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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Marie A Mdamu,

10 Plaintiff,

11 v.

12 American Traffic Solutions Incorporated,

13 Defendant.
14

No. CV-15-00326-PHX-DLR

ORDER

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16 Defendant has filed a motion for summary judgment. (Doc. 34.) The Court held
17 oral argument on the motion on June 21, 2016, and at the conclusion of the hearing, took
18 the matter under advisement. For the reasons stated below, the motion is granted.

19 **BACKGROUND**

20 The following facts are undisputed unless otherwise noted. Plaintiff Marie
21 Mdamu worked for Defendant American Traffic Solutions Incorporated (ATS) as a
22 Violations Processor from January 2008 to August 29, 2012. (Doc. 35, ¶ 3.) As a
23 Violations Processor, Mdamu's job was to "view and process video footage of traffic
24 events taken by ATS cameras, which information is provided to ATS' municipal clients
25 for further review." (*Id.*, ¶ 7.) This requires entering data into computers and the ability
26 to process a certain number of potential violations per hour (VPH). (*Id.*, ¶ 8.) The VPH
27 metric is important because it ensures that ATS will meet its contractual obligations to its
28 customers. (*Id.*, ¶ 9.) When Mdamu began working at ATS in 2008, the VPH

1 requirement was 70, meaning that Violations Processors were expected to review and
2 process 70 potential violations per hour. (*Id.*, ¶ 11.) During Mdamu’s employment, the
3 VPH increased to 110. (*Id.*)

4 In addition, Violations Processors are subject to certain Attendance Guidelines,
5 which assign point values to certain type of absences. (*Id.*, ¶¶ 12, 14.) The type of
6 disciplinary action depends on the number of points accrued on a rolling 12-month basis.
7 (*Id.*, ¶¶ 15, 16.) For example, if a Violations Processor misses half of a workday or a full
8 workday, she accrues 1 point. (*Id.*, ¶ 14.) If she fails to show up for work without notice,
9 she accrues 3 points. (*Id.*) If a Violations Processor accrues 5 points, she receives a
10 documented verbal warning. (*Id.*, ¶ 15.) If she accrues 9 points during the 12-month
11 period, her employment is terminated. (*Id.*)

12 In 2010, Mdamu developed “some cramping in her right wrist and hand” and was
13 “diagnosed with Quervian tenosynovitis” by her physician, Dr. Kraig Burgess. (Doc. 42,
14 ¶¶ 4-5.) In 2011, ATS increased the VPH requirement to 110. (*Id.*, ¶ 6.) Mdamu asserts
15 the increase “was causing [her] substantial pain and dramatically affecting her ability to
16 meet the new goal.” (*Id.*) ATS maintains the increase was made “to reflect the
17 productivity of Violations Processors” and that all Violations processors were subject to
18 the increased workload. (Doc. 35, ¶ 11.) Mdamu struggled to keep up with the 110 VPH
19 requirement. (*Id.*, ¶ 31.) In January 2012, Mdamu received a verbal warning for failing
20 to meet the 110 VPH requirement because she had missed it by 20-30 events per hour in
21 each of the previous three months. (*Id.*, ¶ 32.) Mdamu was warned that she needed to
22 come within 95% of the 110 VPH requirement by the end of the thirty-day period. (*Id.*)

23 On March 13, 2012, Mdamu received another verbal warning because she failed to
24 meet the 110 VPH requirement. (*Id.*, ¶ 33.) That same day, Mdamu’s chiropractor, Dr.
25 David Campbell, prepared a health care provider certification in connection with
26 Mdamu’s complaints of neck, back, and wrist pain. (*Id.*, ¶ 34.) Dr. Campbell described
27 Mdamu’s condition as temporary and advised that she be able to “rest more often” and
28 use a “standing workstation w/ bar stool to sit [at].” (*Id.*, ¶ 35.) A week later, Dr.

1 Burgess submitted a second health care provider certification indicating that Mdamu
2 suffered from temporary “right deQuervains tendonitis.” (*Id.*, ¶ 36.) He prescribed
3 Naproxen and recommended that Mdamu be limited to a VPH of 70. (*Id.*) In response,
4 ATS provided Mdamu a standing workstation, bar stool, and an ergonomic keyboard,
5 mouse, and wrist pad. (*Id.*, ¶ 37.) ATS sought further clarification from Dr. Burgess
6 regarding how many breaks Mdamu required. (*Id.*, ¶ 42.)

