IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LINDA VELTRI	:	
	:	
Plaintiff,	:	
	:	Case No. 2:09-cv-416
vs.	:	
	:	Judge James L. Graham
DFS SERVICES LLC,	:	
	:	Magistrate Judge Kemp
Defendant.	:	

OPINION AND ORDER

Plaintiff Linda Veltri ("Veltri") alleges that during her employment with defendant DFS Services LLC ("DFS"), DFS violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Ohio Civil Rights Act, Ohio Rev. Code § 4112.01 *et seq.*, and Ohio public policy by discriminating against her based on her disability.[1] DFS has filed a motion for summary judgment that is now ripe for this court's review.

I. FACTS

The facts of this case are largely undisputed and are recited in a light most favorable to Veltri. Veltri was a long-term employee of DFS, beginning her employment with the company in 1989 and ending with her resignation on August 18, 2008. Throughout her tenure, Veltri held various positions, the last as a senior team leader in the DFS Card Member Assistance ("CMA") department. That department handles the collection of

[1]Veltri's amended complaint also alleges violations of the Family and Medical Leave Act (FMLA), but Veltri abandoned these claims in her Response in Opposition to DFS's motion for summary judgment. (Plaintiff's Response in Opposition, Doc. 29, p. 1 ("Veltri chooses not to defend DFS' Motion in regards to her Family and Medical Leave Act claim . . .").) Similarly, although Veltri's Amended Complaint contains a charge of retaliation, defendant asserted in its Motion that Veltri had no evidence to support such a claim and Veltri did not dispute this. (Defendant's Motion for Summary Judgment, Doc. 27, p. 12 n. 23.) Thus, Veltri has abandoned her retaliation claim as well.

outstanding accounts, and the employees within that department contact cardholders in an attempt to secure payments.

In her role as senior team leader, Veltri was responsible for ensuring that the employees she supervised satisfied their midmonth and month-end deadlines. Several of her monthly deadlines were time sensitive in nature, including timekeeping, performance evaluations, discipline, and the submission of monthly reports. Veltri also conducted monthly meetings with her team members as well as periodic training sessions.

Veltri was also expected to satisfy certain monthly goals. These goals included team dollar goals, compliance monitoring, and department results when comparing her team to other centers. Each collection representative was to achieve or exceed their defined amount of monthly dollars collected. This amount was based on the amount of money collected by the department, divided by the hours worked within the department. Therefore, an increase in sales in one shift would increase monthly goals for the entire department.

As a senior team leader, Veltri worked within level 1 of the CMA department. The employees she supervised in level 1 were responsible for collecting accounts that were 60 to 89 days delinquent. Accounts that were delinquent for fewer days, such as 0-30, were considered easier to collect because a cardholder in default fewer days was statistically more likely to pay when contacted. In order to contact cardholders, an automatic dialer would place phone calls for the CMA representatives. The automatic dialer routed calls of the proper delinquency level to the proper representatives, *i.e.*, level 1 representatives would receive calls for card members that were for 60-89 days delinquent.

In the early part of 2006 and during Veltri's time as a senior team leader in the CMA department, the automatic dialer system began experiencing what came to be known as "system issues." The Level 1 evening shift began running out of accounts to call that

were at the appropriate level of delinquency of 60-89 days. As a result, the automatic dialer began routing calls to evening shift level 1 employees that were only 0-30 days delinquent and, therefore, easier to collect. These system issues allowed the evening shift to collect more dollars on delinquent accounts than other level 1 shifts who did not receive the 0-30 day calls. Because monthly goals are based upon the amount of money collected by the department divided by the hours worked within the department, the system issues increased the goals for all level 1 employees. In other words, the system issues increased the level of expectations for the employees Veltri supervised and for Veltri herself.

Veltri and other team leaders received complaints from their subordinates about the system issues and complained to upper management. Veltri alleges DFS still required her to discipline subordinates for performance falling below the monthly goals, even though the goals were unfairly skewed. She described her high stress level to her manager and he told her that DFS was "working on it." Although DFS assured CMA employees that they were trying to fix the system issues, months went by and nothing changed.

Veltri alleges that the stress of the system issues caused her to suffer physical and mental impairments. In 2006, she began taking medication for anxiety because of the stress she was under at work. In 2007, Veltri began having difficulty speaking clearly and expressing her ideas in meetings and her manager commented about her inability to articulate. She then began to make extensive notes to read from during these meetings so that she could meaningfully participate. At one point, her doctor required her to wear a heart monitor for 24 hours so that he could monitor her blood pressure. Veltri alleges her manager "was aware of this test and the reason for the testing." Veltri Affidavit, ¶14, attached to Plaintiff's Motion in Opposition (hereinafter "Veltri Aff.").

At her home, on September 16, 2007, Veltri experienced a "severe anxiety attack" that caused her to lose "control of [her] body." (Veltri Aff. ¶15.) She had trouble breathing, her muscles tensed up, and she was unable to speak. She then began crying, uttering grunts, and losing motor control. The attack subsided throughout the evening. She consulted with her doctor the next day and elected to take short term disability leave under the DFS group plan.

