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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RACHEL WATERS,	)	
	)	No. CV 08-322-HU
Plaintiff,	)	
	)	
v.	)	
	)	OPINION AND ORDER
FRED MEYER STORES, INC.,	)	
	)	
Defendant.	)	
_____	)	

Kerry M.L. Smith  
 Smith and Fjelstad  
 722 N. Main Avenue  
 Gresham, Oregon 97030

Marnae H. Cunningham  
 29955 S.W. Boones Ferry Road, Suite K  
 Wilsonville, Oregon 97070  
 Attorneys for plaintiff

Alan M. Lee  
 Francis T. Barnwell  
 David H. Wilson  
 Bullard Smith Jernstedt Wilson  
 1000 S.W. Broadway, Suite 1900  
 Portland, Oregon 97205

Attorneys for defendant

HUBEL, Magistrate Judge:

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1 Plaintiff Rachel Waters brings this action against defendant  
2 Fred Meyer Stores, Inc. (Fred Meyer) for violation of Title I of  
3 the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §  
4 12201 (claim one); disability discrimination under Oregon law, Or.  
5 Rev. Stat. § 659A.100 *et seq.* (claim two); common law wrongful  
6 discharge (claim three); violation of the federal Family and  
7 Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.* (claim  
8 four) and violation of the Oregon Family Leave Act (OFLA), Or. Rev.  
9 Stat. § 659A.150 *et seq.* (claim five). Waters moves for summary  
10 judgment on her FMLA and OFLA claims, as well as on Fred Meyer's  
11 Tenth Affirmative Defense. Fred Meyer moves against each of  
12 Waters's claims.

### 13 **Factual Background**

14 Waters worked for Fred Meyer as a clerk in the Clackamas  
15 warehouse beginning June 25, 2000. She was terminated on December  
16 7, 2006.

17 Fred Meyer has an attendance policy under which employees are  
18 charged "points" for unexcused tardiness or absenteeism. When an  
19 employee's point total reaches 60, she is suspended; if it reaches  
20 80, she is terminated.

21 Waters has requested and received intermittent FMLA leave on  
22 several occasions, for different medical conditions. In May 2002,  
23 she submitted an application and medical certification for  
24 intermittent leave pending the birth of her child. Suzanne  
25 Boomhower, Fred Meyer's Payroll Processor, told Waters her doctor's  
26 certification did not state medical facts necessary for  
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1 intermittent leave, and that she should send a corrected  
2 certification, which Waters did. The request was allowed and the  
3 time off was not counted against Waters under the attendance  
4 policy. Taylor Declaration ¶¶ 3-4, Exhibit A.

5 Waters was absent between October 26 and November 4, 2004, for  
6 an upper respiratory infection. During her absence, Fred Meyer sent  
7 her FMLA leave forms, which Waters completed and submitted with a  
8 doctor's certification. The leave was allowed, and the time off was  
9 not counted against Waters under the attendance policy. Id. at ¶ 5,  
10 Exhibit B.

11 In 2004, Waters was diagnosed with narcolepsy. Waters dep.  
12 83:3-5. Waters was absent from work between January 14 and January  
13 20, 2005. She submitted an application for FMLA leave on those  
14 dates, along with a doctor's certification stating: "Patient has a  
15 condition which required her to be off work for more than 3 days."  
16 Taylor Declaration Exhibit C. On February 2, 2005, Boomhower asked  
17 Waters for the medical facts supporting her leave request, setting  
18 a deadline of February 17, 2005. On February 3, 2005, Waters  
19 submitted a statement from her doctor, Carla Bowman, M.D., showing  
20 a diagnosis of anxiety. Boomhower approved the leave and the points  
21 assessed against Waters for the absence were removed. Id. at ¶ 6,  
22 Exhibit C.

23 On April 18, 2005, Waters applied for one year of intermittent  
24 FMLA leave. Taylor Declaration Exhibit D. The application was  
25 supported by a certificate from Dr. Bowman stating that Waters had  
26 "narcolepsy, extreme fatigue, headache, nausea." Id. Boomhower  
27

1 approved the application, with leave beginning retroactively on  
2 April 3, 2005. Id.

3 On March 10, 2006, Boomhower notified Waters that her year of  
4 intermittent leave would expire on April 3, 2006, and enclosed FMLA  
5 forms for completion in the event that Waters wanted additional  
6 leave.<sup>1</sup> The letter said, "If you are still in need of an  
7 Intermittent Leave of Absence, please have your doctor fill out the  
8 enclosed paperwork. Be sure they indicate the reason and how often  
9 each occurrence might happen and how long it could last." Taylor  
10 Declaration ¶¶ 7, 8, Exhibits D, E.

11 On April 5, 2006, Waters sent Dr. Bowman the Fred Meyer  
12 medical certification form that had been enclosed with the March  
13 10, 2006 letter. On April 6, 2006, Dr. Bowman wrote that Waters had  
14 a "chronic medical condition requiring intermittent time off work  
15 and medical monitoring and testing," and that "patient may miss up  
16 to 40 hours of work time per month due to this medical condition."  
17 Taylor Declaration, Exhibit F.

18 Waters submitted Dr. Bowman's certificate to Fred Meyer on  
19 April 24, 2006. Jenni Swan (later Taylor), who had taken over some  
20 of Boomhower's duties, responded on April 26, 2006, with  
21 "Employer's Response to Employee Request for Family or Medical  
22 Leave," informing Waters that the certificate from Dr. Bowman was  
23

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24 <sup>1</sup>Fred Meyer's policy is to approve intermittent FMLA/OFLA  
25 leave in one year increments. Boomhower dep. 26:8-17. This is  
26 consistent with FMLA, which provides that an employee is entitled  
27 to 12 work weeks of leave for a serious health condition during  
the "12-month period selected by the employer." 29 U.S.C. §  
2612(a)(1)(C), (D); 29 C.F.R. § 825.200(b).

1 insufficient because it did not describe the medical facts  
2 supporting the request for leave. Id. at Exhibit G. In the same  
3 document, Taylor wrote that Waters was required to furnish the  
4 corrected certification by May 11, 2006, "or we will delay the  
5 commencement of your leave until the certification is submitted."  
6 Id. These statements were contained in boilerplate with blanks to  
7 be filled in as appropriate:

8       You will be required to furnish medical certification of  
9       a serious health condition. You must furnish  
10       certification by \_\_\_\_\_ (insert date) (**must be at least 15**  
11       **days after you are notified of this requirement**) or we  
12       will delay the commencement of your leave until the  
13       certification is submitted.

