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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Juanita O. Vasquez,)	
)	CV-14-2339-TUC-DCB
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
Smith's Food & Drug Centers, Inc.,)	
)	
Defendant.)	

Before the Court is Defendant's Motion for Summary Judgment.
(Doc. 45.)

SYNOPSIS

Plaintiff, a longtime employee of Defendant whose employment was terminated, has brought a discrimination and retaliation action against the Defendant under the Americans with Disabilities Act (ADA) and Rehabilitation Act. Defendant has moved for summary judgment on all Counts.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed an Amended Complaint (Doc. 30) against Defendant listing the following claims for relief: COUNT ONE, DISCRIMINATION IN EMPLOYMENT: DISABILITY (29 U.S.C. §§ 794, 794a); COUNT TWO, RETALIATION FOR ASSERTION OF RIGHTS (29 U.S.C. § 794(a & d)); COUNT THREE, DISABILITY DISCRIMINATION IN EMPLOYMENT: TERMINATION OF

1 EMPLOYMENT (42 U.S.C. § 12112(a & b)) (ADA); and, COUNT FOUR,
2 RETALIATION FOR ASSERTION OF RIGHTS: TERMINATION OF EMPLOYMENT (42
3 U.S.C. § 12203(a))(Retaliation). Defendant is Smith's Food & Drug
4 Centers, Inc. dba Fry's Food Stores (Defendant).

5 Juanita O. Vasquez (Plaintiff) was a full time employee of the
6 Defendant. Her employment commenced on or about September 6, 1996, and
7 was terminated on or about January 7, 2014.

8 In 2009, Plaintiff submitted a request for accommodations for her
9 health condition, fibromyalgia, in accordance with Defendant's
10 Accommodation Policy. In the Medical Accommodation Questionnaire
11 completed by Plaintiff's physician, Plaintiff could not stand for more
12 than two (2) hours, could not lift more than ten (10) pounds, and was
13 unable to bend or stoop frequently. These were deemed lifetime
14 restrictions by Plaintiff's physician.

15 On January 7, 2014, Plaintiff learned that her employment was
16 being terminated for violations of store policies and rules. The
17 specific reason for terminating Plaintiff was that she improperly used
18 her override number.

19 After termination, Plaintiff filed a claim for unemployment
20 benefits with the Arizona Department of Economic Security (ADES).
21 Plaintiff alleged that she was subjected to adverse employment actions
22 because of discrimination based on her disability, as well as
23 retaliation for her repeated requests for reasonable accommodations.

24 On March 18, 2014, the ADES Appeal Tribunal conducted a hearing
25 on Plaintiff's application for unemployment benefits. At the hearing,
Fry's Store #58 Assistant Store Manager Mark Anthony Jaime (Jaime)

1 testified that there was no rule or policy which prohibited an
2 employee from using his/her own override number to clock themselves
3 into work. Based on this testimony, the Tribunal concluded that
4 Plaintiff was improperly discharged for willful or negligent
5 misconduct connected with her employment.

6 On June 17, 2014, Plaintiff filed a charge of disability
7 discrimination and retaliation with the Arizona Civil Rights Division
8 and the EEOC. Plaintiff filed her action in federal court in September
9 2014 and filed an Amended Complaint in October 2015 (Doc. 30).
10 Defendant's Motion for Summary Judgment was filed on March 3, 2016.
11 Plaintiff filed a Response on September 19, 2016 and Defendant filed a
12 Reply on October 4, 2016. The parties requested not to have oral
13 argument.

14 **STANDARD OF REVIEW**

15 To grant summary judgment, this court must find that the record
16 clearly establishes that there exists "no genuine issue as to any
17 material fact and that the moving party is entitled to judgment as a
18 matter of law." Fed.R.Civ.P. 56(c). In determining whether summary
19 judgment should issue, the facts and inferences from these facts are
20 viewed in the light most favorable to the non-moving party and the
21 burden is placed on the moving party to establish both that there is
22 no genuine issue of material fact and that he is entitled to judgment
23 as a matter of law. *Matsushita Electric Industrial Co. v. Zenith*
24 *Radio Corp.*, 475 U.S. 574 (1986). The moving party may discharge
25 this burden by showing there is an absence of evidence to support the
non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317