DFS retained the Reed Group to administer its leave of absence policies and certify requests for short term disability benefits. The Reed Group acted as a liaison between DFS and the employee when an employee took disability leave. On December 8, 2007 Veltri's therapist, Stephanie Leach, faxed a fitness for duty form to the Reed Group requesting that DFS modify Veltri's job duties for a period of thirty days, beginning January 7, 2008. Leach requested that Veltri have limited work hours, increased time to satisfy deadlines, no responsibility for organizing trainings and meetings, and no responsibility for conducting performance evaluations.

On December 12, 2007, the Reed Group informed DFS of its receipt of the fitness for duty form. On January 3, 2008, Veltri returned a call from DFS Human Resource Manager Jennifer O'Dee. During that conversation, O'Dee asked Veltri if Veltri was aware of the request, and Veltri indicated that she was not. O'Dee then read aloud to Veltri the accommodation request submitted by the therapist. O'Dee informed Veltri that she was planning a meeting with DFS VP Dan Stedman and DFS Director of Operations Sherry Highfield regarding Veltri's therapist's accommodation request. O'Dee informed Veltri that she would have to attend trainings and meetings. Veltri told O'Dee that her therapist would not have a problem with this requirement. O'Dee then indicated that DFS did not have to accommodate any of Veltri's requests. O'Dee informed Veltri that she would contact

Karen Anderson from the Reed Group in an effort to obtain further clarification concerning the accommodations.

Ultimately, O'Dee conferred with Highfield and Stedman. Highfield and Stedman suggested that Veltri could work a 20-hour per week schedule, be reassigned to a different supervisor, and be given the assistance of a Team Coach. Highfield and Stedman said they could not accommodate the request that Veltri have increased time on deadlines, not be responsible for organizing training or meetings, and not be responsible for performance evaluations. O'Dee then notified Karen Anderson of the Reed Group regarding how DFS could accommodate Veltri's request, stating "We will not, however, be able to accommodate the increased time for deadlines, no performance evaluations, not being responsible for organizing or attending meetings. These are essential functions of the position and would cause a hardship to the business as well as the employees on her team." January 3, 2008 E-mail from Jennifer O'Dee to the Reed Group, attached as Exhibit N to DFS's Motion for Summary Judgment.

The following day, on January 4, 2008, Anderson informed Veltri that she would be permitted to return to work with a modified work schedule of four hours per day with a coach as of January 7, 2008. Veltri was informed that she needed to be able to attend meetings and training sessions and that she would be required to perform all her position duties while working her reduced hours. Later that same day, a Reed Group representative called to tell Veltri that she could not return to work because her doctor had not released her to return to work under the accommodations offered by DFS.

Later in January, Veltri contacted the Reed Group and asked if she could assist the Human Resources department with interviews, be a floating manager, or be a flex-time manager. These requests were denied. Veltri acknowledges that she had never worked in

the HR department before or been officially assigned to human resources and she acknowledged that the position of floating manager would have to be created specifically for her. Veltri was told by DFS that there was no such position as a flex-time manager.[1]

On January 14, 2008, DFS received a request for a revision of the accommodations that eliminated some of her restrictions but still retained the "increased time on deadlines" request. (January 14, 2008 E-mail from David Wachowiak attached as Exhibit 11 to Plaintiff's Motion in Opposition.) DFS responded that "due to the essential functions of the position, deadlines are a required task of a [team leader]." (*Id.*)

On February 6, 2008, Veltri's therapist again changed the accommodations request to only include a Team Coach and limited work hours for 30 days, with a return to work date of February 22, 2008. On February 11, 2008, DFS told Reed Group that Veltri's team leader position had been filled and that they could offer her a CMA collections representative position instead at four hours a day. Veltri did not accept that offer.

Veltri remained on disability leave until it expired on March 14, 2008. She then remained on unpaid medical leave until May 7, 2008. On June 24, 2008, Veltri requested a personal leave from DFS, which was granted on June 26, 2008 and effective from May 8, 2008 until August 31, 2008.

On August 18, 2008, Veltri resigned from DFS. She resigned her employment because of the "unbearable working conditions and the poor treatment" that she received. Ultimately, Veltri filed this action alleging disability discrimination in violation of the ADA

[1] There is no evidence in the record that the position of "flex-time manager" was actually a position at DFS. In response to whether Veltri knew any flex-time managers that worked for DFS, she responded "We've had some." (Veltri Dep., p. 145.) She then indicated she had been told by someone working for the Ohio Civil Rights Commission that had DFS known about Veltri's request to be a flex-time manager, that request would have been honored. Veltri's vague answer and conjecture based on hearsay is insufficient to create a material issue of fact as to whether the position of flex-time manager ever existed.

and the Ohio Civil Rights Act, as well as wrongful discharge in violation of Ohio Public Policy.