14 This boilerplate, with the blank filled in, had appeared on every  
15 response from Fred Meyer to a leave application from Waters: on May  
16 31, 2002, when she requested leave for the birth of her child; on  
17 November 12, 2004, when she requested leave for an upper  
18 respiratory infection; on February 2, 2005, when she was absent for  
19 anxiety; on April 25, 2005, when she first requested intermittent  
20 leave for narcolepsy, and again on April 26, 2006. See Taylor  
21 Declaration, Exhibits A, B, C, D, G.

22       Waters was absent on May 5, May 15, and June 2, 2006, on each  
23 occasion informing Fred Meyer by telephone that she was missing  
24 work because of her narcolepsy and was taking medical leave. Waters  
25 Declaration, filed February 12, 2009, (doc. # 27) ¶ 6, Exhibit B  
26 (Waters I). Fred Meyer did not respond to these telephone calls.  
27 Waters Declaration, filed April 10, 2009 (doc. # 56) (Waters III).  
28 On May 11, 2006, Swan notified Waters's supervisor and others (but  
not Waters) that Waters had submitted paper work for a new year of

1 intermittent leave and that if the medical certification was not  
2 turned in, absences would be assigned points until leave was  
3 approved. Smith Declaration III, Exhibit A. On May 18, 2006,  
4 Boomhower and Swan exchanged emails noting that Waters had not  
5 submitted the revised medical certification. Id. Swan sent another  
6 email to Waters's supervisors asking whether Waters had sent any  
7 leave application papers to them, and noting that her prior leave  
8 had expired in April. Swan wrote that without approved leave,  
9 absences would accumulate points. Id. On May 22 and May 24, 2006,  
10 after Waters's absences of May 5 and 15, Boomhower and Swan had  
11 another email exchange in which Swan asked if Fred Meyer should  
12 "send a 2<sup>nd</sup> request for info and let her know that points will be  
13 charged," and Boomhower responded that "we don't ask again for the  
14 info, and since I have not received an approval from you, then it  
15 is not approved." Id.

16 Waters states in a declaration that her narcolepsy "played a  
17 significant role in my inability to provide medical certifications  
18 to defendant in March, April, and May 200[6]." Waters Declaration  
19 II. On May 29, 2006, 18 days after Fred Meyer's May 11 deadline,  
20 Waters sent a fax to Dr. Bowman with another copy of Fred Meyer's  
21 medical certification form, requesting that Dr. Bowman supply the  
22 medical facts for which Waters sought leave. Lee Declaration,  
23 Exhibit E. Waters sent the fax from Fred Meyer, presumably while  
24 she was at work. Id.

25 On June 2, 2006, Dr. Bowman completed the certificate, stating  
26 that Waters had "headaches, narcolepsy and fatigue requiring  
27

1 intermittent time off work when conditions flare." Taylor  
2 Declaration, Exhibit H; Waters Declaration, Exhibit A. Fred Meyer  
3 received Dr. Bowman's certification on June 8, 2006. Taylor  
4 Declaration, ¶ 12. Waters submitted an application for intermittent  
5 leave on the same day, June 8, 2006, asking for leave beginning  
6 "5/06."<sup>2</sup> Taylor Declaration, ¶ 12, Exhibit J. Boomhower approved  
7 the request the same day Fred Meyer received it, but as stated in  
8 the April 24, 2006 letter, delayed commencement of the leave to  
9 June 7, 2006. Id.; Smith Declaration, Exhibit P. Fred Meyer  
10 assigned 60 points--20 points each--against Waters for the absences  
11 on May 5, May 15, and June 2, 2006. Taylor Declaration ¶ 13,  
12 Exhibit J. While these points appear to be sufficient to warrant  
13 suspension, it does not appear that Waters was suspended, either  
14 when the points were assessed or when intermittent leave was  
15 granted effective June 7, 2006.

16 Waters was 70 minutes late on September 3, 2006, 70 minutes  
17 late on September 5, and 6 minutes late on September 7, 2006. She  
18 was docked 10 points each time, which pushed her point total to 90.  
19 Waters Declaration, Exhibit B. Although normally an employee is

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21 <sup>2</sup> Waters has taken conflicting positions on when her second  
22 period of intermittent leave for narcolepsy should have begun. In  
23 her complaint, Waters alleges, "In April, 2006, Ms. Waters sought  
24 to renew her intermittent OFLA/FMLA leave. Defendant improperly  
25 rejected the April, 2006 application for intermittent OFLA FMLA  
26 leave." ¶ 15. Waters's application for intermittent leave  
27 submitted on June 8, 2006, requests that her leave commence  
"5/06." Taylor Declaration Exhibit J. In her motion papers,  
Waters argues that her request for intermittent OFLA/FMLA leave  
should have commenced on May 5, 2006, the first absence from work  
after her previous period of intermittent leave for narcolepsy  
had expired.

1 suspended after 60 points and discharged after 80, Fred Meyer  
2 decided that, because Waters's supervisor failed to take prompt  
3 action after her total went to 60, and because her points had gone  
4 to 90 before the supervisor had imposed the suspension that was  
5 supposed to occur at 60, Waters should not be discharged; instead  
6 she was given a one-day suspension. Lettenmaier Declaration ¶ 12.

7 On September 15, 2006, Waters applied for intermittent family  
8 leave to care for her husband. She submitted a doctor's certificate  
9 in support of her application, and Fred Meyer approved the  
10 application for leave up to 15 hours per month from September 15,  
11 2006 to March 15, 2007. Taylor Declaration ¶ 14, Exhibit K.

12 Waters called in sick on December 3 and 4, 2006. Waters states  
13 in a declaration that these absences were not for narcolepsy.  
14 Waters Declaration II ¶ 17 ("Following my absences for narcolepsy  
15 in May and June 2006, I did not miss additional time for narcolepsy  
16 between June 2006 and my termination"). See also Lettenmaier  
17 Declaration ¶ 13, Waters Declaration, Exhibit B, p. 5. These  
18 absences brought her point total back up to 80. Id. She was  
19 discharged on December 7, 2006. Lettenmaier Declaration ¶ 13.

#### 20 **Standard**

21 A party is entitled to summary judgment if the "pleadings,  
22 depositions, answers to interrogatories, and admissions on file,  
23 together with affidavits, if any, show there is no genuine issue as  
24 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is  
25 not proper if material factual issues exist for trial. Warren v.  
26 City of Carlsbad, 58 F.3d 439, 441 (9<sup>th</sup> Cir. 1995). A genuine



1 dispute arises "if the evidence is such that a reasonable jury  
2 could return a verdict for the nonmoving party." State of  
3 California v. Campbell, 319 F.3d 1161, 1166 (9<sup>th</sup> Cir. 2003). Where  
4 the record taken as a whole could not lead a rational trier of fact  
5 to find for the non-moving party, there is no genuine issue for  
6 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.  
7 574, 587 (1986).

