EXHIBIT 41

Not Reported in F.Supp.2d, 2006 WL 2456199 (D.Ariz.), 33 NDLR P 90
(Cite as: 2006 WL 2456199 (D.Ariz.))

H

United States District Court,
D. Arizona.
Cynthia GASTELUM, Plaintiff,
v.
ABBOTT LABORATORIES, Defendant.
No. CV 05-645 PHX NVW.

Aug. 22, 2006.

Richard Moreno Martinez, Law Office of Richard M. Martinez, Tucson, AZ, for Plaintiff.

Lonnie James Williams, Carrie Marie Francis, Quarles & Brady Streich Lang LLP, Phoenix, AZ, for Defendant.

ORDER

NEIL V. WAKE, District Judge.

***1** The court has before it Defendant's Motion for Summary Judgment, Doc. # 57, and accompanying Statement of Facts, Doc. # 58; Plaintiff's Opposition Brief, Doc. # 60, and accompanying Statement of Facts, Doc. # 59; and Defendant's Reply, Doc. # 62.[FN1] Having studied the briefs, the statements of facts, and the evidence, the court concludes that oral argument on the motion is not likely to assist the court. Therefore, the August 31, 2006 oral argument will be vacated.

FN1. Defendant's Reply is in violation of LRCiv 7.1(b)(1), which requires documents in proportional font to be "no smaller than 13 point." There is no exception for footnotes.

On February 28, 2005, Plaintiff Cynthia Gastelum ("Gastelum") filed an initial complaint in this court. On November 17, 2005, Gastelum filed an amended complaint, alleging that Defendant Abbott Laboratories ("Abbott") (1) discriminated against her on account of her disability, in violation of the American with Disabilities Act ("ADA"), 42 U.S.C. § 12112, (2) violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612, (3) discriminated against her on account of her race, 42 U.S.C. § 1981, and (4) retaliated against her for engaging in protected activity.

Gastelum has since agreed to dismiss her race-discrimination claim. Abbott now seeks summary judgment on her remaining claims of disability discrimination, FMLA violations, and retaliation.

I. Legal Standard For Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must evaluate a party's motion for summary judgment construing the alleged facts with all reasonable inferences favoring the nonmoving party. *See Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir.2001). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory and speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and to defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden with a

properly supported motion, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). Summary judgment is appropriate 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 ." *Celotex Corp.*, 477 U.S. at 322. *See also Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.1994). Summary judgment is not appropriate when the nonmoving party submits evidence from which a reasonable juror, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor. *United States v. Shumway*, 199 F.3d 1093, 1103-04 (9th Cir.1999). Although the initial burden is on the movant to show the absence of a genuine issue of material fact, this burden may be discharged by indicating to the Court that there is an absence of evidence to support the nonmoving party's claims. *See Singletary v. Pennsylvania Dep't of Corr.*, 266 F.3d 186, 193 n. 2 (3d Cir.2001).

II. Evidentiary Issues

***2** Before addressing the merits of the parties' claims, it is important to emphasize that, at the summary judgment stage, the court may only consider evidence that is admissible. Abbott challenges the admissibility of a number of Gastelum's exhibits.

Gastelum does not identify any facts in Abbott's Statement of Facts that she believes are incorrect or in dispute. Instead, she provides her own Statement of Facts. Although thirty-seven exhibits accompany Gastelum's Statement of Facts, she makes reference to only a handful of these exhibits in the body of the Statement of Facts. The body contains no reference to Exhibit 3 or Exhibits 8-37. (These exhibits are merely identified at the end of the document, and not tied to any specific factual allegations.) "[R]equiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair." *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir .2001). Therefore, Gastelum's Exhibits 3 and 8-37 will not be considered with this motion.[FN2]

FN2. Gastelum's opposition brief is also deficient for failure to comply with Local Rule 56(c)(2), which provides that "[a]ny party seeking summary judgment shall set forth, separately from the memorandum of law, the specific facts relied upon in the memorandum in support of the motion. The facts shall be stated in concise, numbered paragraphs. As to each fact, the statement shall refer to the specific portion of the record where the fact may be found. Any party opposing summary judgment shall file a statement in the form prescribed by this Rule, specifying those paragraphs in the moving party's statement of facts which are disputed, and also setting forth those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party." Gastelum makes no effort to link the claims in her opposition brief to the factual allegations contained in her Statement of Facts. The opposition brief simply refers to Exhibit 3 and then contains nearly three pages of bullet-point facts and legal conclusions-including statements made by other people, raising hearsay questions-without providing page numbers or any identifying information. Doc. # 60 at 3-5. This was insufficient to allow Abbott any meaningful opportunity to respond in its reply brief.