II. DFS'S MOTIONS TO STRIKE

A. Motion to Strike Based on Conflicting Testimony

DFS moves this court to strike paragraph 28 of Veltri's Affidavit, arguing it conflicts with her March 9, 2010 deposition testimony. "A party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony." *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986). However, when an attorney has "not directly questioned" the deponent about an issue, the party should not be prevented from "fill[ing in] a gap left open by the moving party." *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 907 (6th Cir. 2006) and the district court should not refuse to consider a statement contained in an affidavit that is not directly contradicted by prior deposition testimony. *See Briggs v. Potter*, 463 F.3d 507, 513 – 14 (6th Cir. 2006).

DFS argues that in her deposition, Veltri indicated that her limitations were temporary in nature. The deposition questioning was as follows:

> Q: In terms of your day-to day activities, is there anything that you're limited in doing? I've talked to you about walking, talking, taking care of yourself, taking care of your children, your husband, cooking, cleaning. Is there anything in terms of your daily activities where you're actually limited, sitting here today?
> A. I mean, the only thing would be, I don't know whether you—I have difficulty as far as concentrating at times. But I get past it.
> Q. Sometimes you have difficulty focusing?
> A. Yes.
> Q. But you work through that. Is that fair?
> A. Yes.
> Q. Okay. And is it also fair that that difficulty that you have in focusing comes up from time to time, but it also subsides. Is that fair?
> A. Yes.

> Q. Okay. So in other words, that difficulty in focusing is temporary?
> A. Yes.

(Veltri Depo., pages 29–30, attached as exhibit A to DFS's Motion for Summary Judgment (hereinafter "Veltri Depo.").)

In responding to DFS's motion for summary judgment, however, Veltri attached an affidavit that stated the following:

> To this day, I need to make extensive notes so that I will not forget even routine matters. My ability to learn and comprehend has been permanently affected, and as a result it takes me much longer to study for the classes I am taking. I am still seeking medical help, and cannot sustain any true feelings of happiness or contentment.

(Veltri Aff. ¶28.)

This affidavit is not in direct conflict with Veltri's deposition testimony. During her deposition, she indicated that she had difficulty focusing and that her difficulty was temporary. She did not indicate, however, that her overall impairment of focusing was temporary. Rather, her deposition testimony can be construed to mean only that each episode where she had difficulty focusing was temporary. In the affidavit, she simply explains that her overall ability to learn and comprehend had been permanently affected. Therefore, this court **DENIES** DFS's motion to strike paragraph 28 of Veltri's affidavit.

B. DFS's Motion to Strike Based Lack of Personal Knowledge

DFS also moves to strike paragraphs 13 of Veltri's affidavit, arguing that the statements made therein were not based on Veltri's personal knowledge. Federal Rule of Civil Procedure 56(c)(4) provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the

matters stated." "It is well-settled that an 'affidavit that does not satisfy the requirements of [Rule 56(c)(4)] is subject to a motion to strike.'" *Lewis v. Horace Mann Ins. Co.*, 410 F.Supp.2d 640, 647 (N.D. Ohio 2005) (*citing Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F.Supp.2d 948, 954 (S.D. Ohio 2000)).

In paragraph 13 of her affidavit, Veltri states that she made "complaints to Sherry Highfield and Don Stedman about the system issues but neither of them like the complaint [*sic*], nor did they like the increase of complaints about the system issues." (Veltri Aff. ¶13.) There is no reason to believe based on the context of paragraph 13 that Veltri would have personal knowledge of what was in the minds of Highfield or Stedman. Thus, her comments in paragraph 13 relating to Highfield and Stedman's likes or dislikes will be **STRICKEN**.

C. DFS's Motion to Strike Based on Hearsay

DFS also moves to strike paragraphs 22 of Veltri's affidavit, arguing that the statements made therein are hearsay. The Court may consider an affidavit on a motion for summary judgment if, among other requirements, it "set[s] out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The Court cannot consider statements in an affidavit if they are inadmissible hearsay. *North Am. Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1283 (6th Cir. 1997). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

In Paragraph 22 of her affidavit, Veltri states that she "was in contact with [her] therapist who expressed frustration with Ms. Anderson regarding the accommodation request." (Veltri Aff. ¶22.) Veltri is offering the therapist's statement in order to prove its

truth—that the therapist was frustrated with Ms. Anderson's request. This statement is inadmissible hearsay and must be **STRICKEN**.

III. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *See Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 702 (6th Cir. 2008); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact in the case at issue, *LaPointe*, 8 F.3d at 378, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case on which it would bear the burden of proof at trial. *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir. 2005); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993). In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphasis in original). *See generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). Thus, "[o]nly disputed material facts, those 'that might affect the outcome of the suit under the governing law,' will preclude summary judgment." *Daugherty*, 544 F.3d at 702 (*quoting Anderson*, 477 U.S. at 248).

A district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Daugherty*, 544 F.3d at 702; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994). Rather, in reviewing a motion for summary judgment, a court must determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *see Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009).