8 On a motion for summary judgment, the court must view the  
9 evidence in the light most favorable to the non-movant and must  
10 draw all reasonable inferences in the non-movant's favor. Clicks  
11 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9<sup>th</sup> Cir.  
12 2001). The court may not make credibility determinations or weigh  
13 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55  
14 (1990). "Credibility determinations, the weighing of the evidence,  
15 and the drawing of legitimate inferences from the facts are jury  
16 functions, not those of a judge." Reeves v. Sanderson Plumbing  
17 Products, Inc., 530 U.S. 133, 150 (2000). Where different ultimate  
18 inferences may be drawn, summary judgment is inappropriate.  
19 Sankovich v. Ins. Co. of N. Am., 638 F.2d 136, 140 (9<sup>th</sup> Cir. 1981).

#### 20 **Discussion of ADA and state law disability claims**

21 Waters asserts several claims under the ADA and state  
22 disability law: discrimination on the basis of disability,  
23 perceived disability, and "record of" disability; failure to  
24 accommodate; failure to engage in the interactive process; and  
25 retaliation. Fred Meyer contends that each of these claims fails on  
26 multiple grounds.

1           A.     Disability discrimination

2           To establish a prima facie case of discrimination under Title  
3 I of the ADA, plaintiff must show that 1) she is a disabled person  
4 within the meaning of the ADA; 2) she is able to perform the  
5 essential functions of the job with or without reasonable  
6 accommodation; and 3) she suffered an adverse employment decision  
7 because of her disability. 42 U.S.C. §§ 12112(b) (5) (A) & 12111(8);  
8 Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9<sup>th</sup> Cir. 1996). The  
9 standard for establishing a prima facie case of disability  
10 discrimination under Oregon law is identical. Snead v. Metropolitan  
11 Property and Cas. Ins. Co., 237 F.3d 1080, 1087 (9<sup>th</sup> Cir. 2001). In  
12 Oregon, "evidence that permits an inference of discrimination" is  
13 sufficient for a plaintiff to make a prima facie case that she was  
14 discriminated against because of her disability. Id. at 1089.

15           Beyond the prima facie case, the McDonnell-Douglas burden  
16 shifting analysis applies to both federal and state claims. Snead,  
17 237 F.3d at 1092. Thus, if the employer provides a non-  
18 discriminatory reason for the adverse employment action that  
19 disclaims any reliance on the employee's disability, the plaintiff  
20 bears the burden of showing that the employer's reason for the  
21 adverse employment action was pretextual. Id. at 1093. Unless  
22 plaintiff can raise a material question of fact suggesting that  
23 defendant's explanation was a pretext for disability  
24 discrimination, she has presented no triable issue under the ADA,  
25 because at this stage her burden merges with the ultimate burden of  
26 persuading the court that she has been the victim of intentional

1 discrimination. Id., citing Texas Dept. of Community Affairs v.  
2 Burdine, 450 U.S. 248, 256 (1981).

3 A plaintiff may succeed in showing pretext either directly, by  
4 showing that unlawful discrimination more likely motivated the  
5 employer, or indirectly, by showing that the employer's proffered  
6 explanation is "unworthy of credence" because it is internally  
7 inconsistent or otherwise not believable, or by a combination of  
8 the two kinds of evidence. Snead 237 F.3d at 1094; Chuang v. Univ.  
9 of Cal. Davis, 225 F.3d 1115, 1127 (9<sup>th</sup> Cir. 2000). Circumstantial  
10 evidence must be "specific" and "substantial" to create a genuine  
11 issue of material fact. Nilsson v. City of Mesa, 503 F.3d 947, 954  
12 (9<sup>th</sup> Cir. 2007). A plaintiff's belief that a defendant acted from  
13 an unlawful motive, without evidence supporting that belief, is not  
14 sufficient. Carmen v. San Francisco Unified School Dist., 237 F.3d  
15 1026, 10928 (9<sup>th</sup> Cir. 2001).

16 *1. Disability*

17 Fred Meyer's first challenge to Waters's discrimination claims  
18 is that she has not proven that she has a disability, because she  
19 has not demonstrated that she has a "physical or mental impairment"  
20 that "substantially limits one or more major life activities." 42  
21 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(1). An impairment that  
22 affects, but does not substantially limit, a major life activity is  
23 not a disability under the ADA. Albertson's, Inc. v. Kirkingburg,  
24 527 U.S. 555 (1999).

25 At the summary judgment stage, plaintiff's testimony is  
26 sufficient to establish a genuine issue of material fact regarding  
27

1 the impairment of a major life activity. See, e.g., McAlindin v.  
2 County of San Diego, 192 F.3d 1226, 1235-36 (9<sup>th</sup> Cir. 1999),  
3 *amended*, 201 F.3d 1211 (9<sup>th</sup> Cir. 2000).

4 In any ADA disability analysis, the first question is whether  
5 the plaintiff is substantially limited in a major life activity  
6 *other* than working. McAlindin, 192 F.3d at 1233 (emphasis added).  
7 Only if there are no such limitations does the inquiry shift to  
8 whether there is a substantial limitation on the plaintiff's  
9 ability to work.

10 Fred Meyer cites Waters's deposition testimony as evidence  
11 that she cannot identify any way in which narcolepsy substantially  
12 limits her in any major life activity (she could not think of any  
13 effect on speaking, breathing, hearing, seeing, thinking, sitting,  
14 standing, reaching, learning, performing manual tasks, caring for  
15 herself, concentrating, lifting, controlling her bowels, running,  
16 or working.<sup>3</sup>) Although Waters testified that narcolepsy affected  
17 her ability to walk, she identified only one occasion between 2004  
18 and 2006 on which she had momentary paralysis of her legs  
19 (cataplexy) and fell. Declaration of Alan Lee, Exhibit A (Waters  
20 dep.)105:1-14. Waters also testified that she gets tired, has  
21

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22 <sup>3</sup> Although she testified that her ability to work was  
23 affected because she fatigues more easily than a normal person,  
24 and for that reason has requested the accommodation of five eight  
25 hour days and no overtime instead of four ten hour days, she has  
26 also stated on intermittent leave applications that she was able  
27 to work and perform the essential functions of her job. Taylor  
Declaration, Exhibit D, p. 3 and Exhibit I, p. 2; Lee  
Declaration, Exhibit E, p. 3. There is no evidence that Waters  
has ever been unable to perform all the essential functions of  
her job.