1 (1986). The party opposing a motion for summary judgment cannot rest
2 upon his mere allegation or denials of his pleadings, but must set
3 forth specific facts showing there is a genuine issue for trial.
4 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

5 The mere existence of some alleged factual dispute between the
6 parties will not defeat an otherwise properly supported motion for
7 summary judgment. The requirement is that there be no genuine issue
8 of material fact. *Id.* A material fact is any factual issue which
9 might affect the outcome of the case under the governing substantive
10 law. A material fact is genuine if the evidence is such that a
11 reasonable jury could return a verdict for the non-moving party. *Id.*

12 At the summary judgment stage, the trial judge's function is to
13 determine whether there is a genuine issue for trial. There is no
14 issue for trial unless there is sufficient evidence favoring the non-
15 moving party for a jury to return a verdict for that party. If the
16 evidence is merely colorable or is not significantly probative, the
17 judge may grant summary judgment. *Id.* Conclusory statements without
18 factual support are insufficient to defeat a motion for summary
19 judgment. *Nat'l Steel Corp. v. Golden Eagle Ins. Corp.*, 121 F.3d 496,
20 502 (9th Cir.1997).

21 **DISCUSSION**

22 Plaintiff worked as both a Courtesy Clerk and ASP during her
23 employment with Defendant at various stores from 1996 through 2014.
24 Both positions were subject to the Collective Bargaining Agreement
25 with the local union. Plaintiff was given an employee handbook when
she began her employment, which contained Defendant's anti-

1 discrimination and anti-harassment policies. Plaintiff reviewed the
2 handbook and acknowledged that if she felt that she was being
3 discriminated against at work, she could go to Defendant's HR.

4 In November 2006, Plaintiff was transferred to Store #119 after
5 she made a harassment complaint to HR against a store manager who used
6 profanity towards store employees at Store #20. Plaintiff felt her
7 complaint had been resolved by HR when she was transferred to Store
8 #119.

9 In 2009, Plaintiff notified Defendant that she had a disability,
10 fibromyalgia. Her fibromyalgia was first diagnosed by her primary
11 care physician, Gerald D. Roth, M.D., in 2009. Plaintiff was employed
12 at Store #119 at the time. The Store Manager, Frank Orozco, after
13 being informed of the diagnosis provided the accommodations requested
14 so Plaintiff could continue to perform her work duties.

15 In approximately October 2012, Manager Orozco retired and Jay
16 Monteverde replaced him as the Store #119 Manager. In February 2013,
17 Plaintiff requested three reasonable accommodations for her disability:
18 (1) no standing for more than two hours at a time; (2) no lifting over
19 ten pounds; and (3) no frequent bending over and stooping down. These
20 were all accommodations per her physician's advice.

21 Plaintiff sent documentation seeking these accommodations for her
22 disability to Human Resources (HR) Department in February 2013. In
23 April, there was a meeting with HR Lunde, Labor Representative
24 Tremoulis, Store Manager Monteverde and Plaintiff, but no action was
25 taken on the request for accommodations other than to direct Plaintiff
to go to Concentra for a medical evaluation, which she did.

1 Just before Plaintiff went on a vacation in September 2013, Store
2 Manager Monteverde told her to schedule herself for cashier training.
3 Plaintiff informed Manager Monteverde that she could not cashier
4 because of her disability and the standing restrictions. When she
5 returned from vacation, HR Lunde informed Plaintiff that she was being
6 transferred to Store #58 because allegedly Manager Monteverde did not
7 want to accommodate her. Plaintiff was told she was either going to
8 have to give up some of her work duties and work only part-time or
9 accept the transfer. She accepted the transfer.

10 On November 24, 2013, Plaintiff was suspended for three days
11 without pay for setting her own schedule. She objected to this
12 disciplinary action because: (1) she had been setting her own schedule
13 for approximately 16 years and had never been told that she could not,
14 (2) no one had ever previously told her that as the ASP, she could not
15 set her own schedule; and, (3) there was no company rule against it.

