UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKEISHA ELLIS	)	
	)	
Plaintiff,	)	
	)	Case No. 1:08-cv-01174-JDB
v.	)	Judge John D. Bates
	)	
	)	
GEORGETOWN UNIVERSITY HOSPITAL	)	
	)	
Defendant.	)	
	)	

DEFENDANT GEORGETOWN UNIVERSITY HOSPITAL'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

Dated: October 13, 2009

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FEDERAL CASES

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Plaintiff Lakeisha Ellis ("Plaintiff"), a former probationary employee at Georgetown University Hospital ("Hospital"), was discharged from her position as a Patient Financial Associate ("PFA") after she left work without authorization and took three hours to return to work, after being summoned by her supervisor. *See* Ex. 1 (Termination Letter). Contrary to Plaintiff's contentions, her alleged asthma condition, which by Plaintiff's own admission was mild and well-controlled with medication and did not prevent her from engaging in any activity, was not the reason for her termination. Ex. 2 (Deposition of Lakeisha Ellis) ("Ellis Dep.") at 59:11-13[1] (medications control her asthma), 64:18-20 (same) 139:9-11 (not restricted in participating in any activities), 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler).

Despite these undisputed facts, Plaintiff contends that her asthma constitutes a "disability" within the meaning of the Americans with Disabilities Act of 1991 ("ADA"), the Rehabilitation Act of 1973 ("Rehab Act") and the DC Human Rights Act ("DCHRA"), and that the Hospital terminated her employment because of her alleged disability. She also contends that the Hospital retaliated against her because she requested an accommodation not to work in the Emergency Room. Nothing could be further from the truth. The undisputed facts are that the Hospital was in the midst of the interactive process required by the ADA and determining whether it could accommodate Plaintiff's request when her intervening misconduct resulted in her termination.

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[1] References to page numbers in depositions such as "Ellis Dep. at 138:1-2" indicate the page number to the left of the colon and line numbers to the right of the colon. Thus, in the example "at 138:1-2" the reference is to page 138, lines 1 and 2 of Plaintiff's deposition.

In short, Plaintiff does not have a disability within the meaning of any of the statutes referenced above. Moreover, her employment was not terminated because of her alleged disability. Instead, her employment was terminated for legitimate, non-discriminatory reasons. *See* Ex. 1 (Termination Letter). Accordingly, her discrimination and retaliation claims should both be dismissed, in their entirety, as a matter of law.

UNDISPUTED MATERIAL FACTS[2]

Plaintiff's Mild and Well Controlled Asthma

1. Plaintiff is one of an estimated 34 million Americans who has been diagnosed with asthma.[3] Plaintiff was diagnosed with asthma approximately ten years ago. Ex. 2 (Ellis Dep.) at 138:1-2. Both Plaintiff and her expert witness, Dr. Steven Lerner, have admitted unequivocally under oath that her asthma is mild and well controlled by medication. Ex. 2 (Ellis Dep.) at 59:11-13 (medications control her asthma), 64:18-20 (same); 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler); Ex. 3 (Deposition of Dr. Steven Lerner) ("Lerner Dep.") at 35:7-14 (agreeing that Plaintiff's original diagnosis of mild persistent asthma by Dr. Hasselquist was correct); Ex. 4 (Expert Report of Dr. Steven Lerner) ("Lerner Rep.") at P000156 (describing Plaintiff's condition as "mild persistent bronchial asthma" and noting that she is "well maintained" by her medications).

2. During Plaintiff's pre-employment health screening with Georgetown's Employee Health Service ("Employee Health"), the nurse who conducted Plaintiff's exam noted on

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[2] The following section of Undisputed Material Facts constitutes the Hospital's statement of material facts to which there is no genuine issue as required by Local Civil Rule 7(h).

[3] *See* Ex. 5 (AMERICAN LUNG ASSOCIATION, TRENDS IN ASTHMA MORBIDITY AND MORTALITY 3 (2009), available at: http://www.lungusa.org/site/c.dvLUK9O0E/b.22884/k.7CE3/Asthma_Research__Studies.htm (last accessed Sept. 1, 2009)).

Plaintiff's Pre-Placement Health Clearance form that Plaintiff suffered asthma attacks on relatively rare occasions including only once every six or seven months. Ex. 6 (Plaintiff's Pre-Placement Health Clearance) at ELLIS000090 (noting zero episodes of asthma in the last 6 or 7 months). Plaintiff also admits that she checked the box on her Pre-Placement Health Clearance form that she was not suffering from any breathing problems. *Id*. at ELLIS000093; Ex. 2 (Ellis Dep.) at 63:3-4 (confirming she did not have any breathing problems at the time she commenced her employment with the Hospital). The medical records Plaintiff produced in this case corroborate that history in that she visited her doctor regarding her asthma only a handful of times over the last several years. Ex. 7 (Plaintiff's Medical Records from Kaiser Permanente) at P000113-117 (noting only two sets of visits to her primary care physicians – one in December 2004 and one in February 2005 – regarding her asthma). Moreover, Plaintiff admitted that she has never been hospitalized or needed to go to the emergency room as a result of an asthma attack. Ex. 4 (Lerner Rep.) at P000155.

3. Plaintiff also admitted that on the rare occasions that she suffers an asthma attack, she uses her Albuterol inhaler and the symptoms of the attack subside quickly thereafter. Ex. 2 (Ellis Dep.) at 232:14-19, 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler). She conceded that she told the nurse completing her pre-employment screening that her medications controlled her asthma. *Id*. at 58:14-20, 59:11-13, 64:14-20. Not surprisingly, Plaintiff also admitted that her treating physicians have never placed any restrictions on the activities she can engage in as a result of her asthma. *Id*. at 139:9-11, 276:12-15, 277:20-278:3 (confirming she is not restricted in any activities by her asthma). In fact, at the time of her pre-employment health screening at Georgetown, Plaintiff admitted to the nurse completing the evaluation that she participated in cardiovascular exercise routines approximately

once a week. Ex. 6 (Plaintiff's Pre-Placement Health Clearance) at ELLIS000090; Ex. 2 (Ellis Dep.) at 60:19-61:6.

Plaintiff's Employment at Georgetown

The Patient Financial Associate ("PFA") Position in the Patient Access Department Requires, as an Essential Function of the Job, that PFAs Be Able to Rotate into the Various Locations in which PFAs Register Patients

4. Plaintiff was hired as a Patient Financial Associate ("PFA") in the Patient Access Department ("Patient Access") at Georgetown in May 2006. Ex. 2 (Ellis Dep.) at 25:8-11. Like all new employees, Plaintiff was considered a probationary employee during the first three months of her tenure. Ex. 8 (Hospital Probationary Employment Period Policy) at ELLIS000055. As a probationary employee, she was subject to termination at any time if her behavior was deemed unacceptable by her supervisors. *Id.*

5. Individuals hired as Patient Access PFAs are required to register patients in several sites around the Hospital. Ex. 2 (Ellis Dep.) at 65:4-21 (Plaintiff admitting she worked and serviced patients in Gorman, Main Admissions, the Lombardi Cancer Center and the Emergency Department during her time working as a Patient Access PFA); Ex. 9 (Deposition of Mary Jo Schweickhardt) ("Schweickhardt Dep.") at 101:5-12 (noting Patient Access is spread across the Hospital); Ex. 10 (Affidavit of Cynthia Hecker dated 5/11/09) ¶ 2 (noting Patient Access PFAs work in several departments around the Hospital). In registering patients, Patient Access PFAs obtain demographic and insurance information from the patient and enter that information into Georgetown's various computer registration systems. Ex. 2 (Ellis Dep.) at 32:15-33:4; Ex. 11 (Deposition of Fannice Beckett) ("Beckett Dep.") at 14:7-10; Ex. 12 (PFA Job Description) at ELLIS000046-48.

6. Although Patient Access is described as a Department, which might otherwise connote the idea that its employees work in one central location, in fact, Patient Access PFAs

work in at least eight different locations throughout the Hospital where patients come to access Georgetown's medical services. Ex. 13 (Deposition of Deborah Felton) ("Felton Dep.") at 25:16-26:3 (noting Patient Access PFAs register patients in at least 8 or 9 different locations); Ex. 14 (Deposition of Renie McKenzie) ("McKenzie Dep.") at 18:2-13; Ex. 10 (Affidavit of Cynthia Hecker dated 5/11/09) ¶ 2 (noting Patient Access PFAs work in several departments around the Hospital). Included among these locations are the Emergency Department ("ED"), the Lombardi Comprehensive Cancer Center ("Lombardi"), the Gorman Building ("Gorman"), and the Main Admissions area ("Main"). Ex. 10 (Affidavit of Cynthia Hecker dated 5/11/09) ¶ 2; Ex. 2 (Ellis Dep.) at 65:4-21; Ex. 9 (Schweickhardt Dep.) at 101:5-12.