IV. DISCUSSION

A. Disability Discrimination

In Counts II and III of her First Amended Complaint, Veltri alleges that DFS discriminated against her based on her alleged disability in violation of the ADA and Ohio Revised Code Chapter 4112.[2] The burden shifting approach utilized in employment discrimination cases also applies in cases based on disability. *Plant v. Morton Int'l, Inc.,*

[2] Federal case law interpreting the Americans with Disabilities Act is generally applicable to cases involving alleged violations of Ohio Rev. Code § 4112. *See Columbus Civ. Serv. Comm. v. McGlone*, 697 N.E.2d 204, 206–07 (Ohio 1998) (stating "[w]e can look to regulations and cases interpreting the [Americans with Disabilities Act] for guidance in our interpretation of Ohio law"). The parties have pointed to no difference between Ohio case law and federal case law that would be relevant to this case.

212 F.3d 929, 936 (6th Cir. 2000). *See also Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 882 (6th Cir. 1996).

In order to establish plaintiff's *prima facie* case of discrimination, a plaintiff must show: 1) he or she is disabled; 2) he or she is otherwise qualified for the position, with or without reasonable accommodation; 3) he or she suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced. *Monette v. Electronic Data Systems Corporation*, 90 F.3d 1173, 1186 (6th Cir. 1996).

Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to produce some legitimate, non-discriminatory reason for the adverse employment action taken against the plaintiff. *Plant,* 212 F.3d at 936; *Kocsis,* 97 F.3d at 883.

If the employer meets its burden of production, then the burden shifts back to the plaintiff to prove that the employer's stated reason was a pretext for discrimination. *Plant,* 212 F.3d at 936; *Kocsis,* 97 F.3d at 883. Although the burden of production shifts, the burden of persuasion remains at all times with the plaintiff. *Plant,* 212 F.3d at 936; *Kocsis,* 97 F.3d at 883.

1. Veltri is not Disabled

Under the first prong of her prima facie case, Veltri must demonstrate she has a "disability" within the meaning of the ADA. *See* 42 U.S.C. § 12112(a).[4] Under the ADA, "disability" with respect to an individual means: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102. Here, Veltri argues that she both has a physical or mental impairment that substantially limits one or more of her major life activities and that she has a record of such impairment. Although Veltri makes no mention of a "record of impairment" claim in her Amended Complaint, this court will assume, without deciding, that because the statute defining disability includes "record of" discrimination, the Amended Complaint implicitly encompassed a "record-of-impairment" claim. *See Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1105–06 (6th Cir. 2008).

i. A Physical or Mental Impairment that Substantially Limits One or More Major Life Activities

Veltri has argued that her mental impairment has substantially limited her ability to learn, think, and concentrate. "Merely having an impairment does not make one disabled for purposes of the ADA." *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 195 (2002). A claimant must also establish that her impairment "substantially" limits one or more "major

[4]The amendments to the ADA became effective in 2009, subsequent to the events giving rise to Veltri's lawsuit. This court must analyze Veltri's claims pursuant to the earlier version (provided above) because the amendments to the ADA do not apply retroactively. *See Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565(6th Cir. 2009) (holding that "the ADA Amendments Act does not apply to pre-amendment conduct"). Similarly, the new ADA regulations did not become effective until 2011. All references in this case to the ADA and corresponding regulations will be to those versions of the statute and regulations that were in effect as of 2008.

life activities." *Id*. at 196. *See also Bryson v. Regis Corp.*, 498 F.3d 561, 575 (6th Cir. 2007). "[A]n individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota*, 534 U.S. at 197.[5] "The ADA addresses impairments that limit an individual, not in a trivial or even moderate manner, but in a major way, to a considerable amount, or to a large degree." *Gonzales v. National Bd. of Med. Examiners*, 225 F.3d 620, 627 n. 12 (6th Cir. 2000).

"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*, 534 U.S. at 198. Plaintiffs claiming a violation of the ADA must prove a disability by offering "evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)(holding that monocular vision is not invariably a disability, but must be analyzed on an individual basis, taking into account the individual's ability to compensate for the impairment); 29 C.F.R. pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual").

"Substantially limited" means the inability to perform or a severe restriction in the ability to perform as compared to the average person. *See* 29 C.F.R. § 1630.2(j). "An 'impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation' under the ADA. *Bryson v. Regis Corp.*,

[5]The Supreme Court's holding in *Toyota* that the ADA requires that an impairment "severely restrict" major life activities has been called into question by the ADA Amendments Act, but as noted above, that Act does not govern this case.

498 F.3d 561, 576 (6th Cir. 2007) (quoting *Mahon v. Crowell*, 295 F.3d 585, 590-91 (6th Cir. 2002)). The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (1) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. 1630.2(j)(2).