7 Mdamu’s average VPH for March 2012 was 89.66. (*Id.*, ¶ 39.) She claims the
8 Naproxen helped her process faster, but also made her drowsy, which interfered with her
9 production. (Doc. 42, ¶ 15.) On April 6, 2012, she received a written warning and her
10 supervisor, Scott Darnell, arranged for another Violations Processor to observe Mdamu’s
11 work practices and help her attain the 110 VPH. (Doc. 35, ¶ 41.) The observer noted that
12 “Mdamu engaged in unnecessary tasks, such as watching videos from beginning to end
13 when traffic events appeared at the beginning of the footage and cropping photos before
14 confirming a traffic event had occurred.” (*Id.*) The observer also noted that Mdamu also
15 struggled with her mouse and keyboard. (Doc. 35-2 at 34.)

16 On April 19, 2012, ATS posted an internal job opening for several Safety
17 Processing Training Subject Matter Experts (SMEs), “who would perform their duties as
18 Violations Processors, but also coach and train new hires for up to six months.” (Doc.
19 35, ¶ 49.) The post noted that it was available only to ATS employees “not currently on
20 written or final disciplinary action.” (*Id.*, ¶ 50.) Mdamu applied, but did not meet the
21 requirements because she was on written disciplinary warning. (*Id.*, ¶ 51.)

22 On May 3, 2012, Mdamu filed a Charge of Discrimination with the Equal
23 Employment Opportunity Commission (EEOC). (*Id.*, ¶ 53.) She alleged ATS denied her
24 requests for reasonable accommodation and transfer to a new position. (Doc. 35-2 at 95.)
25 She also alleged she was “subjected to write-ups and placed on a Performance
26 Improvement Plan” because of her disability. (*Id.*)

27 On May 22, 2012, Mdamu received a written warning after she accumulated 7
28 attendance points. (Doc. 35, ¶ 18.) The warning stated that Mdamu would be “subjected

1 to further action (up to and including termination) at any time during or after the
2 performance notice period” if she failed to immediately improve her performance and
3 attendance. (*Id.*, ¶ 19.) In addition, Mdamu was precluded from applying to other open
4 positions at ATS until the warning period expired. (*Id.*, ¶ 18.) Although the warning was
5 subject to expire on June 22, 2012, it was extended until January 20, 2013 because
6 Mdamu was late to work on May 30, 2012 and June 11, 2012. (*Id.*, ¶ 20.)

7 On May 31, 2012, Dr. Burgess responded to ATS’ request for clarification
8 regarding Mdamu’s breaks. (*Id.*, ¶ 42.) He recommended that Mdamu’s VPH be reduced
9 to 70 and that she be able to work a reduced schedule of four hours per day, five days per
10 week, for six months. (*Id.*) As a result, effective June 4, 2012, ATS placed Mdamu on
11 the recommended reduced schedule and permitted Mdamu to take a 5-10 minute break
12 each hour, which was not counted against her VPH requirement. (*Id.*, ¶ 43.) ATS did
13 not, however, reduce the VPH requirement to 70. (*Id.*, ¶ 45.)

14 Mdamu missed full days of work without providing notice on July 27 and August
15 1. (*Id.*, ¶ 23.) In the middle of August, Mdamu left work three hours early and was given
16 a final written warning. (*Id.*, ¶ 21.) When asked about missing work on July 27 and
17 August 1, Mdamu told ATS that her absence was due to a health issue. (*Id.*, ¶¶ 24-25.)
18 But Dr. Burgess never responded to ATS’ request for medical certification, and thus ATS
19 assessed points to Mdamu’s unexcused absences, bringing her twelve month total to 10
20 points, which resulted in termination of her employment. (*Id.*, ¶¶ 26-27.)

21 Mdamu’s last day at ATS was August 29, 2012. (*Id.*, ¶ 29.) On August 30, 2012,
22 Mdamu filed another EEOC charge, alleging that she was “given multiple write-ups” and
23 fired after requesting reasonable accommodation. (Doc. 35-2 at 97.) The EEOC
24 dismissed both charges and issued a right to sue notice. (*Id.* at 104-08.)