7. A key and essential job requirement for Patient Access PFAs is the ability to work in the various Hospital departments serviced by Patient Access. Ex. 11 (Beckett Dep.) at 17:1-9 (noting need to rotate Patient Access PFAs to different locations), 31:15-32:3 (noting that PFAs work under Patient Access wherever needed in the Hospital); Ex. 2 (Ellis Dep.) at 243:9-11 (conceding that if her managers told her to rotate to another department during her workday that she would be required to do so); Ex. 13 (Felton Dep.) at 10:13-18. The Hospital often cannot predict when and where patients will arrive to access the Hospital's services and the registration function can therefore become a bottleneck to patient care if there are not enough Patient Access PFAs available to assist in registering patients in a given location. Ex. 15 (Declaration of Cynthia Hecker dated 10/9/09) ¶ 3. As such, although Patient Access PFAs are scheduled to work in a particular location for any given shift, they are often asked to move to another department at some point during the day to alleviate patient traffic flow issues as they arise. Ex. 11 (Beckett Dep.) at 17:1-9; Ex. 13 (Felton Dep.) at 72:22-73:22; Ex. 14 (McKenzie Dep.) at 16:15-17:14. Patient Access PFAs are also expected to be able to rotate to the other departments

serviced by Patient Access in order to cover absences of other PFAs who are on vacation or call in sick on any particular day. Ex. 2 (Ellis Dep.) at 243:9-11; Ex. 11 (Beckett Dep.) at 17:1-9, 25:1-10; Ex. 13 (Felton Dep.) at 9:3-19, 10:13-18, 65:9-66:4 (explaining that Patient Access PFAs are trained to work in all departments serviced by Patient Access so they can be rotated to assist as needed to cover employee absences).

8. More so than any other department, it is vital that all Patient Access PFAs are able to work in the ED as needed. Ex. 9 (Schweickhardt Dep.) at 101:17-102:6. This is so because Georgetown needs to be able to respond to any mass emergency situations that may arise and possess the capacity to handle a flood of patients entering the ED in a short amount of time. Ex. 15 (Declaration of Cynthia Hecker dated 10/9/09) ¶ 4. As such, Patient Access must be able to rely on its PFAs to be able to respond to such an emergency and help register the mass of patients entering the ED. *Id.* at ¶ 4.

9. It also goes without saying that PFAs in Patient Access need to be able to have constant patient contact, including contact with sick patients. A Patient Access PFA is often the first point of contact for patients entering the Hospital. Ex. 12 (PFA Job Description) at ELLIS000046-47 (including, but not limited to, communicating with the patients regarding their demographic and financial information on the day of service when the patient is physically present in the Hospital, placing armbands on patients, and obtaining required signatures from patients); Ex. 2 (Ellis Dep.) at 33:13-16. In obtaining the required financial and demographic information to register patients, Patient Access PFAs are in close physical proximity to the patients and often pass documents back and forth with the patients. Ex. 2 (Ellis Dep.) at 36:8-16 (noting there are no barriers between PFAs and patients in Main), 96:14-18 (describing completing bedside registrations of patients in the ED).

During Her Brief Employment, Plaintiff Was Assigned to Work in Several Locations, Including Gorman, Lombardi, and Main

10. After her initial training in May 2006, Plaintiff was first assigned to work as a PFA in Gorman. Ex. 2 (Ellis Dep.) at 31:14-20, 34:5-7 (stating she primarily worked in Gorman). Patients entering Gorman to register are coming to the Hospital to obtain laboratory testing of one kind or another. Ex. 2 (Ellis Dep.) at 33:9-12. The physical layout of Gorman is such that the Patient Access PFAs sit behind a glass partition that separates them to some degree from the patients who come to Gorman to register for services. Ex. 2 (Ellis Dep.) at 35:1-36:4. However, there is a hole in the glass partition at face level to facilitate verbal communications between PFA and patient. *Id*.

11. Although Plaintiff primarily worked in Gorman for the two and a half months she was employed at Georgetown, Plaintiff admitted, under oath, that there were times when she was asked to work at other locations, including the Lombardi and Main locations. Ex. 2 (Ellis Dep.) at 64:21-65:21. In Lombardi, the PFAs sit at a large registration/nursing desk in the center and the patients are able to come right up to the desk to register. Ex. 10 (Affidavit of Cynthia Hecker dated 5/11/09) ¶ 7. There are no glass partitions or any other means of separating the PFAs from the patients other than the width of the registration/nursing desk. *Id*. In Main, registration takes place in a series of several booths wherein the PFAs sit on one side of the booth and the patients sit directly across from the PFAs on the other side of the booths. *Id*. ¶ 8; Ex. 2 (Ellis Dep.) at 36:5-16. Again, there are no glass partitions in these booths or any other means of separating the PFAs from the patients other than the width of the desk within each booth. *Id*.

Plaintiff Rotates to Work in the ED

12. On July 25, 2006, Plaintiff was asked to rotate into the ED to work. Ex. 2 (Ellis Dep.) at 74:7-9. Plaintiff worked in the ED registering patients for several hours that morning

before she claimed she started to feel an asthma attack approaching. *Id*. at 75:12-18. Plaintiff contends that she excused herself to the bathroom where she used her Albuterol inhaler and the symptoms of the attack began to clear. *Id*. at 232:12-19. She claims that after the attack, she went upstairs to Main to tell her supervisor, Deborah Felton, about the asthma attack and that Ms. Felton asked if the symptoms had subsided. *Id*. at 81:3-18, 232:8-11, 254:11-255:17. Plaintiff responded that the symptoms had subsided and Ms. Felton asked if Plaintiff felt she could return to work in the ED. *Id*. Plaintiff responded that she could, and Ms. Felton sent her back to the ED with the instruction to report to Gorman after lunch. *Id*. Plaintiff returned to the ED and continued working for approximately 30 to 45 minutes before leaving for lunch. *Id*. at 82:2-8. During that additional time working in the ED, Plaintiff did not suffer another asthma attack or experience any other symptoms. *Id*. at 82:9-14.

Plaintiff Becomes Sick and Visits the ED as a Patient, But Has No Asthma Symptoms During Her Visit

13. Plaintiff returned to work in Gorman after lunch on July 25, 2006. Ex. 2 (Ellis Dep.) at 83:7-9. At some point that afternoon, Plaintiff began to feel ill with a stomach ache and was escorted by the Team Leader in Gorman, Renie McKenzie, to the ED. *Id*. at 84:5-85:13; Ex. 14 (McKenzie Dep.) at 33:8-22. Ms. McKenzie gave Plaintiff the option of leaving work early or going to be treated in the ED, and Plaintiff admitted that she requested to go to the ED for treatment. Ex. 2 (Ellis Dep.) at 85:4-10. At some point while Plaintiff was waiting to be seen in the ED, Ms. McKenzie notified Fannice Beckett, the other Supervisor in Patient Access, that Plaintiff had taken ill and was awaiting treatment in the ED. Ex. 14 (McKenzie Dep.) at 34:12-35:3; Ex. 11 (Beckett Dep.) at 42:15-20. Ms. Beckett went down to the ED shortly thereafter to check on Plaintiff. Ex. 14 (McKenzie Dep.) at 34:12-35:3; Ex. 11 (Beckett Dep.) at 43:13-18; Ex. 2 (Ellis Dep.) at 87:10-13. Plaintiff informed Ms. Beckett that her sickness was not related

in anyway to the asthma attack she claimed to have had that morning, nor was it a result of feeling any stress from working in the ED for the first time that day. Ex. 16 (Beckett note regarding Plaintiff) at ELLIS000049.