The Equal Employment Opportunity Commission's ("EEOC") interpretive guidance for the ADA provides that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities." 29 C.F.R. Pt. 1630, App § 1630.2(j). "Episodic, impairing manifestations or flare-ups caused by an underlying chronic condition may constitute a disability if they occur with sufficient frequency and are of sufficient duration and severity to substantially limit a major life activity." *Brown v. BKW Drywall Supply, Inc.*, 305 F. Supp. 2d 814, 826-827 (S.D. Ohio 2004)(finding plaintiff was not disabled where there was no evidence plaintiff ever experienced more than one flare-up of his disability and it lasted approximately two and a half weeks). In determining whether an impairment is temporary or substantially limiting, a court will look at the plaintiff's condition after the time of the alleged discriminatory acts. *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001).

"Major life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). While under the regulations learning is designated as a major life activity, there is doubt in the Sixth Circuit that thinking or concentrating constitutes a major life activity, at least in the

relevant version of the Act at issue here.[3] *Linser v. Ohio Dep't of Public Health*, No. 99-3887, 2000 U.S. App. Lexis 25644, at *9 (6th Cir. October 6, 2000)(holding that concentration might be a component of a major life activity such as working, but it is not an activity in itself); *Hill v. Metro. Gov't of Nashville & Davidson County*, 54 Fed. App'x 199, 201 (6th Cir. 2002) (finding it doubtful that "thinking" constitutes a major life activity); *Boerst v. Gen. Mills Operations*, 25 Fed. App'x 403, 406 (6th Cir. 2002); *Lee v. City of Columbus*, 2009 U.S. Dist. LEXIS 78151 (S.D. Ohio Aug. 31, 2009). *But see Verhoff v. Time Warner Cable, Inc.*, 299 Fed. App'x 488, 493 at *21-22(6th Cir. 2008)(noting that it seemed "bizarre" to flatly say that thinking is not a major life activity); *MacDonald v. UPS*, No. 09-2617, 2011 U.S. App. LEXIS 14539 (6th Cir. July 14, 2011)(collecting cases). The more recent amendments to the ADA explicitly include "thinking" and "concentrating" as major life activities. This court need not resolve the dispute as to whether thinking and concentrating are major life activities because, even if they are, Veltri has not created a genuine issue of material fast as to whether her mental impairment substantially limited her ability to think, concentrate, or learn.

Veltri has not met her burden to show she actually has a physical or mental impairment that substantially limits one or more of her major life activities. Veltri has testified that she is able to walk, talk, hear, see, breathe, perform household chores, and care for her children without any assistance. She also stated that, in terms of her daily activities, there is nothing that she is limited in doing except for "concentrating at times."

[3] Veltri's Opposition Motion at page 13 also argues she is limited in the function of "communicating," but she has presented no evidence that such a limitation is *current,* as opposed to just a temporary, short-lived impairment. *See Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001)(holding that in order to determine if an impairment is temporary or substantially limiting, a court will look at plaintiff's condition after the time of the alleged discriminatory act).

(Veltri Depo., pp. 29-30.) She needs to make extensive notes so she will not forget routine matters and she takes much longer to study for her classes than she had to in the past. She claims her "ability to learn and comprehend has been permanently affected." (Veltri Aff. ¶28.[4]) Veltri's testimony that she needs to take extensive notes or study much longer for classes than in the past may demonstrate she is somewhat limited in learning, concentrating, or thinking, but it does not demonstrate she is substantially limited in those activities. The need to take extensive notes or to study for a longer period of time for a class hardly constitutes an impairment that restricts Veltri from doing activities of central importance to her daily life. *See Singh v. George Washington Univ. Sch. of Med. And Health Scis*, 508 F.3d 1097, 1104 (D.C. Cir. 2007)(holding that test-taking is not a major life activity, but is rather a component of one, and the "limitation [must be] substantial from the perspective of the major life activity as a whole."). There is no reason to believe that taking notes to remember routine matters or studying for a longer than average period of time constitutes a *significant* restriction on Veltri's ability to learn, think, or concentrate. Veltri has adduced no evidence that her ability to learn is significantly restricted any more than the average person in the general population.[5] *See* 29 C.F.R. § 1630.2(j).

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[4] Veltri also claims she is unable to sustain true feelings of happiness or contentment. She has made no attempt, however, to explain to this court how her lack of feeling has substantially limited one of her major life activities.

[5] Cases from the Sixth Circuit point out that a plaintiff must be more than just impaired or limited in some way, he must be substantially limited. *See Myers v. Cuyahoga County*, 182 Fed. App'x 510, 516 (6th Cir. 2006) (finding that the plaintiff's adjustment disorder and its resulting "intermittent irritability" was only a minor interference with a major life activity and fell short of the definition of a disability under the ADA); *Adams v. Potter*, 193 Fed. App'x 440, 444 (6th Cir. 2006)(holding under the Rehabilitation Act that plaintiff's back problems placed some restrictions on his activities but not considerable limitations on his major life activities); *Huge v. GMC*, 62 Fed. App'x 77, 80 (6th Cir. 2003)(holding that plaintiff's depression that resulted in lack of motivation, trouble getting out of bed or making it to work on time, trouble concentrating, difficulty asking for assistance, difficulty

ii. Veltri Does Not Have a Record of Such Impairment

A plaintiff may also demonstrate that he or she has a "record of impairment" in order to show he or she is disabled within the ADA's meaning. 42 U.S.C. § 12102 (2)(B)(1990). A "record of an impairment means an individual has 'a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.'" 29 C.F.R. 1630.2(k)(1991). The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. 29 C.F.R. pt. 1630, App. § 1630.2(k)(1991). "For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification." 29 C.F.R. pt. 1630, App. § 1630.2(k) (1991).