1 headaches and nausea, once fell asleep while talking to a  
2 supervisor in 2004, and once fell asleep on the job in 2006. Id. at  
3 106:9-13, 107:24-108:19, 121:11-122:1. She testified that she does  
4 not abruptly fall asleep, id. at 104:5-9, and that her medication  
5 "puts the fatigue at bay," id. at 109:5, and sometimes controls the  
6 nausea and headaches. Id. at 109:13-15. She sleeps "really good,"  
7 but "too much." Id. at 107:10.<sup>4</sup>

8 On the basis of this evidence, Fred Meyer contends that Waters  
9 has not met her burden of proving the existence of a disability,  
10 since none of her evidence can support an inference that she is  
11 substantially limited in any major life activity.

12 Waters responds that she is significantly limited in the major  
13 life activities of sleeping, caring for herself, and working. She  
14 relies on her own declaration, filed February 26, 2009 (doc. # 39)  
15 (Waters II), submitted with her response to Fred Meyer's motion for  
16 summary judgment, stating as follows:

17 1. Her medication relieves her symptoms "at best 20-25%."

18 Waters Declaration ¶ 2. While her medications keep her  
19 from falling asleep during the day while she is doing  
20 something, they do not prevent her from falling asleep  
21 when she sits down for a minute. She is continually on  
22 the alert to keep from falling asleep. Id. at ¶ 13.

23 2. She cannot do any job that requires her to work more than  
24 eight hours a day, or that requires her to work a shift  
25

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26 <sup>4</sup> Under the law of the Ninth Circuit, sleeping is considered  
27 a major life activity. McAlindin, 192 F.3d at 1333.

1 other than the day shift. Id. at ¶ 3.

2 3. If she is forced by circumstances to sleep less than  
3 seven or eight hours a night, she becomes physically ill  
4 with "severe nausea, dizziness and headaches," and will  
5 "throw up, lose my balance, and stagger." The symptoms do  
6 not decrease until she gets 11 to 12 hours of sleep. Id.  
7 at ¶ 4.

8 4. She typically sleeps 11 to 12 hours per night. If she  
9 does not get this much sleep, she has "medium" nausea,  
10 headaches and dizziness. If she gets 11-12 hours of  
11 sleep, these symptoms are "light." She is always on the  
12 verge of nausea, headaches and dizziness. Id. at ¶ 5. If  
13 she gets less than 11-12 hours of sleep she must take a  
14 two or three hour nap during the day. Id. at ¶ 14.

15 5. She is generally able to fall asleep quickly. After she  
16 is awake for any period of time she can fall asleep  
17 almost instantly. At times she falls asleep when it is  
18 not appropriate, such as in a social setting or in  
19 public. Id. at ¶ 6.

20 6. She wakes up every night after about four hours of sleep.  
21 When she wakes up, she must get something to eat. Her  
22 regular sleeping schedule at night is to sleep four  
23 hours, get up and eat, stay awake for about 45 minutes,  
24 and then try to get another 3 to 4 hours of sleep. Id. at  
25 ¶ 7.

26 7. If she is not working and she gets up to get kids to  
27

1 school, she goes back to sleep for two to three hours in  
2 the morning. Id. at ¶ 8.

3 8. When she is working, she frequently drives to work and  
4 naps in her car before she goes in. If she works and does  
5 not sleep for 11-12 hours the night before, she naps on  
6 her breaks and/or lunch period. She typically naps during  
7 the day even if she gets 11 to 12 hours of sleep. Id. at  
8 ¶ 9.

9 9. She cannot perform physical activities without sleeping.  
10 She is very limited in the physical activities she can  
11 perform. If she takes her children to the park for an  
12 hour, then she must sleep for an hour or two when she  
13 gets home; if she cleans the house or does chores for an  
14 hour or two, she must sleep for about two hours or she  
15 becomes physically ill to the point of throwing up. Id.  
16 at ¶ 10.

17 10. She is drowsy every day and even with 11-12 hours of  
18 sleep has difficulty getting up in the morning. It is  
19 difficult for her to wake up, get out of bed and get  
20 going every day. Id. at ¶ 11.

21 11. She is limited to one or two hours of physical activity  
22 per day, and cannot perform physical activity two days in  
23 a row. She considers "physical activity" to be any  
24 activity outside her normal daily living activities and  
25 including such things as cleaning house, doing laundry,  
26 working in the yard, going to the park, going to the zoo  
27

1 or engaging in any type of exercise. Id. at ¶ 15.

2 12. Sometimes her condition becomes worse and flares up. She  
3 had a significant flare up in May and June 2006, due to  
4 medical issues affecting her husband and personal issues.  
5 The stress associated with her husband's condition  
6 worsened her symptoms. Id. at ¶ 17.

7 This testimony is sufficient to generate an issue of fact on  
8 whether Waters is significantly impaired in at least the major life  
9 activity of sleeping.

10 Because Waters has generated an issue of fact on whether she  
11 is significantly limited in the life activity of sleeping, Fred  
12 Meyer is not entitled to summary judgment on this element of  
13 Waters's prima facie disability discrimination case.

14 2. *Discrimination based on perception of disability*

15 Waters concedes this claim. Fred Meyer's motion for summary  
16 judgment on this claim is granted.

17 3. *Discrimination based on record of disability*

18 Fred Meyer moves against Waters's "record of disability"  
19 claim, arguing that to establish a "record," Waters must show 1)  
20 that her employer relied on a medical record in taking an action  
21 against her, and 2) that the record relied on shows that she has or  
22 had a disability, as opposed to a mere impairment. Fred Meyer  
23 argues that neither condition is met here.

24 To have a "record of" a disability "means [the employee] has  
25 a history of, or has been misclassified as having, a mental or  
26 physical impairment that substantially limits one or more major  
27



1 life activities." 29 C.F.R. § 1630.2(k). Under Oregon law, the  
2 definition is essentially the same. Snead, 237 F.3d at 1089 (citing  
3 Oregon cases). When an employee's records fail to reveal a level of  
4 impairment that substantially limits one or more life activities,  
5 a "record of" disability claim cannot stand. See Coons v. Secretary  
6 of U.S. Dept. of the Treasury, 383 F.3d 879, 886 (9<sup>th</sup> Cir. 2004);  
7 Walz v. Marquis Corporation, 2005 WL 758253 (D. Or. 2005). Fred  
8 Meyer argues that Waters does not have a record of disability.