25 Mdamu brought suit on February 23, 2015, and filed an amended complaint on
26 October 30, 2015, alleging claims of disability discrimination and retaliation under the
27 Americans with Disabilities Act (ADA). (Docs. 1, 25.) ATS now moves for summary
28 judgment on both claims. (Doc. 34.)

1 **LEGAL STANDARD**

2 Summary judgment is appropriate when, viewing the facts in a light most
3 favorable to the nonmoving party, “there is no genuine dispute as to any material fact and
4 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary
5 judgment may also be entered “against a party who fails to make a showing sufficient to
6 establish the existence of an element essential to that party's case, and on which that party
7 will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
8 (1986). The party seeking summary judgment “bears the initial responsibility of
9 informing the district court of the basis for its motion, and identifying those portions of
10 [the record] which it believes demonstrate the absence of a genuine issue of material
11 fact.” *Id.* at 323. The burden then shifts to the non-movant to establish the existence of a
12 material fact. *Id.* at 324. The non-movant “must do more than simply show that there is
13 some metaphysical doubt as to the material facts,” and instead must “come forward with
14 ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus.*
15 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)
16 (1963)). A dispute about a fact is “genuine” if the evidence is such that a reasonable jury
17 could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477
18 U.S. 242, 248 (1986).

19 **ANALYSIS**

20 Mdamu argues ATS (1) failed to accommodate her disability by refusing to reduce
21 the VPH requirement, which resulted in her termination, and (2) denied her the SME job
22 and later fired her in retaliation for filing the May 2012 EEOC charge and requesting
23 reasonable accommodation. (Doc. 25, ¶¶ 32-49.)¹

24
25 ¹ To the extent that Mdamu complains of a hostile work environment, the Court
26 finds that claim meritless. Mdamu did not make any such allegations in her EEOC
27 charges, and thus she has failed to exhaust this claim. *Sosa v. Hiraoka*, 920 F.2d 1451,
28 1456 (9th Cir. 1990). In addition, the Ninth Circuit has not recognized that such a claim
is cognizable. See *EEOC v. Evergreen Alliance Golf Ltd.*, No. CV11-0662-PHX-JAT,
2013 WL 4478870, at *9 (D. Ariz. Aug. 20, 2013). Even if it were, the record
undermines Mdamu’s allegations. Mdamu testified that her supervisor, Darnell, paid
extra attention to her work, reminded her to meet the 110 VPH requirement, told her to
stop making excuses for her failure to meet the VPH requirement, and that his tone of

1 **I. Unlawful Termination**

2 To establish a prima face case of unlawful termination under the ADA, Mdamu
3 must demonstrate that “(1) she is disabled within the meaning of the ADA; (2) she is a
4 qualified individual able to perform the essential functions of the job with reasonable
5 accommodation; and (3) she suffered an adverse employment action because of her
6 disability.” *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir.
7 2012). If the plaintiff establishes her prima facie case, the burden shifts to the defendant
8 to articulate a legitimate, nondiscriminatory reason for its conduct. *See Fleming v. IASIS*
9 *Healthcare Corp.*, --- F. Supp. 3d ---, No. CV-14-02333-PHX-NW, 2015 WL 9302301,
10 at *6 (D. Ariz. Dec. 22, 2015). If the defendant meets its burden, the burden shifts back
11 to the plaintiff to demonstrate that the defendant’s reason is pretext for discrimination.
12 *Id.*

13 For purposes of its motion, ATS does not dispute that Mdamu is disabled within
14 the meaning of the ADA or that she suffered an adverse employment action. (Doc. 49 at
15 1). Instead, ATS argues that Mdamu is not a “qualified individual with a disability”
16 because she was unable to perform two essential functions of her job with or without
17 reasonable accommodation: (1) meeting the 110 VPH requirement, and (2) complying
18 with the Attendance Guidelines. ATS asserts these two functions are essential to working
19 as a Violations Processor, and thus it need not accommodate Mdamu by modifying,
20 reducing, or eliminating these functions.