14. Plaintiff was diagnosed with gastroenteritis by one of the doctors in the ED. Ex. 2 (Ellis Dep.) at 88:19-89:7; Ex. 17 (ED Records for Plaintiff) at ELLIS000063 (identifying gastroenteritis as the diagnosis in the "Serial Notes/Procedures/Case Analysis" section).[4] The examination notes from her ED visit indicate that Plaintiff denied suffering any shortage of breath at the time she was seen in the ED. *Id*. at ELLIS000062 (noting that Plaintiff "denies SOB"). The discharge papers from that visit also indicate that Plaintiff was in the ED that afternoon for just under two hours. *Id*. at ELLIS000069 (indicating Plaintiff arrived in the ED at 3:50 p.m. (1550 hours) and was discharged at 5:40 p.m. (1740 hours)). Plaintiff admits she did not suffer another asthma attack during that time. Ex. 2 (Ellis Dep.) at 86:7-11.

15. After Plaintiff was discharged from the ED, she returned to speak with Ms. Beckett regarding her schedule the next day. Ex. 2 (Ellis Dep.) at 90:21-92:2. The ED doctor had suggested that Plaintiff follow up with her primary care physician the following day and Plaintiff informed Ms. Beckett of this diagnosis. *Id*. at 92:6-9. Ms. Beckett's only instruction to Plaintiff was to make sure that Plaintiff followed the normal procedures for calling off work if she was going to be unable to work. *Id*. at 90:21-92:2.

Plaintiff Sees Dr. Finkelman, Who at Plaintiff's Request, Gives Plaintiff a Note Requesting that She Be Excused from Working in the ED

16. Plaintiff was treated the next day by her primary care physician at Kaiser Permanente, Dr. Ellen Finkelman. Ex. 2 (Ellis Dep.) at 92:6-11, 93:12-14; Ex. 18 (Deposition of

[4] Gastroenteritis is an "inflammation of the mucous membrane of both stomach and intestine." *See* Ex. 19 (STEDMAN'S MEDICAL DICTIONARY 708 (Marjory Spraycar ed., 1995)).

Dr. Ellen Finkelman) ("Finkelman Dep.") at 15:6-8. Dr. Finkelman confirmed the ED doctor's diagnosis of gastroenteritis, and Plaintiff's test results also apparently indicated a slight pancreatitis. Ex. 18 (Finkelman Dep.) at 15:10-16:1. Dr. Finkelman noted that there were no signs of any active asthma during that July 26, 2006 visit. *Id*. at 15:15-16. Dr. Finkelman decided to hold Plaintiff out of work until July 31, 2006 to allow her proper time to recover from her gastroenteritis. *Id*. at 16:2-4. The decision to hold Plaintiff out of work until the 31st had nothing to do with Plaintiff's alleged asthma. *Id*. at 34:17-22.

17. During that visit, Plaintiff asked Dr. Finkelman to write a note excusing Plaintiff from having to work in the ED. *Id*. at 16:16-19, 17:3-9, 32:16-19; Ex. 20 (Second Amended Complaint) ¶ 10 (conceding that Dr. Finkelman wrote the note at Plaintiff's request). Dr. Finkelman drafted the note, which indicated Plaintiff had asthma and concluded that Plaintiff "should not work in the emergency department as this is too high an exposure to many sick patients and puts her at risk for her own health." Ex. 21 (Dr. Finkelman's Note). Dr. Finkelman admitted, under oath, that she would not have written such a note unless Plaintiff asked for it. Ex. 18 (FinkelmanDep.) at 16:16-19, 17:3-9, 32:16-19. In addition, Dr. Finkleman noted that she had not reached any independent medical conclusion that Plaintiff's asthma prevented her from working in the ED. *Id*. at 34:10-14.

When Plaintiff Advised the Hospital of Her Requested Accommodation, the Hospital Initiated the Interactive Process to Determine Whether Plaintiff's Request Could Be Accommodated

The First Step in the Interactive Process – Plaintiff Requests an Accommodation

18. Armed with her note, Plaintiff contacted Ms. Beckett at some point in the evening of July 26, 2006 to inform Ms. Beckett that she was going to be out of work until the 31st and that she could no longer work in the ED. Ex. 2 (Ellis Dep.) at 104:6-105:14; Ex. 11 (Beckett Dep.) 79:12-13. Consistent with Hospital policy, Ms. Beckett instructed Plaintiff to return to

work on the 31st with the documentation of her condition that Plaintiff had received from Dr. Finkelman so that the Hospital could assess her request. Ex. 2 (Ellis Dep.) at 105:15-107:12.

The Second Step in the Interactive Process – Plaintiff Speaks with Her Supervisors Regarding Her Requested Accommodation

19. Plaintiff claims she returned to Georgetown on July 31, 2006 and had a conversation with Ms. Beckett, and her second-line supervisor, the Director of Patient Access, Cindy Hecker. Ex. 2 (Ellis Dep.) at 108:7-21; Ex. 20 (Second Amended Complaint) ¶¶ 70-71. Plaintiff alleges that Ms. Hecker inquired as to what Plaintiff's restrictions were and Plaintiff told Ms. Hecker that Plaintiff's doctor stated she should not have to work in the ED. Ex. 2 (Ellis Dep.) 109:4-19, 111:9-13 (stating Ms. Hecker asked about Plaintiff's restrictions). Plaintiff claims that Ms. Hecker then stated that once Plaintiff was seen by Employee Health – as required under Hospital policy – and Ms. Hecker and/or Ms. Beckett were notified of Plaintiff's fitness for duty by Employee Health, that Ms. Hecker and the Hospital would decide whether or not they could meet Plaintiff's request for an accommodation. *Id*. at 110:21-111:13. Plaintiff did not return to seeing patients immediately after the meeting. *Id*. at 111:19-112:6.

The Third Step in the Interactive Process – Plaintiff is Assessed by Employee Health

20. Prior to being allowed to return to working with patients after an extended absence, PFAs are required to report to Employee Health for an evaluation of their fitness for duty. Ex. 2 (Ellis Dep.) at 107:13-21; Ex. 9 (Schweickhardt Dep.) at 77:15-22. Plaintiff admitted that her appointment with Employee Health for this return to work evaluation occurred in the morning on August 1, 2006. Ex. 2 (Ellis Dep.) at 112:10-13. Plaintiff provided Employee Health the notes from Dr. Finkelman. *Id*. at 112:14-113:1. Thereafter, the Employee Health nurse conducting Plaintiff's evaluation provided Plaintiff with a form titled "Statement of Work Status." *Id*.; Ex. 22 (Statement of Work Status).

21. The form was addressed to Ms. Hecker largely copying the text of Plaintiff's excuse note that she was allowed to return to work with the accommodation of not having to work in the ED. Ex. 22 (Statement of Work Status). Pursuant to Hospital policy, the "Statement of Work Status" notes are a starting point for a dialogue between Employee Health and an employee's supervisor, as well as Human Resources and Georgetown's Legal Department as needed, regarding whether the supervisor believes he or she can accommodate the request. Ex. 23 (Deposition of Cynthia Hecker) ("Hecker Dep.") at 50:13-16, 55:10-56:22, 65:21-67:6, 69:17-70:15. Once a decision is made about whether the accommodation request can be granted, an additional form is completed indicating the result of that dialogue. *Id*. at 70:8-15. The initial "Statement of Work Status" is not a determination by the Hospital that an employee should be granted the requested accommodation. *Id*. at 50:13-16, 55:10-56:22, 65:21-67:6, 69:17-70:15.

The Fourth Step in the Interactive Process – Plaintiff's Supervisor Attempts to Alleviate Plaintiff's Concerns

22. After receiving the "Statement of Work Status" on August 1, 2006, Plaintiff spoke with Ms. Beckett, and Ms. Beckett instructed Plaintiff to return to work in Gorman while the Hospital considered Plaintiff's request. Ex. 11 (Beckett Dep.) at 52:20-53:6, 53:21-54:5. Plaintiff told Ms. Beckett that, in addition to being unable to work in the ED, she also did not want to return to work in Gorman. Ex. 2 (Ellis Dep.) at 280:9-18. Plaintiff admits that she told Ms. Beckett she did not want to create a disruption by returning to work in Gorman at that time. *Id*.; Ex. 11 (Beckett Dep.) at 66:4-20, 67:19-68:20. Although Ms. Beckett explained that the HR Generalist normally assigned to assist Patient Access – Lorna McFarlane – was out of the office, Ms. Beckett offered to allow Plaintiff to go speak with Angela Freeman, the HR Generalist covering for Ms. McFarlane, about Plaintiff's concerns. *Id*. at 57:19-58:10, 67:19-68:20.