Defendants also challenge the admissibility of Exhibits 4, 5, 6, and 7. Pursuant to the parties' case management order, the parties had from November 3, 2005, until May 31, 2006, to complete discovery.

For the first six months, Gastelum did nothing. On April 24, 2006, Gastelum provided her initial disclosure, even though, according to the parties' case management order, Gastelum purportedly provided her initial disclosure to Abbot before November 3, 2005. On May 2, 2006, Gastelum supplemented her initial disclosure. Abbott moved for sanctions pursuant to Rule 37(c) of the Federal Rules of Civil Procedure, which the court granted on June 2, 2006. Doc. # 56. That rule provides in part, "A party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). *See also United States for Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc.*, 857 F.2d 600, 602 (9th Cir.1988) ("Rule 37(b)(2) of the Federal Rules of Civil Procedure authorizes sanctions against a party who 'fails to obey an order to provide or permit discovery' or who 'fails to obey an order entered under Rule 26(f)'-that is, a discovery scheduling order.") (citing Fed.R.Civ.P. 37(b)(2)). The court found that Gastelum's failure to provide a timely disclosure of the witnesses and documents she intended to use was knowing and intentional and resulted in substantial harm to Abbott. The court held that Gastelum was precluded from offering testimony from the twenty-three named witnesses in Gastelum's belated disclosure, including the testimony of John Jacobs, Sergio Martinez, and Jeffrey Toulson. The court also held that Gastelum was precluded from offering as evidence the documents listed in her disclosure statement unless Abbott had disclosed those same documents.

***3** Exhibits 4, 5, 6, and 7 are out-of-court investigative interviews conducted by the Arizona Civil Rights Division of John Jacobs (Exhibit # 4), Sergio Martinez (Exhibit # 5), Grace Steele (Exhibit # 6), and Jeffrey Toulson (Exhibit # 7). Gastelum has attempted to circumvent the court's sanction-which held that these witnesses could not be deposed because of untimely disclosure-by submitting interview transcripts.

These exhibits are not admissible. First, in its June 2, 2006 Order, the court held that Gastelum could not submit documents as evidence unless Abbott had disclosed the documents. Abbott did disclose Exhibits 4, 6 and 7 to Gastelum. But none of these exhibits are properly authenticated pursuant to Rule 901 of the Federal Rules of Evidence. Exhibits 4, 6, and 7 do not include the reporter's certification that the transcript is a true record of the testimony of the witness. *See Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir.2002) ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent."). Exhibit 5 does not contain a certification that the witness was sworn by the reporter, as required by Rule 30(f) of the Federal Rules of Civil Procedure.

Gastelum makes no effort, in her opposition brief or Statement of Facts, to explain why the interview transcripts should be admissible. Therefore, the four exhibits are not admissible.

In sum, Gastelum's affidavit and deposition-Exhibit 1 and 2-are admissible and will be considered in deciding this motion.

III. Background

Gastelum began working at Abbott on January 13, 1986. Gastelum worked at a plant in Casa Grande, Arizona that manufactures infant formula and other nutritional liquids. Between October 1995 and April 5, 2004, Gastelum worked as a Manufacturing Coordinator, which required that she collect statistical data and prepare reports regarding the data to ensure the quality of Abbott's nutritional products. Defendant's Statement of Facts ("DSOF" at ¶ 1).

In 1989, Gastelum was diagnosed with Lupus, and in 1995 Gastelum was diagnosed with fibromyalgia . Plaintiff Statement of Facts ("PSOF") at ¶ 1.

Gastelum also suffers from Hyper/Hypo-thyroid-Thyroid gland dysfunction. PSOF at ¶ 1. Since 1995, Gastelum's medical conditions have caused chronic fatigue and pain in her arms and legs. PSOF at ¶ 4.

In December 2001, Gastelum applied for the position of Powder Supervisor Trainee. DSOF at ¶ 6. Gastelum met the qualifications for the position and was interviewed. However, she was not selected for the position. Kristin Losey, the other applicant who was qualified for the position, interviewed for the position and was selected. DSOF at ¶ 2. Gastelum filed a Charge of Discrimination with the Arizona Civil Rights Division on September 10, 2002, alleging that she was not selected for the position because of her medical conditions. DSOF at ¶ 3. On December 2, 2002, Gastelum filed a second Charge of Discrimination with the Arizona Civil Rights Division, alleging that she was retaliated against because of her September 10, 2002 filing. DSOF at ¶ 5. The Civil Rights Division dismissed both charges, and Gastelum received right to sue notices for both charges.