21 A qualified individual under the ADA is a person “with a disability who satisfies
22 the requisite skill, experience, education, and other job-related requirements of the
23 employment position such person holds or desires,” 29 C.F.R. § 1630.2(m), and “who,
24 with or without reasonable accommodation, can perform the essential functions of the

25 _____
26 voice had extra “bass.” (Doc. 35-1 at 53-54.) But Mdamu admitted that Darnell never
27 yelled at her, cursed at her, mentioned her disability, or teased her. (Doc. 42, ¶ 58.) In
28 fact, after her first warning for missing the VPH, Mdamu reported that Darnell was
“professional and understanding” with regard to her disability. (*Id.*, ¶ 59.) Mdamu fails
to connect any alleged harassment to her disability. As such, Mdamu fails to establish
that she worked in an environment permeated with abuse related to her disability. *See*
Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

1 employment position that such individual holds or desires,” 42 U.S.C. § 12111(8).
2 Essential functions are the “fundamental job duties” of the position. 29 C.F.R. §
3 1620.2(n). The employer “has the burden of production in establishing what job
4 functions are essential as ‘much of the information which determines those essential
5 functions lies uniquely with the employer.’” *Samper*, 675 F.3d at 1237 (quoting *Bates v.*
6 *United Parcel Serv., Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc)). In making this
7 determination, courts should consider (1) the employer’s judgment regarding what
8 functions are essential, (2) job descriptions prepared before advertising or interviewing
9 applicants, (3) the amount of time spent on the job performing the function, (4) the
10 consequences of not requiring the employee to perform the function, and (5) the work
11 experience of current and former employees. *See Bates*, 511 F.3d at 991 (citing 29
12 C.F.R. § 1630.2(n)(3)(i)-(vii)).

13 Importantly, an essential function of a job need not be eliminated, modified, or
14 reassigned in order to reasonably accommodate a disabled employee. *See Cripe v. City of*
15 *San Jose*, 261 F.3d 877, 889 (9th Cir. 2001) (“Reasonable accommodations are
16 mechanisms to remove barriers or provide assistance to disabled individuals so that they
17 can perform the ‘essential functions’ of employment positions.”). “Employers are only
18 required to make ‘reasonable accommodations’ that do not impose ‘undue hardships’ on
19 them.” *Id.* at 885 n.6 (quoting 42 U.S.C. § 12112(b)(5)(A)).

20 **A. VPH Requirement**

21 ATS argues the 110 VPH requirement is an essential function of Violations
22 Processors and that Mdamu continually failed to perform this function. It asserts all
23 Violations Processors were held to the same standard. In contrast, Mdamu argues that the
24 110 VPH requirement was not established until the third quarter of 2012 and that other
25 Violations Processors received a reduced VPH requirement due to their disability. (Doc.
26 41 at 11.) She asserts that the “VPH production requirement was not essential; rather, the
27 accuracy was the essential function.” (*Id.* at 12.)

28 Debbie Duff, ATS’ Director of Service Delivery, testified that the VPH

1 requirement is an essential function of a Violations Processor. (Doc. 35-1 at 94.) She
2 stated that ATS set the goal to meet customer expectations and to meet service levels that
3 are contractually agreed upon with ATS' customers. (*Id.* at 96.) In addition, if an
4 employee were to be permitted a reduction in their VPH requirement, another employee
5 would have to make up the reduction, which would "cause a lot of questions as to why
6 someone's allowed a lesser amount and still be[ing] employed." (*Id.* at 103.) Duff also
7 stated that permitting a reduction would impact ATS financially because it would have to
8 pay employees overtime or hire additional employees to make up the difference. (*Id.*)
9 She further noted that the VPH was increased to 110 in the third quarter of 2011, and that
10 employees were expected to achieve at least 90% of the 110 VPH. (Doc 49 at 23.)²

11 Karen Holihan, ATS' Human Resources Business Partner Manager, testified that
12 reducing Mdamu's quota would impact ATS' ability to "anticipate how much work
13 comes through our operations department on a given day," which affects schedules, and
14 ultimately, ATS' profitability. (Doc. 35-2 at 24.) She clarified that if an employee
15 cannot perform an essential function of her job, it would cause an undue hardship to ATS
16 financially. (Doc. 43-10 at 7.) Holihan detailed the accommodations provided to
17 Mdamu, which included a standing workstation, ergonomic keyboard, trackball mouse,
18 raised stool, and reduced working hours. (Doc. 35-2 at 26.) At one point, ATS also
19 offered to change Mdamu's schedule from four ten-hour days to five eight-hour days, but
20 Mdamu refused because of daycare issues. (Doc. 43-10 at 10.) Holihan stated that ATS
21 never permitted reduced VPH as an accommodation for any employee who requested it.
22 (Doc. 35-2 at 24.)