9 I do not find Fred Meyer's argument persuasive because in  
10 Snead, 237 F.3d at 1089, the court held that physicians' notes  
11 combined with prolonged leave create at least a genuine issue of  
12 fact regarding a record of an impairment. In Snead, the court cited  
13 an Eleventh Circuit case, Pritchard v. Southern Co. Services, 92  
14 F.3d 1130, 1132 (11<sup>th</sup> Cir. 1996) holding that paid and unpaid  
15 disability leave provide evidence of a record of being impaired.  
16 Waters had submitted previous medical certifications for narcolepsy  
17 and had obtained a year of intermittent leave for narcolepsy.

18 Fred Meyer also moves against the "record of" claim on the  
19 ground that there is no evidence that Fred Meyer took any action  
20 against Waters because of the narcolepsy shown in her medical  
21 records. Waters counters that Fred Meyer treated her narcolepsy  
22 differently from other medical conditions for which she had  
23 requested leave. She points out that in January 2005, Fred Meyer  
24 issued points to Waters when she missed work between January 14-20,  
25 2005, for anxiety. On February 3, 2005, Waters sent in her medical  
26 documentation stating that the condition was anxiety, and on

1 February 11, 2005, Fred Meyer removed the points and rescinded the  
2 discipline. In contrast to that, she points to the three absences  
3 in May and June 2006, which were not retroactively excused and for  
4 which the points were not rescinded, after medical documentation  
5 was submitted. Waters argues that the difference can only be  
6 accounted for by the fact that the January 2005 absence was not for  
7 narcolepsy, while the May and June 2006 absences were.

8 In its reply, Fred Meyer points out that the reason the points  
9 were rescinded in February 2005 and not in June 2006 is that for  
10 the 2005 leave, Waters produced her corrected medical certification  
11 within the deadline set by Fred Meyer (the deadline was February  
12 17, 2005, and Waters produced the certification on February 2,  
13 2005, see Taylor Declaration, Exhibit C), while in 2006 she did not  
14 produce corrected certification within the deadline set by Fred  
15 Meyer (the deadline was May 11, 2006; Waters sent a fax to her  
16 doctor from Fred Meyer's fax machine requesting the information on  
17 May 29, 2006, and Fred Meyer received it on June 8, 2006.)

18 Waters has rebutted this explanation with evidence that  
19 generates a question of fact on whether Waters's inability to meet  
20 the May 11, 2006 deadline was related to her narcolepsy and/or to  
21 a motive on the part of Fred Meyer to discriminate against her on  
22 the basis of the narcolepsy. Fred Meyer's motion for summary  
23 judgment on the "record of" disability claim is denied.

24 4. *Able to perform essential functions of job*

25 The parties do not dispute that Waters was able to perform the  
26 essential functions of her job.

1           5.    *Adverse employment action because of disability*

2           Fred Meyer asserts that regardless of whether Waters can show  
3 she has a disability, her disability discrimination claims fail  
4 for lack of evidence that any adverse employment action was taken  
5 against her because of that claimed disability. Fred Meyer argues  
6 that it has shown Waters was suspended and then dismissed for a  
7 nondiscriminatory reason, i.e., attendance points.

8           Waters responds that she was terminated in part for conduct  
9 resulting from her disability, citing Humphrey v. Memorial  
10 Hospitals Ass'n, 239 F.3d 1128, 1139-40 (9<sup>th</sup> Cir. 2001) ("Conduct  
11 resulting from a disability is considered part of the disability,  
12 rather than a separate basis for termination.") and Gambini v.  
13 Total Renal Care, Inc., 486 F.3d 1087, 1093 (9<sup>th</sup> Cir. 2007) (law  
14 protects behavior or actions which are the consequences of the  
15 disability). Waters points out that she missed three days of work  
16 (May 5, May 12, and June 2, 2006) because of her narcolepsy, and  
17 that these three absences were counted against her in the  
18 termination decision.

19           Waters was terminated because she accumulated a total of 80  
20 points, including 60 points for the absences in May and June 2006.  
21 Fred Meyer has articulated the explanation that the three absences  
22 in May and June 2006 were unexcused because Waters did not get her  
23 medical certification to Fred Meyer in time to have them excused.  
24 However, Waters states in her declaration that her narcolepsy  
25 "played a significant role in my inability to provide medical  
26 certifications to defendant in March, April, and May 200[6]."

1 Waters Declaration II. Indeed, the record shows that one of the  
2 three absences for narcolepsy occurred during the time she'd been  
3 given to get the additional medical information to Fred Meyer. With  
4 this evidence, Waters has raised a question of fact on whether her  
5 narcolepsy hindered her from timely completion of her medical  
6 certification in April and May, 2006, and therefore on the issue of  
7 whether her unexcused absences of May 2, May 15, and June 2, 2006  
8 were related to difficulties in obtaining medical certification  
9 caused by narcolepsy.

10 I conclude that Waters has raised a material question of fact  
11 for this element of her prima facie case.

12 *6. Pretext*

13 Fred Meyer argues that even if Waters has made out a prima  
14 facie case, she has not rebutted Fred Meyer's evidence of a  
15 nondiscriminatory reason for termination with evidence that the  
16 explanation was a pretext for discrimination.

17 Waters asserts that her evidence of Fred Meyer's failure to  
18 respond to her telephone calls of May and June 2006 reporting that  
19 she was out sick because of narcolepsy, and of the emails in which  
20 it was decided not to remind Waters that these absences would be  
21 unexcused because she had not met the deadline for medical  
22 certification, is indicative of a discriminatory motive.

23 Waters argues that "by intentionally covering its corporate  
24 eyes and ears," Fred Meyer "found a way to push Ms. Waters closer  
25 to termination for excessive absences and placed Ms. Waters on the  
26 road to discipline and her ultimate termination." I conclude that

1 a reasonable jury could infer from the failure to follow up on the  
2 telephone calls, and from the emails about whether to remind Waters  
3 about the lapsed medical certification deadline and the possible  
4 penalties for the absences of May and June, that Fred Meyer  
5 intended for Waters to accumulate unexcused absences. When Waters  
6 called in on May 5, to say she would miss that day due to her  
7 narcolepsy, Fred Meyer made no response. No annual intermittent  
8 leave had been approved at that date. When an employee takes  
9 unexpected leave under OFLA with no prior notice, the employee must  
10 give the employer oral notice within 24 hours. Or. Rev. Stat. §  
11 659A.165(3). The phone call arguably sufficed. The employee also  
12 must provide written notice within three days of returning to work.  
13 Id. The employer may require an explanation of the need for leave.  
14 Or. Rev. Stat. § 659A.165(1) and medical certification. Or. Rev.  
15 Stat. § 659A.168(1). The record does not reveal any effort to ask  
16 for an explanation of the May 5 need for leave, or for medical  
17 certification, or any written follow up by Waters.