***4** On February 22, 2003, Gastelum requested a flexible schedule that would allow her to complete her forty hours at any time during the week. DSOF at ¶ 8. [FN3] In her written request, Gastelum stated that the flexible schedule would help keep her attendance in good standing and enable her to attend doctor appointments and work around her illness. Prior to her request, Gastelum was expected to work Monday through Friday between 8:00 a.m. and 4:30 p.m. DSOF at ¶ 11. In response to her request, Gastelum and her supervisor, Grace Steele ("Steele"), reached the following agreement: on Monday, Tuesday, and Wednesday, Gastelum was required to work from 9:00 a.m. to 2:00 p.m. and could work the remaining 2.5 hours either before 9:00 a.m. or after 2:00 p.m.; on Thursday and Friday, she could work at any time during the day. DSOF at ¶¶ 9-10. In the agreement, Steele made clear that Gastelum was not receiving the flexible schedule to accommodate an illness. This was because Gastelum had not submitted any medical documentation establishing that she was restricted in any way from working her normal schedule. DSOF at ¶ 12.

> FN3. Gastelum alleges that she was allowed to work on a flexible schedule until she was assigned to Steele. PSOF at ¶ 8. This is addressed is the discussion of her ADA claim.

IV. Analysis

In her opposition brief, Gastelum asserts: (1) a disparate treatment claim, arguing that Abbott violated the ADA by not promoting her because of her disability and failing to accommodate her; (2) that Abbott retaliated against her for filing claims with the Arizona Civil Rights Division; (3) that Abbott violated the FMLA; (4) that Abbott created a hostile environment; and (5) that Abbott constructively discharged her.

Abbott argues that it is entitled to summary judgment on all five claims.

A. Disparate Treatment Claim

The ADA prohibits employers from discriminating "against a qualified individual because of the disability of such individual." 42 U.S.C. § 12112(a). To establish a prima facie case under the ADA, a plaintiff must demonstrate that (1) her condition qualifies as a disability within the meaning of the ADA, (2) she is qualified to perform the essential functions of her position with or without reasonable accommodation, and (3) she has suffered an adverse employment action because of disability. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1133 (9th Cir.2001).

Abbott argues that Gastelum cannot demonstrate (1) that she is disabled within the meaning of the ADA, (2) that she can perform the functions of her job with or without a reasonable accommodation,

and (3) that even if she can establish a prima facie case, Abbott had a legitimate, nondiscriminatory reason for its decision not to promote Gastelum.

1. Disabled Under the ADA

A "disabled" employee under the ADA is one who: (1) has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) has a "record of such an impairment"; or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2). A plaintiff bears the burden of proving that she is disabled within the meaning of the ADA. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794 (9th Cir.2001). Disability is determined on a case-by-case basis. *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

***5** Here, even assuming arguendo that Gastelum is disabled, there are independent reasons why Abbott should be granted summary judgment on Gastelum's ADA claim. Therefore, the court will not reach the issue of whether Gastelum is disabled within the meaning of the ADA.

2. Qualified to Perform the Essential Functions With or Without Reasonable Accommodation

The second element necessary to establish a prima facie case under the ADA is that the plaintiff is qualified to perform the essential functions of her position with or without reasonable accommodation. *Humphrey*, 239 F.3d at 1133. Abbott submitted evidence establishing that one of the essential functions of a Manufacturing Coordinator is that the employee work a set schedule. DSOF at ¶ 19. Gastelum does not dispute this fact. Rather, Gastelum conclusorily states in her brief that she is qualified to perform all essential functions of her position if she is able to have an entirely flexible schedule. (Doc. # 60 at 14:10-11). Gastelum's position is essentially non-responsive. If an essential function of a Manufacturing Coordinator is the ability to work a set schedule-as Abbott contends, and as Gastelum does not dispute-then it follows that an individual who requires a flexible schedule is not qualified to perform it. Gastelum therefore has not established a prima facie case under the ADA.

2. Adverse Employment Action

In order to establish a prima facie case under the ADA, Gastelum must also establish that she suffered an adverse employment action because of her disability. Although Gastelum provides a lengthy list of allegedly adverse employment actions in the section of her brief dedicated to whether Abbott retaliated against her-"denying continued accommodation, transfer, repeated challenges to FMLA, termination, discipline and denial of promotion"-Gastelum does not explain which of these adverse actions resulted from discrimination because of her disability. The only adverse employment actions discussed in conjunction with her ADA claim were Abbott's decisions (1) not to promote her to Powder Supervisor Trainee, (2) not to promote her to other positions, and (3) to end her flexible schedule. These will be addressed below.