23. Ms. Beckett's understanding is that Plaintiff went to speak to Ms. Freeman and then returned to speak with Ms. Beckett, but that the conversation with Ms. Freeman had not alleviated any of Plaintiff's concerns. *Id*. at 60:3-12, 68:21-69:7. Ms. Beckett then offered to go speak with Ms. Freeman herself. *Id*. at 69:8-13. Ms. Beckett instructed Plaintiff to wait in the lobby outside of Ms. Beckett's office during this time, but Plaintiff refused to do so because she was worried other employees would see her waiting there. *Id*. at 69:14-19. Ms. Beckett then offered for Plaintiff to wait at the Leavey Center and instructed Plaintiff to provide Ms. Beckett with her cell phone number so she could contact Plaintiff after Ms. Beckett spoke with Ms. Freeman. *Id*. at 69:20-70:4. Ms. Beckett, however, is certain she did not give Plaintiff the option to leave the Hospital and return home. *Id*. at 60:18-21.

Plaintiff Severs the Interactive Process by Ignoring Her Supervisor's Directions and Leaving the Hospital

24. Instead of following Ms. Beckett's directions, Plaintiff left the Hospital at this point and proceeded to get on the Metro. Ex. 2 (Ellis Dep.) at 123:2-11, 124:15-125:7, 216:9-217:9; Ex. 11 (Beckett Dep.) at 65:4-20. At the same time, Ms. Beckett went to speak with Ms. Freeman and learned during that meeting that Ms. Freeman had instructed Plaintiff to return to her designated work area as instructed by Ms. Beckett. Ex. 11 (Beckett Dep.) at 60:2-17. Ms. Beckett concluded at this point that Plaintiff had lied to Ms. Beckett about what Ms. Freeman had instructed Plaintiff to do. Ex. 1 (Termination Letter).

25. Ms. Beckett[5] then attempted to contact Plaintiff several times on her cell phone expecting Plaintiff to wait in the Leavey Center for her call. Ex. 11 (Beckett Dep.) at 65:4-20.

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[5] Plaintiff has changed her story multiple times during the course of discovery as to who from the Hospital actually contacted her that morning. Plaintiff first alleged that Deborah Felton, another Supervisor in Patient Access and Ms. Beckett's colleague, contacted Plaintiff on the

(continued…)

After several attempts, Plaintiff finally answered her phone and informed Ms. Beckett that Plaintiff was in fact on the Metro. *Id.* Shocked to learn that Plaintiff had disregarded her instructions to wait at the Leavey Center, Ms. Beckett informed Plaintiff she needed to return to work immediately. *Id.*; Ex. 2 (Ellis Dep.) at 217:12-20, 219:15-17.

Plaintiff Takes Three Hours to Return to Work Without Calling Anyone at the Hospital and Was Discharged as a Result

26. Plaintiff admitted at her sworn deposition that it took her approximately three hours to return to work after Ms. Beckett summoned her to return to work. Ex. 2 (Ellis Dep.) at 125:19-126:4, 247:3-12, 135:9-12. Plaintiff claims that despite the fact that she took the Metro from Greenbelt to work in the morning, that she needed to retrieve her car from the Greenbelt Metro station and drive back to the Hospital. *Id.* at 125:14-18. It took Plaintiff three hours to return to the Hospital, despite the fact that the Greenbelt Metro station is just over 18 miles away from the Hospital.[6] Plaintiff admitted that she was carrying her cell phone but did not call anyone at the Hospital that afternoon to tell them she was going to be delayed in returning. *Id.* at

(continued)

Metro. Ex. 2 (Ellis Dep.) at 125:10-12. Plaintiff's Second Amended Complaint notes, however, that it was Ms. Beckett who contacted her on the Metro. Ex. 20 (Second Amended Complaint) ¶ 76. In the end, whether it was Ms. Felton or Ms. Beckett that contacted her that morning is immaterial. The undisputed facts are that she was contacted by her supervisor, told to return to work immediately, but took three hours to do so and did not inform anyone at the Hospital that she would be delayed in returning. Ex. 2 (Ellis Dep.) at 219:15-17 (noting Plaintiff was told to return to work), 125:19-126:4 (conceding she did not return for almost three hours), 226:19-227:5 (admitting she did not call anyone).

[6] *See* Ex. 24 (map and directions from the Greenbelt Metro Station to 3800 Reservoir Road, NW Washington, DC 20007 (the Hospital's street address)), available at: http://maps.google.com/maps?f=d&source=s_d&saddr=Greenbelt+Metro+Station+Greenbelt+Maryland&daddr=3800+Reservoir+Rd+NW,+Washington,+District+of+Columbia,+20007&hl=en&geocode=%3BFQfAUQIdXuln-yn9Oz-oQLa3iTF2jabkPOtH9A&mra=pe&mrcr=0&sll=38.961753,-76.993882&sspn=0.128139,0.22007&ie=UTF8&ll=38.956205,-76.950989&spn=0.256298,0.44014&z=11&layer=c&pw=2 (last accessed on October 13, 2009).

136:4-9. This is true despite the fact that Plaintiff believed her job was on the line at this point. *Id*. at 116:14-117:9, 118:20-119:9.

27. When Plaintiff finally returned to work, she met briefly with Ms. Beckett who told her to return to work in Gorman for the rest of the afternoon. *Id*. at 129:8-13, 228:8-17. Plaintiff admitted that Ms. Beckett never instructed her to return to work in the ED after Plaintiff requested not to work there. *Id*. at 115:20-116:2, 270:2-16.

Plaintiff, a Probationary Employee, Is Terminated Because of Her Misconduct

28. After consulting with Ms. Freeman and obtaining approval from HR, Ms. Beckett terminated Plaintiff on the morning of August 2, 2006. Ex. 11 (Beckett Dep.) at 74:4-75:8. As stated in Plaintiff's termination letter, she was fired for disobeying Ms. Beckett's order to remain in the Leavey Center and then taking an inordinate amount of time to return to work on August 1, 2006. Ex. 1 (Termination Letter). In addition, Plaintiff's termination letter indicates that Plaintiff's termination was also due in part to the fact that she failed to report to Ms. Beckett that Ms. Freeman advised her to follow her supervisor's instructions and return to work since she was cleared to do so the day before. *Id*.

SUMMARY JUDGMENT STANDARDS

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact…" Fed. R. Civ. P. 56(c). This rule applies equally to discrimination actions. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). A factual dispute is "material" only if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id*. After discovery, if the non-moving party "has

failed to make a sufficient showing on an essential element of [her] case with respect to which [she] has the burden of proof," then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To avoid summary judgment, the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to find that the defendants' employment decision was more likely than not based on discrimination. *Adeyami v. Dist. of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008). Plaintiff has failed to satisfy this burden.

ARGUMENT

I. PLAINTIFF'S DISABILITY DISCRIMINATION CLAIM FAILS AS A MATTER OF LAW

The undisputed record evidence reveals that the Hospital terminated Plaintiff's employment for legitimate, non-discriminatory reasons – namely, "misconduct while on probation." Ex. 1 (Termination Letter). There is not a shred of evidence that the Hospital discriminated against her by failing to accommodate her request not to work in the ED or terminating her employment because of her asthma. There is also no evidence that the Hospital's stated reasons for terminating Plaintiff's employment are a pretext for discrimination.

After Plaintiff presented a note to the Hospital's Employee Health Department stating that her asthma no longer allowed her to work in the ED due to fear of exposure to sick people, the Hospital initiated the interactive process and began evaluating whether it could accommodate Plaintiff's request. While the Hospital was evaluating her request, the Hospital did not assign Plaintiff to work in the ED, in accordance with her doctor's note. *See* Ex. 21 (Dr. Finkelman's Note). Despite these facts, Plaintiff, a probationary employee, refused to follow her supervisor's instruction to return to work in Gorman, left the Hospital premises without authorization, and

took three hours to return to work after being instructed to return immediately. Thus, Plaintiff's actions more than establish legitimate, non-discriminatory reasons to terminate her employment.

Because Plaintiff can neither establish a *prima facie* case of discrimination nor prove that the Hospital's termination of her employment was pretextual, both her discriminatory termination and failure to accommodate claims must be dismissed, as a matter of law.