18  
19 I conclude that a reasonable jury could find the proffered  
20 explanation by Fred Meyer was pretextual. Genuine issues of  
21 material fact preclude summary judgment for Fred Meyer on the  
22 disability discrimination claim.

23 B. Failure to accommodate

24 Waters also asserts a claim under the ADA and state disability  
25 law for failure to accommodate her disability.

26 The ADA's regulations provide:

27 (1) The term reasonable accommodation means:

1  
2 \* \* \*

3 (ii) Modifications or adjustments to the work  
4 environment, or to the manner or circumstances  
5 under which the position held or desired is  
6 customarily performed, that enable a qualified  
7 individual with a disability to perform the  
8 essential functions of that position; or

9 (iii) Modifications or adjustments that enable a  
10 covered entity's employee with a disability to  
11 enjoy equal benefits and privileges of employment  
12 as are enjoyed by its other similarly situated  
13 employees without disabilities.

14 (2) Reasonable accommodation may include but is not  
15 limited to:

16 \* \* \*

17 (ii) Job restructuring; part-time or modified work  
18 schedules; reassignment to a vacant position;  
19 acquisition or modifications of equipment or  
20 devices; appropriate adjustment or modifications of  
21 examinations, training materials, or policies; the  
22 provision of qualified readers or interpreters; and  
23 other similar accommodations for individuals with  
24 disabilities.

25 29 C.F.R. § 1630.2(o) (emphasis added); 42 U.S.C. § 12111(9)(B).  
26 The employee bears the burden of proving the existence of specific  
27 reasonable accommodations that the employer failed to provide.  
28 Memmer v. Marin County Courts, 169 F.3d 630, 633-34 (9<sup>th</sup> Cir. 1999).

Waters argues that Fred Meyer's assessment of points against  
her for the three absences in May and June 2006 constituted a  
failure to accommodate. Fred Meyer makes two arguments against this  
claim. The first is that Waters had the same access to protected  
leave as similarly situated employees without her disability; thus,  
Waters had no need for accommodation in the form of different rules  
or waivers of rules governing protected leave and discipline for

1 unexcused absences. The second is that even when a duty to  
2 accommodate exists, employers are not required to grant leaves of  
3 absence for sporadic and unpredictable absences when regular  
4 attendance is an essential function of the job.

5 On the first issue, Fred Meyer cites the definition of  
6 "reasonable accommodation" in ADA regulations:

7  
8 The reasonable accommodation that is required by this  
9 part should provide the qualified individual with a  
10 disability with an equal employment opportunity. Equal  
11 employment opportunity means an opportunity to attain the  
12 same level of performance, or to enjoy the same level of  
13 benefits and privileges of employment as are available to  
14 the average similarly situated employee without a  
15 disability.

16 29 C.F.R. Part 1630 Appx. § 1630.9 (emphasis added).

17 Fred Meyer argues that an accommodation is intended to provide  
18 a qualified disabled employee with the means to perform the  
19 essential functions of her position or to enjoy the same benefits  
20 and privileges of employment as non-disabled employees. Further,  
21 Fred Meyer asserts, an accommodation allowing Waters random and  
22 unpredictable absences is not, as a matter of law, a reasonable  
23 accommodation, because an employee who must be allowed frequent  
24 unscheduled absences is not "otherwise qualified" for most jobs.  
25 Fred Meyer cites an unpublished opinion from the Sixth Circuit,  
26 Hibbler v. Reg'l Med. Ctr. at Memphis, 12 Fed. Appx. 336, 339 (6<sup>th</sup>  
27 Cir. 2001) (holding that an employer was not required to overlook or  
28 accommodate frequent unscheduled and unapproved absences by  
plaintiff because an employee who cannot meet the attendance  
requirements of the job cannot be considered a qualified individual

1 protected by the ADA) and an unpublished opinion from the Tenth  
2 Circuit, Keoughan v. Delta Airlines, 113 F.3d 1246 (10<sup>th</sup> Cir.  
3 1997) (employer not required to accommodate employee by increasing  
4 the number of times she could miss work without being disciplined  
5 because the requested accommodation precluded the employee from  
6 performing an essential function of the position, i.e., showing up  
7 for work on a regular and predictable basis).

8  
9 Waters counters that under Ninth Circuit authority, Humphrey,  
10 239 F.3d at 1135, n. 11, "[r]egular and predictable attendance is  
11 not per se an essential job function of all jobs."

12 Waters also challenges Fred Meyer's argument that the  
13 accommodation Waters sought was permission to be absent at  
14 "sporadic and unpredictable times." Waters argues that the only  
15 accommodation she sought from Fred Meyer was waiving the points  
16 assessed against her for the three absences in May and June. She  
17 asserts that if Fred Meyer had simply accommodated those three  
18 absences by not disciplining her for them, Waters would not have  
19 been terminated.

20 Waters's evidence that Fred Meyer knew for a substantial  
21 period of time that Waters had narcolepsy, failed to follow up on  
22 her telephone calls saying she was absent because of narcolepsy,  
23 and considered and rejected the possibility of reminding her of the  
24 deadline generates an issue of fact on whether Fred Meyer could  
25 reasonably have accommodated Waters by waiving the points  
26 accumulated for the May and June 2006 absences.

27 ////



1  
2 C. Failure to engage in interactive process

3 Waters asserts that Fred Meyer failed to engage in the  
4 interactive process with her in connection with her application for  
5 intermittent family leave, which Waters requested retroactively  
6 back to "5/06" but which Fred Meyer commenced on June 8, 2006, the  
7 date it received the second certification from Dr. Bowman. Fred  
8 Meyer counters that Waters has failed to demonstrate any need for  
9 accommodation, because Waters was able to access family leave in  
10 the same manner as every other employee; in the absence of any need  
11 for accommodation in the process of obtaining leave, Fred Meyer had  
12 no duty to interact with her about it.

13 For the reasons discussed above, I conclude that the evidence  
14 in the record creates issues of fact that preclude summary judgment  
15 on this claim. A jury could reasonably conclude that an inquiry by  
16 Fred Meyer after the May and June 2006 absences for narcolepsy was  
17 a called-for step by the employer in an interactive process.