23 Mdamu testified that two employees, Huskie and James, received "help" after they
24 had surgery, but she could not remember whether their VPH was reduced. (Doc. 49 at
25 32-33.) She stated that she knew of no employee who was permitted to reduce their VPH
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27
28 ² At her deposition, Duff misspoke and said the VPH was changed in 2012. She
then changed her answer to 2011.

1 requirement. (*Id.* at 34.)³ She also testified that when she started working for ATS, the
2 VPH was 70, but less than six months later it increased, though she could not remember
3 how much. (Doc. 35-1 at 17.) Mdamu learned of the 110 VPH at a meeting in which all
4 Violations Processors attended, and she knew that it was applicable to all Violations
5 Processors. (*Id.* at 17-18.)

6 After considering the factors set forth in 29 C.F.R. § 1630.2(n) and the evidence
7 submitted by the parties, the Court finds that the 110 VPH requirement is an essential
8 function of a Violations Processor. The undisputed evidence indicates that (1) ATS, as
9 part of its business judgment, considered the VPH requirement essential to maintain
10 productivity; (2) all Violations Processors were required to meet the requirement; and (3)
11 ATS’ productivity would diminish if Mdamu and other employees were exempted from
12 the requirement. Although Mdamu disagreed with the 110 VPH, it is undisputed that she
13 understood she was required to meet ATS’ expectations. Further, Mdamu was not the
14 only employee who was required to be highly productive—all employees had to meet the
15 requirement—and Mdamu has not identified any other employees who were allowed a
16 VPH reduction.⁴

17 The facts of this case are similar to *Beaver v. Delta Air Lines, Inc.*, 43 F. Supp. 2d
18 685, 694 (N.D. Tex. 1999). In *Beaver*, the plaintiff was employed as a “Reservations
19 Sales Agent” for Delta and was responsible for “generating revenue for Delta by selling
20 the company’s services to customers.” *Id.* at 687 n.1. Her job responsibilities included
21 “taking calls from customers, locating flight information in the computer, reading
22

23 ³ James testified that, in order to accommodate her disability, ATS was “willing to
24 modify my [VPH] requirement[.]” (Doc. 43-5, ¶ 24.) But James does not provide the
25 name of any ATS employee who made such an offer, how much of a reduction she would
receive, or when she made the request. In any event, the reduction never occurred
because James left ATS.

26 ⁴ Mdamu argues that job postings for Violations Processors did not identify a
27 specific VPH requirement. Although neither of the two job postings referred to by the
28 parties contain a specific VPH requirement, (Doc. 35-1 at 89, 91), job listings are not
dispositive on this issue, and ATS requires different VPH requirements for different types
of processors, (Doc. 42, ¶ 86). In any event, Mdamu does not dispute that the position
involves high volume data entry.

1 information from the computer screen and hard copy materials, conveying that
2 information to callers and entering reservation information.” *Id.* During her
3 employment, the plaintiff suffered a head injury, which resulted in permanent, partial
4 vision loss in both eyes. *Id.* Upon returning to work, the plaintiff was “continuously
5 counseled for her poor productivity,” including her “lack of salesmanship and poor
6 attendance.” *Id.* The plaintiff stated that her “blind spots required her to read more
7 slowly, thereby affecting her productivity,” and requested “that she be excused from
8 Delta’s productivity requirements” and be permitted extra breaks. *Id.* at 687-88. Delta
9 “took away some of [the plaintiff’s] job responsibilities, such as answering information
10 calls from Spanish speaking customers, to allow her to concentrate on general sales
11 calls.” *Id.* at 688. But her productivity did not increase, and she was eventually
12 transferred to another position. *Id.* at 689. The court concluded that Delta’s production
13 requirements, such as processing a high volume of sales calls, were essential functions of
14 the plaintiff’s job. *Id.* at 694. It noted that the plaintiff’s job “is particularly important to
15 the efficient running of Delta’s business,” and that satisfying and maintaining
16 productivity and performance standards is “essential to increasing Delta’s sales revenue.”
17 *Id.* Therefore, because she could not perform an essential function of her job, the
18 plaintiff was not a qualified individual under the ADA. *Id.*

19 Like the plaintiff in *Beaver*, Mdamu’s job involved high-volume production,
20 which is particularly important to ATS’ business. In fact, Mdamu’s entire job centers on
21 efficiently processing violations, and ATS set the 110 VPH requirement in order to meet
22 customer needs and satisfy existing contractual obligations. The 110 VPH is not an
23 arbitrary number ATS implemented to target Mdamu—it is based on legitimate
24 productivity goals. As with Delta in *Beaver*, processing violations at a high volume is
25 essential to ATS’ ability to maintain and increase revenue.