4. Legitimate, Nondiscriminatory Reason

Assuming that Gastelum has made out a prima facie case, the burden of production, but not persuasion, shifts to Abbott to articulate some legitimate, nondiscriminatory reason for the challenged action. *Ratheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (applying *McDonnell Douglas's* burden-shifting approach to an ADA disparate treatment claim). If Abbott does so, Gastelum "must show that the articulated reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Chuang v. Univ. of Ca. Davis*, 225 F.3d 1115, 1124 (9th Cir.2000) (citations and internal quotation marks omitted).

a. Powder Supervisor Trainee

***6** As its legitimate, nondiscriminatory reason for denying Gastelum's promotion request, Abbott submitted evidence that Losey was more qualified than Gastelum for the position of Powder Supervisor Trainee. DSOF at ¶ 2 (Harger affidavit, explaining that Losey had worked with the Powder Operations Department before and that Losey's "experience in the processing department is similar to the powder operations department in that both departments have similar technical elements including control systems, fluid processing, heat treatments, and tanks."). In her affidavit, Harger also stated that "[t]hese technical elements are not present in the filling and packaging department where Ms. Gastelum acquired her manufacturing experience, thus making Ms. Losey's experience more relevant." Doc. # 58, Exhibit 2. Abbott has therefore submitted evidence of a legitimate, nondiscriminatory reason for its decision to select Losey for the position of Powder Supervisor Trainee.

Gastelum, in turn, must demonstrate that Abbott's proffered reason is pretextual. While in some cases a plaintiff's prima facie case is sufficiently strong to create a triable dispute, see *Chuang,* 225 F.3d at 1127 (stating "a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reason" (citations and internal quotation marks omitted)), such facts are not present here. "[A] plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang,* 225 F.3d at 1127 (citations and internal quotation marks omitted).

In her Statement of Facts, Gastelum provides that her "qualifications for promotion were superior to those of Kristen Losey, she had more years of experience and was better qualified due to specific assignments at Abbott laboratories." PSOF at ¶ 10 (referring to Gastelum's deposition). However, from Gastelum's deposition, it is clear that when Abbott determines who to select for a position, it considers each applicant's resume, personnel file, interviews, and comments of the people involved in the process. Doc. # 59, Exhibit # 2 at 54:7-12. Gastelum does not argue that Abbott has mischaracterized Losey's qualifications; rather, she argues that her background was stronger. This is a subjective conclusion that does not establish pretext, nor does it establish that Abbott's position that Losey was more qualified is "unworthy of credence or otherwise unbelievable." While it may be a disputed fact whether Losey or Gastelum was more qualified for the position based on their resumes and past experience, this alone does not suggest pretext under the circumstances. Both women were deemed "qualified" and interviewed and evaluated for the position.

***7** In short, Gastelum has not submitted any admissible evidence from which a reasonable juror could infer that Abbott decided to not promote Gastelum because of her disability.

b. Other Supervisory Positions

Gastelum vaguely refers to another supervisor position for which she was not selected: "The May, 2002 supervisor position was not advertised and Ms. Gastelum was not considered for the position." PSOF at ¶ 11. However, Gastelum does not provide any facts demonstrating that she was not considered for this position because of her disability. Without more specific facts and relevant authority, Gastelum does not establish that Abbott failed to consider Gastelum for this position because of Gastelum's medical conditions.

c. Terminated Gastelum's Reasonable Accommodation

To the extent Gastelum argues that she had an entirely flexible schedule before Steele became her

supervisor and that Abbott improperly terminated this flexible schedule, this argument fails for want of evidentiary support. Even assuming that Gastelum had such a schedule from 1995 to 2002-which Abbott disputes-Gastelum has not submitted any evidence showing that she received this schedule because of a medical accommodation. In her deposition, Gastelum stated that she never filed a written request for a flexible schedule before March 2003. DSOF at ¶ 14.

5. Reasonable Accommodation Claim

Even assuming that Gastelum is disabled under the ADA, Gastelum has failed to establish that Abbott did not reasonably accommodate her disability. Under the ADA, employers must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5). Courts "recognize [ ] the need for parties to engage in a good-faith interactive process to arrive at a reasonable accommodation." *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1096 (9th Cir.2001). "[T]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation." *Id.* (citations and internal quotation marks omitted).