The EEOC interpretive guidance as well as case law indicate that an ADA plaintiff must demonstrate that the "record" relied upon by the defendant showed that the past impairment in fact "substantially limited" the plaintiff in a major life activity. *See e.g., MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002)(analyzing "record of" prong under Title II of the ADA); *Equal Opportunity Empl. Comm'n v. Daimler Chrysler Corp.*, 111 Fed. App'x 394, 404, 405 n.11 (6th Cir. 2004)(noting that the EEOC regulation and other case law arguably stand for the proposition that an ADA plaintiff must demonstrate that the "record" relied on by the defendant indicates that the past impairment in fact

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applying her education and training, and inability to fit in did not significantly restrict her compared to the average person); *Swanson v. Univ. of Cincinnati,* 268 F.3d 307, 316 (6th Cir. 2001)(noting that while getting five hours of sleep is not optimal, it did not significantly restrict the plaintiff in the life activity of sleeping and that while plaintiff's depression impacted his ability to concentrate, it did not significantly restrict it where his medical training record demonstrated he was successful in some areas but not in others); *Shepler v. Northwest Ohio Developmental Center*, No. 99-3079, 2000 U.S. App. LEXIS 1954, at *14 (6th Cir. February 9, 2000) (finding plaintiff was not disabled where she had decreased concentration and required a note taker to accompany her to her classes when she was able to complete her associate's degree and begin course work towards the completion of her bachelor's degree).

substantially limited the plaintiff in a major life activity); *See Sebest v. Campbell City Sch. Dist Bd. of Education*, 94 Fed. App'x 320, 326 (6th Cir. 2004) (finding that, to demonstrate that one is disabled because he has a "record of" disability, the plaintiff would have to present evidence "demonstrating that he had a record of an impairment that substantially limits a major life activity."); *Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc.*, 242 F.3d 610, 615 (5th Cir. 2001); *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1120-21 (5th Cir. 1998); *Dunning v. UPS*, 471 F. Supp. 2d 795, 803 (E.D. Mich. 2007)(the impairment described in the "record" must constitute an actual disability in the past within the meaning of the ADA); 29 C.F.R. Pt. 1630, App. § 1630.2(k) ("This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.").

The "record of impairment" provisions covers "people who have recovered from previously disabling conditions (cancer or coronary disease, for example) but who may remain vulnerable to the fears and stereotypes of their employers." *Equal Opportunity Empl. Comm'n v. Daimler Chrysler Corp.*, 111 Fed. App'x 394, 404 (6th Cir. 2004) (quoting *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998)). An employer's mere knowledge or awareness of an employee's condition is not a record of disability under the ADA proving disability discrimination absent some evidence that the employee suffered from a substantially limiting impairment under the ADA. *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 962 (8th Cir. 2000). *See Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc.*, 242 F.3d 610, 615 (5th Cir. 2001); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499,

510, n.8 (7th Cir. 1998)(noting that "record of impairment" claims require proof that the employer was aware of the record in question).

There is no evidence in this case that Veltri had a history of, or had been misclassified as having, a mental or physical impairment that substantially limited one or more of her major life activities. Veltri alleges that her record of impairment reflected that she was substantially limited in the functions of thinking, communicating, and concentrating. The evidence indicates that during her time with DFS, Veltri complained to her managers that she was under stress due to the systems issues. She also claims to have had difficulty speaking clearly and expressing her ideas in meetings. But after her manager commented about her inability to articulate, she began making extensive notes to read from so that she could meaningfully participate. At one point, Veltri's doctor required her to wear a heart monitor for 24 hours to monitor her blood pressure and Veltri claims her manager was aware of this test and "the reason for the testing." (Veltri Aff., ¶14.)

The fact that Veltri told her manager she was under stress, needed to read from notes in order to articulate in meetings, and at one point wore a blood pressure monitor for a 24-hour period does not indicate that she had a record of a mental or physical impairment that substantially limited a major life activity. None of these impairments rises to the level of "substantially" limiting outlined above because none prevented or severely restricted her from doing her day-to-day activities. Moreover, Veltri did nothing to indicate to DFS that her impairment was long term or anything more than a stress-related, temporary impairment. Although Veltri claimed to have gone on medication for her anxiety, there is no indication in the record that DFS knew about this prescription. Even if it had, a medical diagnosis alone is not enough to demonstrate a disability. *See Toyota*, 534 U.S. at 198. After

Veltri went out on disability leave, there is no evidence that DFS was aware of any record indicating Veltri's anxiety attacks or other resulting impairments.