A. PLAINTIFF CANNOT SATISFY HER *PRIMA FACIE* BURDEN REGARDING HER DISABILITY DISCRIMINATION AND FAILURE TO ACCOMMODATE CLAIMS

In this case, Plaintiff's discriminatory termination and failure to accommodate claims must be dismissed, as a matter of law, because she cannot prove any of the elements of her *prima facie* case. To establish a *prima facie* case of discrimination, Plaintiff must prove: (1) that she was an individual who had a disability within the meaning of the applicable statutes; (2) that she was qualified for the Patient Access PFA position; and (3) that she suffered an adverse employment action because of her disability.[7] *Duncan v. Washington Metro. Transit Auth.,* 240 F.3d 1110, 1114 (D.C.Cir.2001) (en banc); *Thompson v. Rice,* 422 F.Supp.2d 158, 166 (D.D.C.2006). Plaintiff cannot meet these requirements. In this case, Plaintiff's own sworn

[7] It is unsettled in the DC Circuit whether a failure to accommodate claim requires plaintiffs to meet the three-prong test above, or instead, a four-prong prima facie test – (1) that he or she was an individual with a disability under the applicable statutes; (2) that the employer had notice of the disability; (3) that with a reasonable accommodation, the plaintiff could perform the essential functions of the position; and (4) that the employer refused to make such an accommodation." *Bonieskie v. Mukasey*, 540 F. Supp. 2d 190, 196 (D.D.C. 2007). As Judge Friedman noted in his decision in *Bonieskie*, the difference between the three and four-prong tests is unimportant in that the notice requirement of the four-prong test is implied in the three-prong test's requirement that the adverse action be due to the plaintiff's disability. *Id*. at 196 n. 2. In Plaintiff's case, the fact that she is not disabled and cannot perform the essential functions of the position with or without accommodation dooms her case under either test. Therefore, for the sake of brevity, the Hospital proceeds to demonstrate how her claim fails to meet the three-prong test. Should the Court feel the four-prong test is more appropriate in considering Plaintiff's failure to accommodate claim, the Hospital avers that she fails to meet prongs 1, 3, and 4 for the reasons stated throughout this brief.

testimony demonstrates that she is not disabled within the meaning of the ADA, the Rehab Act or the DCHRA. In addition, she cannot establish that she was "qualified" for the PFA position or that she suffered an adverse action because of her alleged disability. Because Plaintiff cannot satisfy any element of her *prima facie* case, her claims must be dismissed, as a matter of law.

1. PLAINTIFF CANNOT SATISFY THE DEFINITION OF BEING DISABLED UNDER THE APPLICABLE STATUTES

Under the ADA, the Rehab Act and the DCHRA, a plaintiff may meet the definition of "disabled" if she can prove that she is: (1) currently disabled; (2) has a record of disability; or (3) is regarded as disabled. 42 U.S.C. § 12102(2).[8] In this case, Plaintiff's mild, well-controlled asthma does not meet any definition of disabled under any of the three statutes.

a) PLAINTIFF IS NOT ACTUALLY DISABLED BECAUSE SHE IS NOT SUBSTANTIALLY LIMITED IN ANY MAJOR LIFE ACTIVITIES

Here, Plaintiff admitted under oath that her asthma condition does not limit her ability to participate or engage in any activity. Ex. 2 (Ellis Dep.) at 139:9-11 (Plaintiff answering "no" to the question "are there any other activities you can't engage in [besides working in the ED]?"). For this reason alone, her claim that she is disabled fails, as a matter of law.

To qualify as actually disabled, Plaintiff must demonstrate that her asthma substantially limited a major life activity. 42 U.S.C. § 12102(2)(a); *Toyota Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002) ("merely having an impairment does not make [an individual] disabled"); *Duncan*, 240 F.3d at 1114; *Swanks v. Washington Metro. Transit Auth.*, 179 F.3d

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[8] The definition of what impairments qualify as disabilities under the ADA, Rehab Act and DCHRA is virtually the same and courts therefore analyze disability discrimination claims made under each of these statutes in the same manner. *Whitbeck v. Vital Signs, Inc.*, 159 F.3d 1369, 1371 (D.C. Cir. 1998) (finding that the DCHRA and ADA share the same definition of disability); *Dage v. Johnson*, 537 F. Supp. 2d 43, 49 n.4 (D.D.C. 2008) (Bates, J.) (finding the Rehab Act and ADA should be analyzed in the same manner).

929, 934 (D.C. Cir. 1999); *Thompson*, 422 F. Supp. 2d at 169 (Bates, J.). Further, as this Court and the Supreme Court have noted, the terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled." *Thompson*, 422 F. Supp. 2d at 169 (Bates, J.) (quoting *Toyota*, 534 U.S. 184, 197 (2002)). A major life activity is one that is "of central importance to daily life." *Toyota*, 534 U.S. at 197.

Notwithstanding Plaintiff's sworn testimony, at her deposition, that she is not limited from any activity, Plaintiff's Second Amended Complaint makes the bald assertion that her asthma limits her in the major life activity of breathing. Ex. 20 (Second Amended Complaint) ¶ 35 First, her general allegation in her complaint, without more, is insufficient to create a genuine fact issue on the question of disability. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (plaintiff's conclusory allegations in plaintiff's affidavit regarding retaliatory animus of defendant insufficient to overcome summary judgment). Second, perusal of the undisputed record in this case makes clear that Plaintiff is not limited in any major life activity.

The undisputed record evidence in this matter indicates that Plaintiff's asthma has little impact, if any, on her daily activities. Plaintiff and her expert witness testified that her asthma was, at all times, well controlled through her medications. Ex. 2 (Ellis Dep.) at 59:11-13 (medications control her asthma), 64:18-20 (same); 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler); Ex. 3 (Lerner Dep.) at 35:7-14 (agreeing that Plaintiff's original diagnosis of mild persistent asthma by Dr. Hasselquist was correct); Ex. 4 (Lerner Rep.) at P000156 (describing Plaintiff's condition as "mild persistent bronchial asthma" and noting that she is "well maintained" by her medications).

Over the past 10 years, Plaintiff has rarely had asthma attacks and when they have occurred she has been able to quickly quell the symptoms through the use of her Albuterol

inhaler. Ex. 6 (Plaintiff's Pre-Placement Health Clearance) at ELLIS000090 (noting zero episodes of asthma in the last 6 or 7 months); Ex. 2 (Ellis Dep.) at 232:14-19, 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler). Additionally, Plaintiff testified, under oath, that she has never been restricted from participating in any activities as a result of her asthma. Ex. 2 (Ellis Dep.) at 139:9-11, 276:12-15, 277:20-278:3 (confirming she is not restricted in any activities by her asthma). She even admitted that at the time she was employed at the Hospital, she was able to exercise regularly. Ex. 6 (Plaintiff's Pre-Placement Health Clearance) at ELLIS000090; Ex. 2 (Ellis Dep.) at 60:19-61:6. Accordingly, the evidence is undisputed that Plaintiff's asthma does not substantially limit her ability to breathe.[9] *See Boone v. Reno*, 121 F. Supp. 2d 109, 111-12 (D.D.C. 2000) (finding asthmatic applicant not substantially limited because she admitted her medication controls her asthma and because of her high level of physical fitness); *Plotkin v. Shalala*, 88 F. Supp. 2d 1, 3 n. 2 (D.D.C. 2000) (finding plaintiff with tobacco induced asthma not disabled in part because of her ability to teach a swimming class); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) (finding asthmatic plaintiff not substantially limited in ability to breathe in light of plaintiff's testimony that she was able to exercise regularly); *Byrne v. Bd. of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992) (holding that in a respiratory impairment case, evidence that person participated in recreational activities undermines finding that person is disabled).

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[9] All of the facts and circumstances that give rise to Plaintiff's claims in this case all arose prior to the effective date of the ADA Amendments Act of 2008 ("ADAA"). The ADAA does not apply retroactively. *Lytes v. DC Water and Sewer Auth.*, 572 F.3d 936, 942 (D.C. Cir. 2009). As such, any mitigating measures such as medications must factor into the decision of whether Plaintiff's asthma constitutes a disability under the applicable laws. *Sutton v. United Airlines*, 527 U.S. 471, 482 (1999).

Plaintiff's admission during her deposition that she was not restricted in any way as a result of her asthma, including not preventing from exercising, mirrors the testimony of the plaintiff in *Heilweil* who testified during her deposition that her respiratory condition did not limit her ability to exercise and that she swam regularly. The court in *Heilweil* found this admission to be crucial in determining that the plaintiff was not substantially limited in the major life activity of breathing. *Heilweil*, 32 F.3d at 723 (finding that plaintiff's admissions indicated that her breathing was not limited in any significant way).