Here, assuming that Gastelum is disabled, she did not at any time inform Abbott of the limitations of her illness. "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Toyota Motor Mfg., KY, Inc.*, 534 F.3d 184, 198 (2002). The only evidence in the record providing any notice to Abbott of Gastelum's limitations is Gastelum's request to Steele for a flexible schedule. In that letter, Gastelum wrote:

> Grace, I would like to be able to work a flexible schedule. I have worked a flexible schedule for the last 6 years. The flexible schedule has helped to keep my attendance at good standing. I was able to work around my illness and Dr. appointments and still worked my 40 hrs. a week.
>
> ***8** My current job responsibilities don't require me to be in the plant at specific times. I can complete my responsibilities at any hour.
>
> I have been doing very well lately controlling flare ups with my illness, but there are still some morning that are difficult for me to get around. FN4

> FN4. All grammatical mistakes are transcribed without alteration.

Doc. # 58, Exhibit 5. At most, this letter informed Steele that Gastelum had an undisclosed "illness" and that Gastelum sometimes had medical appointments. Gastelum did not submit doctors' notes or diagnoses explaining the limitations caused by her illness. An employer's knowledge of medical limitations is highly relevant in determining whether the employer provided a "reasonable accommodation." *See Gammage v. West Jasper Sch. Bd. of Educ.*, 179 F.3d 952, 955 (5th Cir.1999) ("[T]he ADA does not require an employer to assume that an employee with a disability suffers from a limitation; as a result, it is incumbent upon the ADA plaintiff to assert not only a disability, but also any limitation resulting therefrom." (citation omitted)).

In response to her request for a flexible schedule, Steele and Gastelum agreed to a schedule whereby Gastelum worked from 9:00 a.m. to 2:00 p.m. on Monday, Tuesday, and Wednesday with an additional 2.5 hours either before 9:00 a.m. or after 2:00 pm., and worked the remainder of the forty hours at any point during the week. Steele's accompanying memorandum explicitly provided that the accommodation was not a medical accommodation, and explained that Gastelum had been informed that, in

order to receive medical accommodation, she needed to submit medical documentation to the Plant Nurse. Gastelum never submitted any additional medical documentation. Therefore, Gastelum did not participate in the "interactive process" and has not introduced any additional evidence that Abbott failed to provide reasonable accommodation.

B. Retaliation Claim

Gastelum argues that she was retaliated against because she filed claims in September 2002 and December 2002 with the Arizona Civil Rights Division. To establish a prima facie case under the ADA, a plaintiff must establish that (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the employment decision. *Pardi v. Kaiser Permanente Hosp., Inc.*, 389 F.3d 840, 849 (9th Cir.2004). Abbott argues that Gastelum did not suffer any adverse employment action after filing her first claim in September 2002.[FN5]

> FN5. In her brief, Gastelum asserts that she told Human Resources that she planned to file a claim with the Arizona Civil Rights Division on June 10, 2002; however, the statement in her Statement of Facts provides that she told Human Resources about her intent to file a claim on September 10, 2002. Therefore, the court will treat the relevant date of the filing and notice of her intent to file a claim with the Arizona Civil Rights Division as September 10, 2002.

In her opposition brief, Gastelum asserts that the prohibited conduct in which Abbott engaged included "denying continued accommodation or modification of accommodation, transfer, repeated challenges to FMLA, termination, discipline and denial of promotion." Doc. # 60 at 12:7-9. Gastelum then cites several cases for the proposition that causation may be established solely by the timing of the relevant employer action. Doc. # 60 at 12:18-27. However, Abbott does not in her brief or in her Statement of Facts provide dates for when Abbott engaged in this allegedly prohibited conduct. There is no date for when Steele became her supervisor and allegedly "modified" her accommodation. The record is entirely silent as to when Gastelum was "transferred." No dates are given for when her FMLA requests were challenged. Moreover, her "termination" occurred on April 5, 2004, which is not so close in time as to establish a causal link with her filing of the September 2002 and December 2002 claims with the Arizona Civil Rights Division. And as discussed above, Gastelum applied for a promotion in December 2001, so her failure to receive this position could not have resulted retaliation for her filing of claims with the Arizona Civil Rights Division in September 2002 and December 2002.

***9** Gastelum provides neither reasoned analysis nor evidence from which a reasonable juror could infer that she was retaliated against.