Because Veltri has failed to demonstrate she is actually disabled or had a record of a disability within the meaning of the ADA, she cannot meet the first prong of her prima facie case and her claims for disability discrimination under the ADA and the Ohio Civil Rights Act must fail.

2. Qualified Individual with a Disability

Veltri also fails to demonstrate that she is a qualified individual with a disability, the second prong of the *prima facie* case. DFS argues that Veltri is not "qualified" under either the ADA or Ohio Revised Code 4112 because, "as Plaintiff admits, she could not perform the essential functions of her job." (Motion, page 16, citing to Veltri Depo., pages 73-74, 76, 79, 129-130, 151-153, 163.) However, Veltri does not claim that she was capable of performing her job *without* accommodation. Rather, her allegation is that she could have performed her job *with* reasonable accommodation had DFS complied. (Response, page 16.)

"A qualified individual with a disability is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 456 (6th Cir. 2004) (quoting 42 U.S.C. § 12111(8)) (other citation and internal quotation marks omitted). A plaintiff "bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable." *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108 (6th Cir. 2009) (internal quotation marks omitted) (quoting *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 870 (6th Cir. 2007)). Although a "reasonable accommodation" may include "reassignment to a vacant

position," an employer is not required to "reassign a disabled employee to a position for which he is not qualified, nor is the employer required to waive legitimate, non-discriminatory employment policies or displace other employees' rights in order to accommodate a disabled employee." *Hedrick*, 355 F.3d at 457 (citing *Burns v. Coca-Cola Enter., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000) and 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(*o*)(2)(ii)). "[A]n employer need only reassign a disabled employee to a vacant position[,]" one that is "comparable to the employee's prior position." *Id.* (citing *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719, 728 n.3 (6th Cir. 2000)). Significantly, "an employee cannot make [her] employee provide a specific accommodation if another reasonable accommodation is instead provided." *Id.* (quoting *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 – 01 (6th Cir. 1996). "If an employee rejects a reasonable accommodation, the individual is no longer considered a 'qualified individual with a disability.'" *Id.*

In *Hedrick*, an employee, a registered nurse for a health care employer, sued her employer after she attempted to return to work from a medical leave of absence. She alleged that the employer discriminated against her on the basis of her disability. The district court found, *inter alia*, that the employee was not a qualified individual with a disability because she rejected the employer's proposed accommodation. The Sixth Circuit affirmed. The deposition testimony in evidence showed that the employee had been offered a new position, that the employee understood that job was hers if she wanted it, and that she "preemptively rejected the position by informing [the employer] that she would not take the position[.]" *Id.* at 458. Further, the district court found, and the Sixth Circuit agreed, that the other positions the employee had requested were "neither vacant nor comparable." *Id.*

There is no dispute that Veltri's December 2007 "Fitness for Duty Certificate" was treated by both parties as an accommodation request related to Veltri's return to work on January 7, 2008.[6] Veltri requested reduced work hours, extended deadlines, and no responsibilities for performance evaluations or for organizing trainings and meetings. In response to Veltri's request, on or about January 4, 2008, DFS agreed to let Veltri work limited hours. DFS did not agree, however, to extend Veltri's deadlines or permit her to opt out of performance evaluations, trainings, or meetings. Instead, DFS offered the assistance of a team coach, to provide Veltri with "additional assistance" in managing her team. (January 3, 2008 E-mail from Jennifer O'Dee attached as Exhibit N to Defendant's Motion for Summary Judgment.) Veltri did not agree to DFS's proposed accommodation and did not report to work on January 7, 2008. Veltri's next communications with DFS were requests to be placed in other positions in the company. She asked to return as a "floating manager" or to "help out the human resources department with interviews" or to help out "the training department with new hires." (Veltri Depo., page 102.) Veltri offers no evidence that these positions existed and were open. *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) (noting that the "duty of reasonable accommodation does not require an employer to create a new job").

Ultimately, weeks later, on or about February 6, 2008, Veltri requested a return to her position with the accommodations proposed by DFS: limited work hours and the additional assistance of a team coach. (Motion, Exh. P; O'Dee Depo., Exh. 12.) By that

[6] Veltri purportedly sought the additional accommodation of a wholesale change to the department to address the "system issues." (Response, page 17, citing to Veltri Aff. ¶¶ 10 – 14.) "[A]s an accommodation, [Plaintiff] simply asked not to be made to discipline her subordinates who were being judged under unjust baselines created by the system issues." (Response, page 17, citing to Veltri Aff. ¶ 14.) Other than her affidavit testimony, Veltri offers no evidence that she communicated these requests as part of an accommodation at any time. Therefore, without any evidence that DFS received these requests as proposed accommodations and subsequently refused them, Veltri fails to create a genuine issue of material fact.

time, though, Veltri's position had been filled. (O'Dee Depo., Exh. 13.) DFS's subsequent offer of a position as a "CMA Collections Rep" was rejected. (O'Dee Depo., pages 82 – 83; Exh. 13; Wachowiak Depo., Exh. 13; Veltri Depo., page 111–10.)