As in *Heilweil*, Plaintiff's regular physical activity precludes a finding that she was substantially limited in the major life activity of breathing.

b) PLAINTIFF DOES NOT HAVE A RECORD OF IMPAIRMENT QUALIFYING HER AS DISABLED UNDER APPLICABLE LAW

Plaintiff's claim that she has a "record of impairment" qualifying her as disabled under the applicable laws also fails, as a matter of law, because there is not a shred of evidence that she has ever been substantially limited in any major life activity as a result of her asthma. In fact, Plaintiff repeatedly confirmed at her various depositions that she is not limited from engaging or participating in any activity. Ex. 2 (Ellis Dep.) at 139:9-11, 276:12-15, 277:20-278:3 (confirming she is not restricted in any activities by her asthma).

Moreover, Plaintiff's treating physician, Dr. Finkelman, never restricted any of Plaintiff's activities as a result of her asthma. Ex. 18 (Finkelman Dep.) at 36:15-19. It is well-settled that the mere fact that Plaintiff was diagnosed with asthma several years ago fails to establish that she has a record of impairment that qualifies her as disabled under applicable law. *Adams v. Rice*, 531 F.3d 936, 946 (D.C. Cir. 2008) (stating that "evidence of a prior illness, without more, is insufficient to show a record of disability").

To satisfy the record of impairment test, Plaintiff must adduce evidence to prove that at some point in time, she was substantially limited in the major life activity of breathing. *Adams*, 531 F.3d at 946 (D.C. Cir. 2008) (citing 29 U.S.C. § 705(20)(B)); *Thompson*, 422 F. Supp. 2d at 174 (Bates, J.) (quoting 29 C.F.R. 1630.2(k) in finding that an employee is disabled based on a record of impairment if he or she "has a history of…a mental or physical impairment that *substantially limits one or more major life activities*")) (emphasis added). Plaintiff, however, cannot do so. The scant medical records produced by Plaintiff in this case combined with her testimony and that of her physicians indicate that she fails to meet this burden. The only evidence in this case is that Plaintiff was diagnosed with asthma approximately 10 years ago. Ex. 2 (Ellis Dep.) at 138:1-2. Over the past 10 years, she has had an occasional asthma attack. Ex. 6 (Plaintiff's Pre-Placemen Health Clearance) at ELLIS000090 (noting zero episodes of asthma in the last 6 or 7 months). When she has an asthma attack, she uses her Albuterol inhaler and her symptoms quickly cease. Ex. 2 (Ellis Dep.) at 232:14-19, 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler). Since her asthma diagnosis, Plaintiff's asthma has been well-maintained by her medication, and she has never been hospitalized for asthma. Ex. 2 (Ellis Dep.) at 59:11-13 (medications control her asthma), 64:18-20 (same); 257:2-9 (asthma symptoms always subside within 5 or 10 minutes of using her inhaler); Ex. 3 (Lerner Dep.) at 35:7-14 (agreeing that Plaintiff's original diagnosis of mild persistent asthma by Dr. Hasselquist was correct); Ex. 4 (Lerner Rep.) at P000156 (describing Plaintiff's condition as "mild persistent bronchial asthma" and noting that she is "well maintained" by her medications); Ex. 4 (Lerner Rep.) at P000155.

In stark contrast, the cases in which the D.C. Circuit has held that a plaintiff qualified as disabled based on a record of impairment involve plaintiffs with ample medical histories of

severe disease and incapacity. For example, the plaintiff in *Norden v. Samper*, 503 F. Supp. 2d 130 (D.D.C. 2007), had nearly died from Dengue Hemorraghic Fever ("DHF") in 2000, was on full medical disability for most of three years thereafter, and suffered severe confusion and cognitive problems during that time. 503 F. Supp. 2d at 152

In this case, Plaintiff offers no comparable evidence to substantiate her claim that she has a record of impairment sufficient to qualify her as disabled under the applicable laws. As such, her claim that she has a record of impairment sufficient to qualify her as disabled, fails as a matter of law. *Thompson*, 422 F. Supp. 2d at 174-75 (mere assertion by plaintiff, who suffered a Grade 1 subarachnoid hemorrhage requiring only a two-day hospital stay and six weeks of sick leave, that she had a record of impairment was insufficient to support disability claim without showing how she was substantially limited in any major life activities).

c) THERE IS ALSO NO EVIDENCE THAT PLAINTIFF WAS REGARDED AS DISABLED

Similarly, there is no evidence that anyone at the Hospital "regarded" Plaintiff as disabled. To establish that she was regarded as having a disability, Plaintiff must show that the Hospital "mistakenly believes that [she] has a physical impairment that substantially limit one or more major life activities" or "mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Adams*, 531 F.3d at 945 (quoting *Sutton*) (internal citation omitted). Plaintiff fails to meet this test, as a matter of law.

Even after amending her Complaint (twice), to allege most recently that she was regarded as disabled, Plaintiff testified at her deposition that, in fact, no one at the Hospital treated her as disabled:

Q [By Counsel for the Hospital]: Okay. But you don't have any information or basis to believe that Georgetown regarded you as disabled; is that correct?

A [By Plaintiff]: I wasn't given any type of documentation that they determined me to be disabled.

Q [By Counsel for the Hospital]: Okay. Did anyone at Georgetown treat you like you were disabled?

A [By Plaintiff]: Not to my recollection. Ex. 2 (Ellis Dep.) p. 268:10-21.[10]

Plaintiff's own testimony, therefore, eviscerates her claim that she was regarded as disabled. *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7th Cir. 1997) (employee's regarded as claim dismissed where he conceded during deposition that he was unaware if anyone else considered his diabetes disabling). As such, Plaintiff's claim that she was regarded as disabled fails in its entirety, as a matter of law, and should be dismissed.

B. PLAINTIFF ALSO WAS NOT QUALIFIED FOR THE PFA POSITION BECAUSE SHE WAS UNABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB

Plaintiff's disability discrimination claim must be dismissed for the further reason that she was not a "qualified" individual with disability because by Plaintiff's own admission, she could not perform the essential functions of her Patient Access PFA position. To be a "qualified individual with a disability," Plaintiff must show that she could perform the essential functions of her job with or without a reasonable accommodation. 42 U.S.C. § 12111(8); *Duncan v.*

[10] Plaintiff's Counsel objected that the first question in this sequence called for a legal conclusion. However, the question merely asked whether Plaintiff was aware whether or not anyone at the Hospital believed she was disabled.

Harvey, 479 F. Supp. 2d 125, 132 (D.D.C. 1997) (plaintiff not "qualified individual with a disability" because she was unable to perform pipetting – an essential function of her job – with or without accommodation). Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires." *Duncan*, 479 F. Supp. 2d at 132 (citing 29 C.F.R. § 1630.2(n)(1)). In this case, the ability to work in the ED and around sick people were essential functions of her job. Because Plaintiff admitted that she could not perform these job functions, she cannot prove this element of her *prima facie* case, as a matter of law.

Here, Plaintiff presented a doctor's note that stated she could no longer work in the ED (due to the potential for exposure to sick people), and Plaintiff requested not to work in the ED as a result.[11] Ex. 21 (Dr. Finkelman's Note). As discussed below, the ability to work in the ED and be near sick patients were essential functions of her position. Thus, Plaintiff's inability to meet these essential functions of her job forecloses her claims of discrimination and failure to accommodate.

The essential functions of a position are typically determined by reviewing the job description for the position and the "employer's judgment as to which functions are essential." *McFadden v. Ballard, Spahr, Andrews & Ingersoll*, 580 F. Supp. 2d 99, 106-07 (D.D.C. 2008) (citing 42 U.S.C. § 12111(8)). In this case, the undisputed record evidence is that the ability to

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[11] It should be noted that Plaintiff's requested accommodation – not to work in the ED – would not have sufficiently accommodated her request not to work around sick people since Plaintiff conceded that the other areas in the Hospital in which Patient Access PFAs work also require registering sick patients. *See*, e.g., Ex. 2 (Ellis Dep.) at 34:17-21 (admitting patients who enter the Hospital through Main are sick), 139:12-140:8 (conceding patients she was exposed to in other areas of the Hospital like elevators and the cafeteria are also likely to be sick since they are at the Hospital).

work in the ED, which requires one to be around sick people, is an essential function of the Patient Access PFA position. Both the job description and the undisputed testimony by Plaintiff's supervisors and Hospital human resources personnel reveal that the Patient Access PFAs job, which includes 24-hour registration of patients, required that PFAs have the ability to work in the ED and work around sick people.