16 On January 2, 2014, Defendant suspended Plaintiff a second time
17 for using her override number to override herself in at a different
18 time than scheduled. She objected to this discipline because: (1)
19 Defendant had given Plaintiff an override number to use when
20 necessary, (2) no one ever previously told her that as the ASP, she
21 could not use her override number for herself to correct a time entry,
22 and, (3) there was no rule against it. On January 7, 2014 (five days
23 after her second suspension), HR informed Plaintiff that she was
24 terminated from employment because of improper use of the override
25 number. In both incidents (November 2013 and January 2014), no wage
theft or dishonesty or false entry was committed, nothing was gained

1 personally by Plaintiff, and the Defendant suffered no detriment.
2 During her last two years working for Defendant in 2012 and 2013,
3 Plaintiff received excellent performance evaluations.

4 On March 18, 2014, the ADES Appeal Tribunal conducted a hearing
5 and at the hearing a store manager testified that there was no rule or
6 policy which prohibited an employee from using his/her own override
7 number to clock themselves into work. The Tribunal decision concluded
8 that: "the claimant was discharged, but not for willful or negligent
9 misconduct connected with employment".

10 **A. Disparate Treatment/Retaliation for Seeking Accommodations:
11 ADA, 42 U.S.C. 12112(a, b)**

12 Title VII prohibits employers from discriminating against an
13 individual based on the existence of a disability. 42 U.S.C. § 12112.
14 Here, the analysis is based on the *McDonnell Douglas Corp. v. Green*,
15 411 U.S. 792 (1973) burden shifting framework. Under this framework,
16 the plaintiff first must establish a prima facie case of
17 discrimination. If the plaintiff establishes a prima facie case, the
18 burden then shifts to the defendant to articulate a legitimate,
19 nondiscriminatory reason for its allegedly discriminatory conduct.
20 *Metoyer v. Chassman*, 504 F.3d 919, 931 n. 6 (9th Cir. 2007). If the
21 employer articulates a legitimate reason for its action, "the
22 presumption of discrimination drops out of the picture." *Id.* (quoting
23 *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1028 (9th
24 Cir.2006)).

25 The plaintiff may then offer direct or circumstantial evidence
that "the employer's proffered nondiscriminatory reason is merely a

1 pretext for discrimination." *Dominguez-Curry v. Nevada Transp. Dep't*,
2 424 F.3d 1027, 1037 (9th Cir.2005). Plaintiffs can prove pretext
3 "indirectly, by showing that the employer's proffered explanation is
4 unworthy of credence" or "directly, by showing that unlawful
5 discrimination more likely motivated the employer." *Fonseca v. Sysco*
6 *Food Services of Arizona, Inc.*, 374 F.3d 840, 849 (9th Cir. 2004)
7 (internal citations omitted). While the use of subjective factors is
8 not *per se* illegal, an employer's use of subjective criteria is to be
9 considered by the trial court. *Casillas v. United States Navy*, 735
10 F.2d 338, 345 (9th Cir. 1984). As has been noted by the Ninth Circuit
11 in a number of different cases, the use of subjective criteria can
12 provide evidence of discrimination. See, *O'Day v. McDonnell Douglas*
13 *Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996).

14 1. Prima Facie Case

15 A prima facie case of retaliation is made by showing that: (1)
16 she engaged in protected activity; (2) she suffered a materially
17 adverse employment action; and (3) there exists a causal connection
18 between the protected activity and the adverse employment
19 action. See *Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 849 (9th
20 Cir.2004). For a prima facie case of disability discrimination,
21 Plaintiff must put forth evidence that: (1) she is "disabled" within
22 the meaning of the statute; (2) she is a "qualified individual" (that
23 is, she is able to perform the essential functions of her job, with or
24 without reasonable accommodations); and (3) she suffered an adverse
25 employment action "because of" her disability. See, e.g., *Hutton v.*
Elf Atochem N. Am., Inc., 273 F.3d 884, 891 (9th Cir.2001). "At the

1 summary judgment stage, the 'requisite degree of proof necessary to
2 establish a *prima facie* case ... is minimal and does not even need to
3 rise to the level of a preponderance of the evidence.' " *Lyons v.*
4 *England*, 307 F.3d 1092, 1112 (9th Cir.2002) (quoting *Wallis v. J.R.*
5 *Simplot Co.*, 26 F.3d 885, 889 (9th Cir.1994)).