18 D. Retaliation

19 Title V of the ADA prohibits retaliation against or  
20 interference with a person who has asserted rights under the ADA.  
21 See 42 U.S.C. §§ 12203(a) & (b). In Barnett v. U.S. Air, Inc., 228  
22 F.3d 1105, 1121 (9<sup>th</sup> Cir. 2000) (en banc), *vacated on other grounds*,  
23 535 U.S. 391 (2002), the court adopted the framework used to  
24 analyze retaliation claims under Title VII of the Civil Rights Act  
25 for ADA retaliation claims. Thus, in order to establish a prima  
26 facie case of retaliation under the ADA, plaintiff must show 1) she  
27 engaged in a protected activity; 2) she suffered an adverse

1 employment decision; and 3) there was a causal link between the  
2 protected activity and the adverse decision. See also Brown v. City  
3 of Tucson, 336 F.3d 1181, 1187 (9<sup>th</sup> Cir. 2003).

4 If the plaintiff makes out a prima facie case of retaliation,  
5 the familiar McDonnell Douglas burden shifting analysis applies:  
6 employer must articulate a nondiscriminatory reason and the  
7 employee must produce evidence that the explanation is pretextual.  
8 Brown, 336 F.3d at 1186; Coons, 383 F.3d at 87.

9 Fred Meyer moves against Waters's ADA retaliation claim on the  
10 ground that she has not produced evidence of pretext. Because I  
11 have concluded that Waters has generated an issue of fact on  
12 pretext, Fred Meyer's motion for summary judgment on this claim is  
13 denied.

14 E. Wrongful discharge

15 Fred Meyer asserts that Waters's wrongful discharge claim  
16 stands or falls with her FMLA/OFLA claims, since this claim is  
17 predicated on her showing of violations of FMLA and OFLA. Waters  
18 does not dispute this characterization of the wrongful discharge  
19 claim. I turn, therefore to the FMLA and OFLA claims.

20 F. FMLA and OFLA

21 OFLA is "construed to the extent possible in a manner that is  
22 consistent with" FMLA. Or. Rev. Stat. § 659A.186(2). Neither party  
23 has directed the court to any differences, for purposes of this  
24 case, between the federal and state statutes, so a single analysis  
25 of both claims suffices.

26 1. Was Fred Meyer required to approve Waters for  
27

1  
2 intermittent leave on April 24, 2006?

3 For this claim, Waters has alleged as follows:

4 Between April, 2006 and June 7, 2006, Ms. Waters missed  
5 work on three occasions which, had defendant properly  
6 approved her intermittent OFLA/FMLA leave in April, 2006,  
7 would have been protected by OFLA/FMLA leave. Defendant  
8 charged unexcused absences to Ms. Waters for these three  
9 missed days.

10 Complaint ¶ 17.

11 Waters asserts that Dr. Bowman's first medical certification,  
12 submitted with her April 24, 2006 application, was adequate, and  
13 that Fred Meyer violated FMLA/OFLA by requesting additional medical  
14 certification on April 26, 2006. She argues that FMLA regulations  
15 do not require disclosure of a diagnosis; therefore, Fred Meyer's  
16 practice of asking for a diagnosis in medical certifications was  
17 illegal.

18 I disagree with Waters that Dr. Bowman's statement on the  
19 April 6, 2006 certification was adequate under FMLA regulations. It  
20 says only that Waters has a "chronic medical condition requiring  
21 intermittent time off work and medical monitoring and testing."  
22 Taylor Declaration, Exhibit F. This statement is devoid of any  
23 "medical facts" to support the certification.

24 Section 825.306 of the FMLA regulations states that the  
25 Department of Labor has developed Form WH 380, for use in obtaining  
26 medical certification, and reflecting medical certification  
27 requirements under FMLA. 29 C.F.R. § 825.306(a). Form WH 380, or  
28 another form containing the same basic information, may be used by  
the employer, but no "additional information" may be required. Id.

1 at (b). The required entries include an explanation of which part  
2 of the definition of "serious health condition," if any, applies to  
3 the patient and "the medical facts which support the certification,  
4 including a brief statement as to how the medical facts meet the  
5 criteria of the definition." Id. at (b)(1).

6 Form WH 380 states as follows:

7 Describe the **medical facts** which support your  
8 certification, including a brief statement as to how the  
9 medical facts meet the criteria of one of these  
categories.

10 Smith Declaration, Exhibit N. Fred Meyer's request for medical  
11 certification form for health care providers contains identical  
12 language: "Describe the medical facts which support your  
13 certification, including a brief statement as to how the medical  
14 facts meet the criteria of one of these categories." See, e.g.,  
15 Taylor Declaration, Exhibit B. Waters argues that requiring a  
16 diagnosis is prohibited "additional information," so that Fred  
17 Meyer violated FMLA by asking for a diagnosis.

18 The term "medical facts which support your certification" does  
19 not specifically require or prohibit a diagnosis. Nor does the  
20 prohibition on "additional facts" reveal whether a diagnosis would  
21 be considered a "medical fact" or an "additional fact." In  
22 resolving this problem, the court is guided by amendments to the  
23 regulations which took effect in January 2009. The amendments  
24 include additional detail about what constitutes "medical facts,"  
25 and specifically includes diagnosis. The amended regulation  
26 provides that the employer may require the employee to obtain a  
27

1  
2 medical certification that contains the following information:

3 A statement or description of appropriate medical facts  
4 regarding the patient's health condition for which FMLA  
5 leave is requested. The medical facts must be sufficient  
6 to support the need for leave. Such medical facts may  
7 include information on symptoms, diagnosis,  
8 hospitalization, doctor visits, whether medication has  
9 been prescribed, any referrals for evaluation or  
10 treatment ... or any other regimen of continuing  
11 treatment.

12 29 C.F.R. § 825.306(a) (3) (2009) (emphasis added). The amendment  
13 indicates that the Department of Labor construes a diagnosis as a  
14 "medical fact" and not as a prohibited "additional fact." The court  
15 defers to the agency's interpretation of the regulation and  
16 concludes that a diagnosis is a "medical fact" and not an  
17 "additional fact." See, e.g., Firebaugh Canal v. United States, 203  
18 F.3d 568, 573 (9<sup>th</sup> Cir. 2000) (agency interpretation accorded  
19 judicial deference unless arbitrary, capricious, or contrary to  
20 statute). Accordingly, I conclude that Dr. Bowman's April 6, 2006  
21 certification, submitted on April 24, 2006 by Waters, was  
22 inadequate and that it was not a violation of FMLA for Fred Meyer  
23 to request medical facts, including a diagnosis.