Plaintiff's job description refers extensively to assisting ED patients in several areas as one of the essential functions of the position. Ex. 12 (PFA Job Description) at ELLIS000046-47 (describes how the procedures for collecting and documenting demographic and financial information vary for unscheduled urgent/emergent patients). Plaintiff even admitted, under oath, that she needed to be trained on patient registration codes used by Patient Access PFAs working in the ED. Ex. 2 (Ellis Dep.) at 65:10-66:10.

Additionally, the testimony from Plaintiff's supervisors was that the ability to work in the ED is an essential function of the Patient Access PFA position. To that end, Ms. Felton, Ms. McKenzie, and Ms. Hecker, who were all Plaintiff's supervisors, testified that the Patient Access Department is a 24-hour department that registers patients all over the Hospital. Ex. 13 (Felton Dep.) at 25:16-26:3 (noting Patient Access PFAs register patients in at least 8 or 9 different locations); Ex. 14 (McKenzie Dep.) at 18:2-13; Ex. 10 (Affidavit of Cynthia Hecker dated 5/11/09) ¶ 2 (noting Patient Access PFAs work in several departments around the Hospital). All Patient Access PFAs must have the ability to rotate and work in all areas of the Hospital where patients are admitted to the Hospital. Ex. 2 (Ellis Dep.) at 243:9-11; Ex. 11 (Beckett Dep.) at 17:1-9, 25:1-10; Ex. 13 (Felton Dep.) at 9:3-19, 10:13-18, 65:9-66:4 (explaining that Patient Access PFAs are trained to work in all departments serviced by Patient Access so they can be rotated to assist as needed to cover employee absences). The ED is one of

the areas where patients are admitted to the Hospital. Ex. 9 (Schweickhardt Dep.) at 101:17-102:6. It is essential that all Patient Access PFA be able to work in the ED and around sick people because of the Hospital's need to be able to respond to any mass emergency situations that may arise and possess the capacity to handle a flood of patients entering the ED in a short amount of time, and because patients coming to the Hospital for services are by definition generally sick and need to be assisted in a one-on-one setting to be processed through registration. Ex. 15 (Declaration of Cynthia Hecker dated 10/9/09) ¶ 5.

Federal courts have recognized that the ability to rotate to different areas of an employer's business is often an essential function of a particular position. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1177 (10th Cir. 1999) (noting the ability to rotate to different parts of the employer's brewing operation was an essential function of the employee's position as it permitted the employer to respond to increases in the demand for a particular job ability); *Laurin v. Providence Hosp.*, 150 F. 3d 52, 59-60 (1st Cir. 1998) (noting the ability to rotate shifts as an essential function in a hospital setting where adequate staffing at all times is necessary for patient care).

The *Laurin* case is particularly instructive in Plaintiff's case as it involved a nurse whose position required her to have the ability to work 24/7 and rotate shifts accordingly. 150 F. 3d at 59-60. In determining the ability to rotate shifts was an essential function, the court noted that the 24-hour nature of a hospital "affords a particularly compelling context in which to defer to rational staffing judgments by hospital employers based on the genuine necessities of the hospital business." *Id*. The same is true here. The Hospital rationally required all of its Patient Access PFAs to be able to rotate to work in the ED to ensure there is always adequate staffing in

this most critical of patient care departments. As such, there is no question that working in the ED is an essential function of the position.

As for having the ability to work in close proximity to sick patients, it is undeniable that ability was an essential function of Plaintiff's position. First, the job description describes several duties that must be completed in close proximity to patients. Ex. 12 (PFA Job Description) at ELLIS000046-47 (including, but not limited to, communicating with the patients regarding their demographic and financial information on the day of service when the patient is physically present in the Hospital, placing armbands on patients, and obtaining required signatures from patients).

Second, Plaintiff admitted, as she must, that the ability to work in close contact with sick patients was a requirement of her position. Ex. 2 (Ellis Dep.) at 36:8-16 (noting there are no barriers between PFAs and patients in Main), 96:14-18 (describing completing bedside registrations of patients in the ED as part of the Patient Access PFA position). Therefore, Plaintiff's admission that she could no longer work in the ED or around sick people in general, forecloses her claim that she was qualified to perform the essential functions of her Patient Access PFA position. *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 999 (7th Cir. 2000) (plaintiff who conceded he cannot work around violent and/or infectious patients as a result of his asthma cannot perform essential functions of position where the very essence of his job was to counsel these patients).

Any argument by Plaintiff that she could have performed her essential job functions with an accommodation fails, as a matter of law. Setting aside the fact that a requested accommodation by a Hospital employee to be excused from working around sick people is non-sensical and hardly constitutes a reasonable accommodation, it should be noted that from the

moment the Hospital learned of Plaintiff's request for accommodation, the Hospital initiated the interactive process to determine whether it could accommodate Plaintiff's request. *See*, *supra*, pp. 10-13 (describing the Hospital's attempts to engage in the interactive process).

Specifically, when Plaintiff first contacted Ms. Beckett regarding her doctor's note, Ms. Beckett advised Plaintiff to provide the documentation prepared by her treating physician to Employee Health. Ex. 2 (Ellis Dep.) at 105:15-107:12. Next, according to Plaintiff's own sworn testimony, Ms. Hecker, the Director of Patient Access, and Ms. Beckett met with Plaintiff to explain the interactive process to Plaintiff and how the Hospital would proceed in evaluating Plaintiff's request for accommodation. Ex. 2 (Ellis Dep.) at 108:7-21; Ex. 20 (Second Amended Complaint) ¶¶ 70-71; Ex. 2 (Ellis Dep.) 109:4-19, 110:21-111:9-13 (stating Ms. Hecker asked about Plaintiff's restrictions and explained that after evaluating Plaintiff's request, the Hospital would ultimately make a determination about whether the Hospital could grant Plaintiff's requested accommodation). Plaintiff was next evaluated by Employee Health and provided with a Statement of Work Status Form addressed to Cynthia Hecker, Director of Patient Access, explaining the restrictions requested by Plaintiff's physician. Ex. 22 (Statement of Work Status).

After receiving the "Statement of Work Status" on August 1, 2006, Plaintiff spoke with Ms. Beckett, and Ms. Beckett instructed Plaintiff to return to work in Gorman while the Hospital engaged in interactive process and evaluated Plaintiff's request. Ex. 11 (Beckett Dep.) at 52:20-53:6, 53:21-54:5. After Plaintiff announced that she was not comfortable working in Gorman while the Hospital began the process of evaluating her request, Ms. Beckett offered to allow Plaintiff to wait in the lobby outside of Ms. Beckett's office while Ms. Beckett spoke to Human Resources to get clarification about the status of Plaintiff's request for accommodation. *Id*. at 69:14-19. After Plaintiff announced she also was not comfortable waiting in the Lobby area, Ms.

Beckett then offered her the option of waiting at the Leavey Center (which is on the Hospital's campus) to give the Hospital additional time to evaluate Plaintiff's request. *Id*. at 69:20-70:4.

While the Hospital was in the process of evaluating Plaintiff's request for the accommodation, Ms. Beckett learned that Plaintiff left the Hospital premises without authorization, misrepresented the instructions that she had been provided by Human Resources regarding returning to work in Gorman, and then took three hours to return to the Hospital after been instructed to return immediately. *See* Ex. 1 (Termination Letter). As a result of Plaintiff's own intervening misconduct, her employment was terminated, and the interactive process regarding Plaintiff's request for accommodation ceased.

In sum, the undisputed facts reveal that Plaintiff cannot prove that she was either qualified to perform the essential functions of her job or that the Hospital failed to offer her a reasonable accommodation. The only evidence is that Plaintiff could not perform the essential functions of her job. And in any event, while the Hospital was in the process of evaluating Plaintiff's request for accommodation, she committed misconduct that resulted in her termination. For these further reasons, Plaintiff's discrimination claim should be dismissed.

C. PLAINTIFF WAS TERMINATED FOR LEGITIMATE, NON-DISCRIMINATORY REASONS AND SHE CAN ADDUCE NO EVIDENCE THAT HER TERMINATION WAS A PRETEXT FOR DISCRIMINATION

There is overwhelming evidence that the Hospital terminated Plaintiff's employment for legitimate, non-discriminatory reasons. The Hospital terminated Plaintiff's employment after: (1) Plaintiff failed to follow Ms. Beckett's instructions to remain in the Leavey Center while Ms. Beckett spoke with Ms. Freeman; (2) took three hours to report for duty after Ms. Beckett was finally able to track down Plaintiff; and (3) misrepresented to Ms. Beckett what Ms. Freeman had told Plaintiff in reference to Ms. Beckett's prior instructions to report for duty

in Gorman, while the Hospital evaluated Plaintiff's request not to work in the ED. Ex. 1 (Termination Letter).