C. FMLA Violations

In her amended complaint, Gastelum alleged that Abbott violated the FMLA. However, she alleged no supporting facts. Abbott challenges Gastelum's FMLA claim on three grounds: (1) she failed to disclose her FMLA claim in her answers to Abbott's interrogatories, (2) she did not identify what conduct violated the FMLA, and (3) the statute of limitations bars Gastelum's claim.

Gastelum responds in her Statement of Facts as follows: "While on FMLA, Gastelum's symptoms and paperwork were challenged, making it difficult to utilize her leave." PSOF at ¶ 3. Gastelum does not refer to the FMLA elsewhere in her Statement of Facts. In her opposition brief, Gastelum uses sweeping language to state that Abbott violated the FMLA:

> 29 U.S.C. §§ 2614(a)(1) and 2617(a)(2)

> provide employees a right to recover damages and equitable relief when an employer interferes, restrains or denies guaranteed by the Act. The evidence presented here demonstrates a pattern of conduct that interfered, restrained and punished Ms. Gastelum for exercising her right to leave under the FMLA. Transfer, denial of promotion, discipline and continuous harassment were all related to request for and actual FMLA leave. In this instance, Ms. Gastelum's disability and her FMLA leave are inextricably intertwined result is violations of two federal Acts.

Doc. # 60 at 17:10-17.

At the summary judgment stage, a non-moving party with the burden of proof must submit evidence to support an essential material fact. However, other than providing conclusory statements of FMLA "violations," Gastelum has failed to address Abbott's three reasons for why summary judgment should be granted. Conclusory statements in affidavits or in moving papers are insufficient to establish a disputed, material fact. *Thornhill Pub. Co.*, 594 F.2d at 738.

D. Hostile Environment Claim

In her opposition brief, Gastelum presents a hostile environment claim. This claim does not survive summary judgment for several reasons. First, Gastelum did not present a hostile environment claim in her First Amended Complaint. Second, Gastelum did not identify a hostile environment claim in her case management report. Third, in her opposition brief, Gastelum does not cite any authority discussing hostile environment claims under the ADA, which presumably provides the basis for Gastelum's claim. Fourth, the only facts that Gastelum discusses are conclusory: "Both the nature of the treatment and the sustained period over which it occurred establish the discriminatory environment Ms. Gastelum was forced to work in. Her supervisors and co-workers all interacted with her as an inferior and dishonest individual. Their decisions concerning her permeated with bias that was resulted in continued harassment and sanctions." Doc. # 60 at 16:4-8. Fifth, Gastelum does not cite or identify any evidence to support her contentions.

D. Constructive Discharge

***10** Summary judgment is appropriate on Gastelum's constructive discharge claim for two reasons.

First, a plaintiff's failure to exhaust administrative remedies deprives the court of subject matter jurisdiction. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir.1994). Abbott argues that Gastelum cannot argue that she was constructively discharged because she failed to exhaust that claim with the EEOC. Gastelum filed her claims with the Arizona Civil Rights Division in September and December of 2002. In her September claim, she asserted that she was not promoted because of her disability. In her December claim, she asserted that she was retaliated against because of her initial filing. She did not at any point supplement her claim or inform the Arizona Civil Rights Division that she had since been constructively discharged. Gastelum's constructive discharge claim is not "like or reasonably related to the allegations contained" in her September and December 2002 claims with the Arizona Civil Rights Division. *See Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1475-76 (9th Cir1989) (stating that plaintiff's "claim that LACOE discriminatorily denied her medical leave and benefits, disseminated poor recommendations, and discharged her are not related to her claims that she was sexually harassed and denied relocation and training").

Second, even if exhaustion were satisfied, the claim lacks evidentiary support. Gastelum's opposition brief does not cite or identify any admissible evidence supporting her conclusory assertion that she was constructively discharged because of her disability. *See* Doc. # 59; *see also Humphrey*, 239 F.3d

at 1133 (“To prevail on a claim of unlawful discharge under the ADA, the plaintiff must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability.”).

V. Conclusion

Abbott is granted summary judgment on all of Gastelum's claims.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment, Doc. # 57, is granted.

IT IS FURTHER ORDERED that the clerk enter judgment in favor of Defendant and that Plaintiff Gastelum take nothing on her complaint, and the Clerk is directed to terminate this action.

D.Ariz.,2006.
Gastelum v. Abbott Laboratories
Not Reported in F.Supp.2d, 2006 WL 2456199 (D.Ariz.), 33 NDLR P 90

END OF DOCUMENT