26 In sum, the Court’s role is “not to second guess the business decisions of a
27 company and inquire as to whether the goals set by management demand ‘too much’
28 from its employees.” *Robin v. Espo Eng’g Corp.*, 200 F.3d 1081, 1091 (7th Cir. 2000).

1 Mdamu’s (and other former employees’) subjective belief that the VPH requirement was
2 too difficult to meet is irrelevant. The undisputed evidence indicates that ATS went
3 above and beyond its obligations under the ADA to accommodate Mdamu’s disability by
4 permitting her to work substantially reduced hours, providing her expensive equipment to
5 help her do her job, and thoroughly investigating Mdamu’s complaints. The evidence
6 also indicates that the VPH requirement is essential to the job of a Violations Processor,
7 and thus ATS need not reduce, modify, or eliminate that function in order to
8 accommodate Mdamu. Because Mdamu does not dispute that she cannot perform an
9 essential function of her job, she is not a qualified individual under the ADA, and her
10 claim fails.

11 **B. Attendance**

12 Assuming *arguendo* that the VPH requirement is not an essential function of a
13 Violations Processor, Mdamu’s claim still fails because it is undisputed that attendance is
14 an essential function of a Violations Processor. “It is a ‘rather common-sense idea . . .
15 that if one is not able to be at work, one cannot be a qualified individual.’” *Samper*, 675
16 F.3d 1237 (quoting *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir. 1999)); *see also*
17 *Ford Motor*, 782 F.3d at 762-63 (“Regular, in-person attendance is an essential
18 function—and a prerequisite to essential functions—of most jobs[.]”). “[A]n employee
19 who does not come to work cannot perform any of [her] job functions, essential or
20 otherwise.” *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001) (en
21 banc) (internal quotation marks omitted). “Attendance may be necessary for a variety of
22 reasons,” including a requirement that the employee “work with items and equipment that
23 are on site.” *Samper*, 675 F.3d at 1237-38.

24 Mdamu does not dispute that attendance is an essential function of her job.⁵ ATS
25 requires its employees to abide by its Attendance Guidelines, which assess points based
26 on the type of absence. (Doc. 35-1 at 122-131.) At her deposition, Mdamu testified that

27 ⁵ In her response brief, Mdamu did not address ATS’ contention that attendance is
28 an essential function of a Violations Processor, nor did she dispute that she failed to
comply with the Attendance Guidelines. (*See* Doc. 41.)

1 she received a copy of the Attendance Guidelines, acknowledged them via signature, and
2 understood that regular attendance was a requirement of Violations Processors. (*Id.* at
3 20-21.) Mdamu stated that she understood the point system and did not dispute that she
4 accumulated numerous points during her employment, including 10 in 2012, which led to
5 her termination. (*Id.* at 24-25.) She further testified that she knew of no employee that
6 had accumulated at least 9 attendance points but was not terminated under the Attendance
7 Guidelines. (*Id.* at 25.) ATS considers attendance an essential function of its employees,
8 and the consequences of not requiring attendance are obvious. *See Bates*, 5114 F.3d at
9 991 (citing 29 C.F.R. § 1630.2(n)(3)(i)-(vii)). If an employee continually misses work or
10 leaves early, ATS loses productivity and cannot efficiently run its business. ATS need
11 not lower its standards to accommodate an employee who does not show up to work.
12 Indeed, the ADA “does not endow all disabled persons with a job—or job schedule—of
13 their choosing.” *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 757 (6th Cir. 2015).