It is axiomatic that misconduct such as that exhibited by Plaintiff serves as a legitimate, nondiscriminatory reason for terminating an employee. *Edwards v. U.S. Envtl. Prot. Agency*, 456 F. Supp. 2d 72, 94 (D.D.C. 2006) (Bates, J.) (recognizing an employee's misconduct is a legitimate non-discriminatory reason for the adverse action at issue); *Nichols v. Billington,* 402 F.Supp.2d 48, 73 (D.D.C.2005) (holding that the employee's "persistently uncooperative attitude, insubordination, and misconduct" constituted a legitimate, nondiscriminatory reason for a proposed suspension). This is particularly true where, as here, the employee at issue is a probationary employee. Ex. 8 (Hospital Probationary Employment Period policy) at ELLIS000055 (noting that employees can be terminated at any time during their probationary period if their behavior is unacceptable).

To the extent that Plaintiff attempts to argue that the Hospital's articulated reasons for termination are a pretext for discrimination, such argument fails, as a matter of law. The only evidence of pretext to which Plaintiff has pointed is a telephone conversation she had with Ms. Beckett on July 26, 2006. Plaintiff claims that when she first told Ms. Beckett that she could no longer work in the ED during this conversation that Ms. Beckett's reaction was to say that "we will have to part ways." Ex. 2 (Ellis Dep.) at 105:10-12. Although Ms. Beckett actually recalls being confused by Plaintiff's statement that she could no longer work in the ED and asking whether or not that meant she was quitting, Plaintiff admits that Ms. Beckett did not fire Plaintiff at that time. Ex. 2 (Ellis Dep.) at 106:14-15; Ex. 16 (Beckett note regarding Plaintiff) at ELLIS000049. Instead, Plaintiff admits Ms. Beckett told her to follow Hospital procedures and

bring her medical documentation to Employee Health to start the process of determining whether or not her request could be accommodated. Ex. 2 (Ellis Dep.) at 105:15-19.

Plaintiff also admits that Cynthia Hecker, who is her second-line supervisor and also Ms. Beckett's boss, confirmed to Plaintiff that she should submit her documentation to Employee Health and the Hospital would evaluate her request for accommodation. *Id*. at 111:3-13. Moreover, Plaintiff admits that her conclusion that Ms. Beckett signaled she was going to fire Plaintiff is nothing but her own personal belief and opinion. *Id*. at 107:9-12 (Plaintiff responding "yes" to "My question was it is your opinion that Ms. Beckett was leaning towards terminating you, right?"). However, Plaintiff's personal belief, without more, is not evidence of discrimination. *See, e.g., Steinberg v. Dep't of Justice,* 179 F.R.D. 357, 360 (D.D.C.1998); *Carter v. Peña,* 14 F.Supp.2d 1, 7 (D.D.C.1997) (use of conjecture is particularly inappropriate where plaintiff would bear the burden of proof at trial) (citing *Celotex Corp.,* 477 U.S. at 322-23); *Campbell-El v. Dist. of Columbia,* 874 F.Supp. 403, 407 (D.D.C.1994) ("Beliefs are not fact," and a plaintiff-to defeat a motion for summary judgment by a defendant-must provide facts). Plaintiff's so-called evidence of pretext is nothing more than conjecture and speculation that cannot withstanding summary judgment, as a matter of law.

II. PLAINTIFF'S RETALIATION CLAIMS ALSO FAIL BECAUSE HER INTERVENING MISCONDUCT CONSTITUTED AN INDEPENDENT AND NON-RETALIATORY REASON FOR TERMINATING HER EMPLOYMENT

Plaintiff's retaliation claim fails as a matter of law because her intervening misconduct breaks any alleged causal connection between Plaintiff's protected activity of requesting accommodation and her termination.

To satisfy her *prima facie* burden on her retaliation claims, Plaintiff must show that she engaged in protected conduct, that she suffered an adverse employment action, and that action

was causally linked to her protected conduct. *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003); *Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 91 (D.D.C. 2006). Here, Plaintiff's claim falters for one of the same reasons as her discrimination and failure to accommodate claims – namely, her intervening misconduct breaks any causal connection between her request for accommodation and her termination. Plaintiff's failure to follow her employer's instruction and return to work in Gorman, followed by her three hour delay to return to work (without explanation), even after being summoned by her supervisor, breaks any causal connection between her request for accommodation and her termination.

In cases where an employee engages in the type of misconduct engaged in by Plaintiff, temporal proximity between Plaintiff's protected activity and her termination are not, alone, sufficient to satisfy the causal connection prong for establishing a *prima facie* case of retaliation. *Hankins v. Airtran Airways, Inc.*, 237 Fed. Appx. 513, 520-21 (11th Cir. 2007) (noting that "close temporal proximity between two events, standing along, is not a panacea, absent any other evidence that the employment decision was causally related to the protected activity" in finding plaintiff's act of misconduct five days after complaining of discrimination broke the causal chain). The plaintiff's request for an accommodation does not provide a free pass for the plaintiff to be insubordinate or engage in misconduct. *Gubitosi v. Kapica*, 154 F.3d 30, 33 (2d Cir. 1998) (finding it impossible to overlook plaintiff's blatant misconduct that occurred approximately three weeks after she raised her complaints about police procedures in determining her suspension did not constitute retaliation).

The facts of *Kiel v. Select Artifacts, Inc.*, 169 F.3d 1131 (8th Cir. 1999) are analogous to those in the instant case and provide additional grounds for dismissing Plaintiff's retaliation claims. In *Kiel*, the plaintiff, a deaf employee, drafted a letter to the co-owner of his employer

requesting that a TDD device be provided. *Id*. at 1134. After observing Kiel use the photocopier to make a copy of this letter, a different co-owner of the company approached Kiel and inquired about his use of the copier. *Id*. In front of other co-workers, Kiel informed her of his request and when she denied it, he yelled at her, slammed his desk drawer, and made a remark about her recent purchase of a new car. *Id*. The company thereafter decided to terminate him for insubordination. *Id*. The Eighth Circuit determined that although his termination occurred on the exact same day as his request for an accommodation, his insubordination broke any causal link between his request and the decision to fire him. *Id*. at 1136.

In the instant case, as in *Kiel,* Plaintiff engaged in misconduct shortly after she requested an accommodation when she left the Hospital without authorization and then failed to report for duty for three hours (without calling) after being told to return by her supervisor. Ex. 11 (Beckett Dep.) at 83:22-84:4 (describing Plaintiff's delay in returning to work as unreasonable). Further, it is undisputed that Ms. Beckett believed, based on her conversation with Ms. Freeman in Human Resources, that Plaintiff misrepresented to Ms. Beckett the instructions Plaintiff received from Ms. Freeman regarding returning to work in Gorman. Ms. Beckett documented the misrepresentation in Plaintiff's termination letter. Ex. 1 (Termination Letter) (stating Plaintiff "indicated that [Plaintiff] spoke with Human Resources but failed to report that the Human resources [sic] representative strongly recommended that you report back to your work assignment"). Plaintiff has not, and cannot, offer any evidence that Ms. Beckett did not believe Plaintiff lied to her. Moreover, as discussed above, Plaintiff's misconduct in failing to follow the instructions of her supervisor was a legitimate, nondiscriminatory reason for her termination and consistent with Georgetown's practices as policies. Ex. 8 (Hospital Probationary Employment

Period policy) at ELLIS000055 (noting that employees can be terminated at any time during their probationary period if their behavior is unacceptable).

The only evidence in the record is that the Hospital appropriately responded to Plaintiff's admitted misconduct. *See Argo v. Blue Cross and Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006) (holding that timing of plaintiff's termination the morning after his misconduct conflicts with a finding his termination was a pretext for retaliation regarding his sexual harassment claim filed three weeks before because the company acted in response to a particular disciplinary problem). In short, the Hospital's decision to terminate a probationary employee for misconduct constitutes a legitimate, non discriminatory and non-retaliatory basis for her termination.

CONCLUSION

For the reasons stated above, the Hospital's Motion for Summary Judgment should be granted, and all of Plaintiff's claims should be dismissed with prejudice.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of October 2009, I caused a copy of the foregoing to be delivered via electronic mail in accordance with the U.S. District Court for the District of Columbia's Rules of Civil Procedure to the following individual:

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