased and the plaintiff had been terminated after three company-wide attendance policy violations. Id.

Although Dalton attempts to raise doubt about Defendants' proffered reason for terminating her employment – her numerous performance deficiencies – she has not met the “genuine doubt” standard contemplated in Chappell. She has not provided evidence that Benedict or any of Dalton's other superiors held feelings of animosity toward Dalton due to a disability or toward any other employee with a disability. Further, she fails to provide evidence that her numerous performance failures – three leading to her February 21 discipline, and at least three leading to her ultimate termination – were fabricated by Defendants. Dalton has not provided enough evidence “to raise a genuine doubt as to the legitimacy” of Defendants' motive in terminating her employment, as required under the test set forth in Chappell for a plaintiff to get past the summary judgment stage to have her claim heard by a jury. Id. Defendants' motion on this issue must therefore be granted.

**c. Failure to Accommodate**

Dalton alleges that Defendants have discriminated against her based on her alleged disability under the ADAAA, which impliedly includes a claim that they failed to accommodate her physical limitations. Thus, Defendants seek summary judgment on this issue.

To prove a violation of the ADAAA for failure to reasonably accommodate an employee's disability, the employee must make a facial showing that she had an ADAAA disability and that she was a “qualified individual” who could perform the essential functions of her job with or without reasonable accommodation.<sup>23</sup> “Determination of whether a disabled employee is

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<sup>23</sup> “The term ‘qualified,’ with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m). “The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires.” 29 C.F.R. § 1630.2(n)(1).

qualified to perform an essential function of the job is a two-fold inquiry, asking: (1) whether the employee meets the necessary prerequisites for the job, such as education, experience, and training and (2) whether the employee can perform the essential job functions, with or without reasonable accommodation.” EEOC v. Convergys Customer Mgmt. Grp., 491 F.3d 790, 794-95 (8th Cir. 2007). If the employee required an accommodation to perform the essential functions of her job, the burden shifts to the employer to produce evidence that they are unable to provide the accommodation or that even with a reasonable accommodation, the employee would still be unable to perform the essential functions of the job.<sup>24</sup> See Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 715 (8th Cir. 2003).

It is undisputed that during her employment with WDM Manor Care, the only accommodation Dalton requested was time off to attend doctors’ appointments and that each of her requests for time off was granted. Even allowing an inference that the attendance discipline Dalton received on February 21, 2011, included days for which Dalton was absent for medical appointments, Defendants did not need to consider those absences in reaching the decision to terminate Dalton’s employment, as she already had a Third/Final Written Warning for performance deficiencies prior to her performance failures on February 25, 2011. The attendance warning was never one of the reasons used by Defendants for terminating Dalton’s employment.

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<sup>24</sup> The ADAAA defines “discriminate” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . .” 42 U.S.C. § 12112(b)(5)(A). “The term reasonable accommodation means,” among other things, “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o)(1)(ii). This may include part-time or modified work schedules, or job restructuring of some sort. 29 C.F.R. § 1630.2(o)(2)(ii). “To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation.” 29 C.F.R. § 1630.2(o)(3). “This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” Id.

Dalton received the time off she requested. Dalton fails to explain how Defendants otherwise failed to accommodate her. She cites Walsted v. Woodbury County, Iowa, 113 F. Supp. 2d 1318, 1336-37 (N.D. Iowa 2000), for the proposition that Defendants acted in bad faith by failing to discuss with Dalton whether she needed further accommodation. However, Dalton admits that she *never* requested any other accommodation, even after she discussed her health condition with Benedict and Schrader on February 21, 2011. Dalton has raised no issue of material fact on her failure to accommodate claim; therefore, summary judgment is appropriate.

Having found Dalton's FMLA, ADAAA, and ICRA claims fail as a matter of law, the Court need not and does not reach Dalton's corporate liability claims against HCR and MHS, nor her individual liability claims against Benedict, Hagen, and Keefer.

#### IV. CONCLUSION

Plaintiffs' Motion to Strike (ECF No. 104) is **granted**. Defendants' Motion for Summary Judgment (ECF No. 75) must be **granted**, and Plaintiffs' Motion for Partial Summary Judgment (ECF No. 76) must be **denied**. The above-titled action is therefore **dismissed**.

**IT IS SO ORDERED.**

Dated this 13th day of November, 2013.

  
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JAMES E. GRITZNER, Chief Judge  
U.S. DISTRICT COURT