This Court finds that DFS's proposed accommodation—reduced hours and the addition of a team coach—was reasonable, as the doubled efforts of Veltri and the team coach may well have enabled Veltri to maintain the requisite deadlines for performance reviews, as well as enabling her to attend trainings and meetings. Veltri knew the job was hers, with the team coach, but the evidence shows that she did not pursue it. Like the plaintiff in *Hedrick*, Veltri is not a qualified individual with a disability, as she rejected her employer's proposed accommodation. Therefore, Veltri does not meet the second prong of the *prima facie* case, as there is no genuine issue of material fact that she was a qualified individual with a disability.

3. Adverse Action

There is no evidence in the record that Veltri suffered an adverse employment action. In fact, there is clear evidence that Veltri resigned, as demonstrated by her resignation letter and her statements at deposition. In addition, her claim that DFS "also refused to reasonably accommodate Veltri's return more than once" is contradicted by the evidence. DFS clearly responded with their proposed accommodation—reduced work hours and the addition of a team coach—which Veltri, at the time it was offered, did not accept. Veltri offers no evidence to support any inference that her resignation was anything but voluntary, and as a result, there is no genuine issue of material fact regarding the third prong of the *prima facie* case. *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir.

1999)("When an employee voluntarily resigns, [s]he cannot claim that [s]he suffered an adverse employment decision under the ADA or FMLA.").

Because Veltri cannot show that she was disabled, that she was a qualified individual with a disability, or that she suffered an adverse employment action, she does not meet her burden to set forth a *prima facie* case of disability discrimination. Therefore, DFS's motion for summary judgment on Veltri's ADA claims is hereby **GRANTED.**

B. Claim For Violation of Ohio Law

Given the similarity between the language used in the ADA and in Ohio Revised Code Chapter 4112, the Ohio Supreme Court has held that federal regulations and case law are applicable to disability discrimination claims brought under Ohio law. *Columbus Civil Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 697 N.E.2d 204, 206-07 (1998). As a result, DFS's motion for summary judgment on Claim III of Veltri's Amended Complaint (disability discrimination under Ohio R.C. § 4112.01 *et seq.*) is hereby **GRANTED.**

C. Claim For Violation of Ohio Public Policy

Finally, Veltri's claim for wrongful discharge in violation of Ohio public policy (Count IV) is without merit. Ohio law recognizes the tort of wrongful discharge as an exception to the at-will employment doctrine. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981, at paragraph 2 of the syllabus (1990); *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 482 N.E.2d 150, at paragraph 1 of the syllabus (1985). Veltri bases her claim on Ohio R.C. § 4101.12, which requires an employer to provide a safe workplace for its employees. (Response, page 23.) Additionally, Veltri cites to the following Ohio cases in support of her claim: *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (1997); *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77,

760 N.E.2d 385 (2002); and *Blair v. Honda of America Mfg., Inc.*, 2002 WL 396531, 2002-Ohio-1065 (Ohio Ct. App.).

In *Kulch*, the court held that an at-will employee may maintain a cause of action for wrongful termination for violation of Ohio public policy "so long as that employee had fully complied with the statute and was subsequently discharged or disciplined." 677 N.E.2d at paragraph 3 of the syllabus, following *Greeley v. Miami Valley Maintenance Contrs., Inc.,* 49 Ohio St.3d 228, 551 N.E.2d 981 (1990) and its progeny. The *Pytlinski* Court held, *inter alia*, that the cause of action is subject to a four-year statute of limitations, and the *Blair* appeals court merely held that there were genuine issues of material fact precluding summary judgment.

These cases are easily distinguishable: in each, the plaintiff had been discharged from employment. This Court has found, as a matter of law, *supra*, that there is no genuine issue of material fact that Veltri *resigned* from her employment with DFS. Because the basis of the claim is the "retaliatory action of the employer," *Pytlinksi*, 760 N.E.2d at 388, without any evidence that Veltri was disciplined or discharged, her claim is without merit. As a result, DFS's motion for summary judgment with regard to this claim is **GRANTED.**

V. CONCLUSION

Based on the foregoing, Defendant DFS Services, LLC's Motion to Strike is **GRANTED IN PART AND DENIED IN PART.** (Doc. 33.) Defendant's Motion for Summary Judgment is hereby **GRANTED**. (Doc. 27.) Plaintiff Linda Veltri's claims are **DISMISSED with prejudice.** The Clerk of Courts is hereby ordered to enter judgment in favor of Defendant DFS Services, LLC as to all claims, with prejudice. The costs of this action are assessed against the plaintiff.

It is so ORDERED.

s/James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: August 22, 2011