6 In 2009, Plaintiff was diagnosed with a recognized disability by
7 a medical professional.¹ For three years she was allowed to work and
8 continued to perform the essential functions of her job with the
9 accommodations. After a turnover in management, that changed. In
10 February 2013, Plaintiff formally requested accommodations from HR
11 based on her disability. She subsequently experienced the following
12 adverse employment actions, which she believes were caused by a
13 negative reaction to her disability and/or the need to accommodate the
14 disability: (1) Defendant failed to engage in any interactive process
15 in response to her February, 2013 request for reasonable
16 accommodations for her disability;(2) Plaintiff was involuntarily
17 transferred from Store #119 to Store #58 where the Store Manager did
18 not want her because of her disability; (3)a first suspension in
19 November, 2013; (4)a second suspension on January 2, 2014; and (5)
20 termination of employment on January 7, 2014.

21 Plaintiff presents evidence, direct and/or circumstantial, that
22 suggests Defendant ignored her request for reasonable accommodations
23 and failed to engage in an interactive process to find such
24 accommodations, which is unlawful under the ADA and evidence of intent
25 to discriminate by not trying to accommodate in order to comply with

¹Plaintiff had been employed with Defendant since 1996 at this point.

1 the ADA. A negative reaction to a protected act by an employer is
2 evidence of a discriminatory or retaliatory animus. *Waters v.*
3 *Churchill*, 511 U.S. 661, 681-682 (1994); *Bagley v. Bel-Aire Mechanical*
4 *Incorporated*, 2016 WL 1393428 (9th Cir. 2016). Plaintiff complained
5 about her treatment to Defendant's HR and managers.

6 Plaintiff sufficiently presents a prima facie case under the ADA
7 of discrimination and retaliation.

8 2. Legitimate Explanation

9 The Defendant's legitimate explanation for the adverse employment
10 actions involved what they interpreted as Plaintiff's dishonesty and
11 her ongoing failure to comply with procedures.

12 Both parties present conflicting evidence involving: whether or
13 not Plaintiff was improperly compensated for the overtime; whether
14 Plaintiff was actually compensated at all for the overtime; whether
15 Plaintiff was treated differently from similarly situated employees
16 with regard to the overtime/override issue; and, whether Plaintiff was
17 treated differently once she requested accommodation. The issue of
18 Defendant's legitimate explanation involves resolution of material
19 facts and credibility assessments. Some of these issues overlap with
20 Plaintiff's claim and explanation of pretext, discussed below.

21 3. Pretext

22 The Plaintiff was employed as a courtesy clerk and
23 administrative secretary by the Defendant for approximately 17
24 years prior to being discharged. Plaintiff explains that she was
25 given an override card as a part of her duties. In her capacity as an
administrative secretary to the store manager, her duties were

1 to make schedules, do payroll and complete daily time edits. This
2 card also allows early entry into the store for employees.²

3 The Plaintiff had always used her override card to enter the
4 premises early in order to complete her work in a timely manner.
5 Plaintiff had used her override card in this manner since she began
6 working in administration. Throughout the Plaintiff's entire period
7 of employment with the company, no one had ever told her not to use
8 the override card on herself. Plaintiff never saw a rule prohibiting
9 the use of an override card on oneself. The Plaintiff was terminated
10 for using her override card to enter the building early.

11 Plaintiff alleges that she has direct evidence of pretext, as
12 follows: When Plaintiff called in sick in December 2012, because of
13 fibromyalgia symptoms, Manager Monteverde responded "If you don't want
14 to be here, quit". HR Lunde told Plaintiff that her (then) store
15 manager, Monteverde, did not want to accommodate her disability and
16 she would have to transfer or switch to part-time work. HR Lunde told
17 Kim Bernal that Plaintiff was a "problem" for Defendant because her
18 disability had caused her to take medical leave from time to time and
19 Defendants did not want to deal with the scheduling issues her
20 disability created. Manager Galvan told Plaintiff that he did not want
21 her working in his store because of her disability and accommodation
22 requests. He said that his Assistant Store Manager Juan Gomez was very
23 adamant that he did not want Plaintiff there because of her disability

24
25 ²In November 2013, Plaintiff received a written warning for
changing her schedule to accommodate her vacation dates. Since that
time, the Plaintiff did not create her own schedule.

1 and that Gomez had told him that every time she was asked to do
2 something, she would lodge a claim with HR.