14 Mdamu argues that her disability precluded her from meeting the attendance
15 function of her position. (Doc. 41 at 7.) She claims that she disputed her attendance
16 issues because of her medical condition at least once. (*Id.*) She also asserts that her
17 disability caused her to miss work because of physical therapy and that she attempted to
18 make up some of her absences. (*Id.*) But ATS was not required to give Mdamu “a free
19 pass for every unplanned absence” allegedly caused by her disability. *Samper*, 675 F.3d
20 at 1240. Mdamu does not dispute that in a relatively short period, she failed to show up
21 for work without notice at least twice, she was late to work twice, left three hours early
22 once, and failed to provide medical documentation in support of the absences. Even now,
23 Mdamu provides no evidence that her absences were, in fact, caused by her disability.
24 Because attendance is an essential function of a Violations Processor, and because it is
25 undisputed that Mdamu failed to perform that essential function with or without
26 accommodation, a reasonable jury could not find that she is a qualified person with a
27 disability under the ADA. Her claim fails.⁶

28 ⁶ Mdamu also struggled with attendance in 2008 and 2009. (Doc. 35-1 at 133-35.)

1 **II. Retaliation**

2 The aforementioned finding that Mdamu is not a qualified individual is relevant to
3 her retaliation claim. The ADA prohibits employers from retaliating against an employee
4 for having opposed “any act or practice made unlawful” by the ADA. 42 U.S.C. §
5 12203(a). Mdamu argues ATS retaliated against her by refusing to reduce the VPH
6 requirement, denying her promotion to the SME position, micromanaging her work, and
7 terminating her employment. She asserts these actions were taken because she requested
8 accommodation for her disability and ultimately filed a charge with the EEOC.

9 To establish a prima face case of retaliation, the plaintiff must establish “that [s]he
10 engaged in an activity protected by the statute, that [s]he suffered an adverse employment
11 action, and that there was a causal connection between the protected activity and the
12 adverse action.” *See Garber v. Embry-Riddle Aeronautical Univ.*, 259 F. Supp. 2d 979,
13 983 (D. Ariz. 2003). Like Mdamu’s unlawful termination claim, if ATS proffers a
14 legitimate, nondiscriminatory reason for its conduct, Mdamu must present evidence of
15 pretext. *See Fleming*, 2015 WL 9302301, at *6.

16 Even assuming Mdamu can make out a prima facie case of retaliation, ATS has
17 proffered a legitimate, nondiscriminatory reason for its conduct—Mdamu’s violation of
18 the Attendance Guidelines. The burden thus shifts to Mdamu to present evidence of
19 pretext. To meet her burden, Mdamu must present evidence “from which a reasonable
20 jury could find that poor performance was not the real reason” for ATS’ conduct, “and
21 that unlawful retaliation in fact was.” *Ford Motor*, 782 F.3d at 767; *see also St. Mary’s*
22 *Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993).

23 Mdamu fails to rebut ATS’ legitimate, nondiscriminatory reason.⁷ In fact, Mdamu
24 admits that “ATS discharged [her] solely due to her repeated violation of [the Attendance
25 Guidelines].” (Doc. 42, ¶ 31.) She also admits that Dr. Burgess never responded to
26

27 On September 15, 2009, her supervisor noted that “Marie was out 6 days and [t]ardy a
28 total of 13 days since June of 2008[.]” (*Id.* at 135.)

⁷ ATS’ legitimate reason also defeats Mdamu’s unlawful termination claim.

1 ATS' request for medical certification, (*Id.*, ¶ 26), nor does she argue that ATS should
2 not have assessed her points for her absences. With respect to the denial of her
3 application for the SME position, she admits that she was on disciplinary warning at the
4 time of her application, which undisputedly rendered her ineligible for promotion. (*Id.*, ¶
5 51.) Moreover, given the fact that she was continually failing to comply with the VPH
6 requirement and Attendance Guidelines, it seems highly unlikely that a promotion would
7 have been in line for Mdamu at the time.⁸

8 Nonetheless, as evidence of pretext, she argues that after she filed the EEOC
9 charge, she was targeted for her poor performance. (Doc. 41 at 16.) She also claims that
10 other processors who failed to meet the VPH were targeted and that “there was
11 speculation that supervisors were fudging the attendance numbers of processors who
12 were not meeting the 110 VPH, such as Marie, to terminate them[.]” (*Id.* at 17.)

13 In support of these claims, she cites the declarations of three former coworkers,
14 Deena Burden, Joanne Huskie, and Yvonne James. Burden states, “[f]rom what I
15 understood, employees that were not meeting their expected requirement and those
16 considered ‘low performing’ employee were let go.” (Doc. 43-3, ¶ 5.) She stated that
17 Darnell “micromanaged” employees and that it “felt like a master/slave type
18 relationship.” (*Id.*, ¶ 6.) Burden claims she saw Darnell “target [Mdamu] for her
19 inability to meet the VPH requirement” and that he was “very rude and unprofessional to
20 her and treated her like a child.” (*Id.*, ¶ 7.) She further stated that she had attendance
21 issues herself due to Darnell’s treatment. (*Id.*, ¶ 9-11.)