3 The timing of Plaintiff's request for accommodations (February
4 2013) and the adverse employment actions (termination from employment
5 in January 2014) suggest that Plaintiff's disability and request for
6 accommodations was a cause of the adverse employment actions. Thus,
7 circumstantial evidence of pretext exists, particularly because
8 Plaintiff was a long time employee and had been accommodated
9 previously for about three years.

10 Thus, Plaintiff has produced direct and circumstantial evidence
11 suggesting pretext for discrimination and/or retaliation for
12 requesting accommodations, which require resolution of material
13 questions of fact and credibility assessments that must be left to the
14 trier of fact and are unresolvable by dispositive motion.

15 **B. Discrimination/Retaliation: Rehabilitation Act, 29 U.S.C. § §
16 794, 794(a)**

17 The Court does not find that the Rehabilitation Act is applicable
18 to the facts at bar.

19 Plaintiff cannot establish that Defendant is subject to Section
20 504 of the Act. Defendant does not receive any "federal financial
21 assistance," as that phrase is contemplated by the Act, for its
22 participation in Medicare or the Supplemental Nutrition Assistance
23 Program (SNAP). Specifically, Section 504 provides that "no otherwise
24 qualified individual with a disability...shall, solely by reason of her
25 or his disability, be excluded from the participation in, be denied
the benefits of, or be subjected to discrimination under any program
or activity receiving Federal financial assistance." 29 U.S.C. §

1 794(a). "Program or activity" is defined in the Act to include "all of
2 the operations of... and entire corporation, partnership, or other
3 private organization, or an entire sole proprietorship" if that entity
4 as a whole receives federal financial assistance, or if the entity "is
5 principally engaged in the business of providing education, health
6 care, housing, social services, or parks and recreation." 29 U.S.C. §
7 794(b)(3)(A).

8 Defendant's participation in SNAP and Medicare are strictly for
9 the purpose of remaining competitive in a competitive industry.
10 Defendant does not receive any kind of federal financial assistance,
11 subsidy, or incentive for allowing customers to use SNAP benefits or
12 Medicare benefits at its locations. As such, Defendant does not fall
13 under the definition of "program or activity." The Rehabilitation Act
14 itself does not define "federal financial assistance." In *United*
15 *States Department of Transportation v. Paralyzed Veterans of America*,
16 the Supreme Court held that only those entities that actually receive
17 federal financial assistance are covered by § 504; entities that
18 indirectly "benefit" from federal aid, or that are "inextricably
19 intertwined" with actual recipients, are not on that basis covered.
20 477 U.S. 597, 607-610 (1986). Finally, Plaintiff did not work under a
21 "program or activity" that received the Medicare benefits. See S. Rep.
22 No. 100-64, at 4-19 (1988).

23 **RULING**

24 Counts One and Two of the Amended Complaint will be dismissed for
25 failure to state legally viable claims under the Rehabilitation Act.
Counts Three and Four of the Amended Complaint state viable causes of

1 action under the ADA for disability discrimination and retaliation.
2 There are material questions of fact and credibility issues that can
3 only be resolved by a jury and thus preclude resolution by dispositive
4 motion.

5 Accordingly,

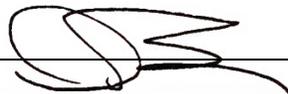
6 **IT IS ORDERED** that the Defendant's Motion for Summary Judgment
7 (Doc. 45) is **GRANTED IN PART** and **DENIED IN PART**.

8 The motion is **DENIED** as to Count Three (Disability Discrimination
9 in Employment) and Count Four (Retaliation for Assertion of Rights) of
10 the Amended Complaint; and,

11 The motion is **GRANTED** as to Count One (Discrimination in
12 Employment under Rehabilitation Act) and Count Two (Retaliation for
13 Assertion of Rights under Rehabilitation Act) of the Amended
14 Complaint. A jury trial shall be conducted on Counts Three and Four.

15 **IT IS FURTHER ORDERED** that that the parties are required to file
16 a Joint Proposed Pretrial Order on or before **June 2, 2017** in
17 contemplation of a jury trial. The Pretrial Conference will be set
18 upon receipt of the Joint Proposed Pretrial Order and a jury trial
19 date will be set during the Pretrial Conference.

20 Dated this 4th day of April, 2017.

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23 Honorable David C. Bury
24 United States District Judge
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