22 Huskie also testified that Darnell was rude to Mdamu and targeted her
23 performance. (Doc. 43-6, ¶¶ 9-11.) She also states that she was “aware that some people
24 in management were targeting processors who were not meeting the goal and fudging
25 their numbers in an effort to terminate the employees who were not performing.” (*Id.*, ¶

26
27 ⁸ Mdamu claims she applied for three jobs. (Doc. 41 at 13.) But she provides no
28 evidence regarding when she applied for the jobs and what functions they entailed. The
Court cannot determine whether she should have been transferred to these jobs due to her
disability.

1 15.) She stated, however, that she did not know whether Darnell was involved. (*Id.*, ¶
2 16.)

3 James stated that Darnell “nit-pick[ed]” Mdamu on a daily basis. (Doc. 43-5, ¶ 7.)
4 She stated that Darnell was unprofessional and would “dock [Mdamu’s] time” for helping
5 James with her seizures. (*Id.*, ¶ 12.) She further states that it is her “opinion that Mr.
6 Darnell increased his micro-management over [Mdamu] after the EEOC claim was filed.”
7 (*Id.*, ¶ 14.) James claims she was not fired, but eventually had to leave ATS because of
8 her disability. (*Id.*, ¶¶ 22-23.)

9 None of this evidence creates a question of fact regarding whether ATS retaliated
10 against Mdamu for engaging in any protected activity. In fact, none of it even remotely
11 connects Mdamu’s disability to ATS’ conduct. The former employees’ subjective beliefs
12 about how Mdamu was treated are irrelevant. Not one of them states that Darnell ever
13 mentioned Mdamu’s disability during his “micromanaging.” Nor do they describe a
14 history of discrimination against employees with disabilities. At most, the evidence
15 suggests ATS’ management team was attempting to weed out poor performing
16 processors. But the ADA does not protect poor performing employees—it protects
17 individuals discriminated against because of their disability. The fact that Mdamu may
18 have been targeted for her poor performance does not implicate any discriminatory
19 motive simply because she has a disability. Without any other evidence of discriminatory
20 motive, Mdamu is left with only her subjective belief that she was retaliated against for
21 filing the EEOC charge or requesting reasonable accommodation, which falls far short of
22 establishing pretext. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028
23 n.6 (9th Cir. 2006) (“A plaintiff may not defeat a defendant’s motion for summary
24 judgment merely by denying the credibility of the defendant’s proffered reason for the
25 challenged employment action. Nor may a plaintiff create a genuine issue of material
26 fact by relying on the plaintiff’s subjective beliefs that the challenged employment action
27 was unnecessary or unwarranted.”).

28 In sum, Mdamu fails to provide any evidence that ATS retaliated against her

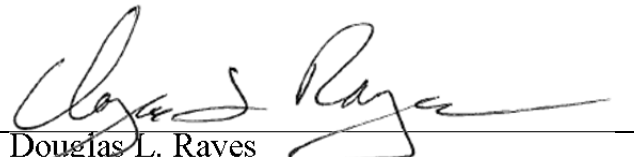
1 because of her disability as opposed to her poor productivity and poor attendance. As
2 such, a reasonable jury could not find that ATS' proffered reason is pretext for
3 discrimination or retaliation due to Mdamu's disability.

4 **III. Conclusion**

5 The undisputed facts demonstrate that Mdamu is not a qualified individual with a
6 disability under the ADA because she cannot perform two essential functions of her job.
7 In addition, even if she could establish that she is a qualified individual, Mdamu fails to
8 rebut ATS' legitimate, nondiscriminatory reason for its conduct. Summary judgment is
9 granted in favor of ATS on both of Mdamu's claims.

10 **IT IS ORDERED** that Defendant's motion for summary judgment, (Doc. 34), is
11 **GRANTED**. The Clerk shall enter judgment accordingly and terminate this action.

12 Dated this 24th day of June, 2016.

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17 Douglas L. Rayes
18 United States District Judge
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