24 Waters also asserts that Fred Meyer knew, from Waters's  
25 telephone calls on May 5, 2006, May 15, 2006, and June 2, 2006,  
26 that she required leave because of her narcolepsy, and therefore  
27 that Fred Meyer's refusal to give her medical leave on those dates  
28 was a violation of FMLA and OFLA. She argues that Fred Meyer had  
long been aware that she suffered from narcolepsy and had no reason  
to believe that her medical condition had changed or improved since  
April 2005, when Dr. Bowman wrote that Waters had "narcolepsy,

1 extreme fatigue, headache, nausea" and Fred Meyer granted her a  
2 year of intermittent leave. Waters relies on the series of email  
3 exchanges within Fred Meyer, indicating that Swan, Waters's  
4 supervisor, Jack Pedro, Boomhaver, and Lettenmeier were aware that  
5 Waters had applied for another year of intermittent leave in April  
6 2006, and that they assumed it was for narcolepsy. Declaration of  
7 Kerry Smith (Smith III), Exhibit A.  
8

9 Fred Meyer responds that FMLA regulations 1) entitled Fred  
10 Meyer to request the "medical facts" missing from Dr. Bowman's  
11 certification of April 24, 2006 (29 C.F.R. § 825.306); 2) gave Fred  
12 Meyer the right to request such certification at the time Waters  
13 gave notice of the need for leave or within two business days  
14 after, and Fred Meyer complied with this regulation by requesting  
15 the certification on April 26, 2006, two days after Waters's April  
16 24, 2006 application (id. at § 825.305); 3) required Waters to  
17 provide certification within the time frame requested by the  
18 employer, so long as that time frame was at least 15 days after the  
19 employer's request, if the need for leave was foreseeable, or as  
20 "soon as reasonably possible under the particular facts and  
21 circumstances" if it was not foreseeable (id. at 825.311);<sup>5</sup> and 4)

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22 <sup>5</sup> When the leave is foreseeable and at least 30 days notice  
23 has been provided, **the employee should provide the medical**  
24 **certification before the leave begins. When this is not possible,**  
25 **the employee must provide the requested certification to the**  
26 **employer within the time frame requested by the employer (which**  
27 **must allow at least 15 calendar days after the employer's**  
28 **request)** unless it is not practicable under the particular  
circumstances to do so despite the employee's diligent, good  
faith efforts.

1 authorized Fred Meyer to delay the leave "until the required  
2 certification is provided." (id. at § 825.311).<sup>6</sup>  
3

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4  
5 In most cases, the employer should request that an  
6 employee furnish certification **at the time the employee**  
7 **gives notice of the need for leave or within two**  
8 **business days thereafter, or, in the case of unforeseen**  
9 **leave, within two business days after the leave**  
10 **commences. \*\*\***

11 Id. at (b), (c) (emphasis added).

12 <sup>6</sup> (a) In the case of foreseeable leave, an employer may delay  
13 the taking of FMLA leave to an employee who fails to provide  
14 timely certification after being requested by the employer to  
15 furnish such certification (i.e., within 15 calendar days, if  
16 practicable) until the required certification is provided.

17 (b) When the need for leave is not foreseeable ... an  
18 employee must provide certification ... within the time frame  
19 requested by the employer (which must allow at least 15 days  
20 after the employer's request) or as soon as reasonably under the  
21 particular facts and circumstances. ... If an employee fails to  
22 provide a medical certification within a reasonable time under  
23 the pertinent circumstances, the employer may delay the  
24 continuation of FMLA leave.

25 See also section 825.312(b) ("If an employee fails to  
26 provide in a timely manner a requested medical certification to  
27 substantiate the need for FMLA leave due to a serious health  
28 condition, an employer may delay continuation of FMLA leave until  
29 an employee submits the certificate) and Washington v. Fort James  
30 Operations Co., 110 F. Supp.2d 1325, 1331 (D. Or. 2000):

31 Washington further contends that Fort James may never  
32 deny FMLA leave as long as the employee ultimately  
33 presents it with proper certification. \*\*\* This court  
34 does not agree with Washington's interpretation of the  
35 regulations. Washington's interpretation of 29 C.F.R. §  
36 825.311(b) would render meaningless that section's  
37 requirement that an employee provide certification to  
38 his employer within the time frame requested unless  
39 particular facts and circumstances justify a delay. The  
40 requirement that an employee return his FMLA  
41 certification within a reasonable time or else lose his  
42 entitlement to FMLA fulfills Congress's desire to

1  
2 Fred Meyer points out that it also complied with the  
3 requirement of section 825.305(d) that, at the time the employer  
4 requests certification, the employer "must also advise an employee  
5 of the anticipated consequences of an employee's failure to provide  
6 adequate certification." Taylor's note to Waters on April 26, 2006,  
7 warned Waters that her certificate from Dr. Bowman was not  
8 sufficient because it did not provide the necessary medical facts,  
9 and gave her until May 11, 2006, to provide another one "or we will  
10 delay the commencement of your leave until the certification is  
11 submitted."

12 The FMLA regulations do not require employers to accept,  
13 without medical verification, the employee's representations about  
14 the medical basis for the leave, or to make assumptions, based on  
15 past experience, about the "medical facts" supporting the leave. In  
16 fact, the regulations specifically authorize the employer to  
17 require medical certification "issued by the *health care provider*  
18 *of the employee,*" not from the employee. 29 C.F.R. §  
19 825.305(a) (emphasis added). I disagree, therefore, with Waters's  
20 argument that Fred Meyer was required to accept the April 24  
21 application without medical facts.

22 However, a reasonable jury could conclude that when Waters

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23 balance the demands of the workplace with the needs of  
24 families. \*\*\* Accordingly, the court concludes that an  
25 employer may deny FMLA leave where the employee has  
26 failed to timely submit the required certification  
27 unless timely submission was not reasonably possible  
28 under the employee's particular facts and  
circumstances.



1 called in on May 5, 2006, and again on May 15, 2006--after the May  
2 11, 2006 deadline had expired-- Fred Meyer had some obligation to  
3 treat the telephone calls in May as requests for discrete instances  
4 of FMLA or OFLA leave, since leave under the April 24, 2006  
5 application was not yet approved.  
6

7 2. Did Fred Meyer violate FMLA by assessing points  
8 against Waters for the absences in May and June  
9 2006?

10 As discussed, Waters asserts that Fred Meyer violated FMLA  
11 when it determined that her leave commenced on June 7, 2006,  
12 instead of permitting the leave to commence on "5/06" as Waters  
13 wrote in her application for leave dated June 8, 2006. Accordingly,  
14 she argues, Fred Meyer should not have imposed points on her for  
15 the May 5, May 15, and June 2, 2006 absences.

16 Fred Meyer asserts that it acted consistently with FMLA  
17 regulations when it limited Waters's intermittent leave to the  
18 period beginning June 7, 2006; accordingly, the assessment of  
19 points against Waters for the May and June 2006 absences was  
20 proper. Fred Meyer points out that 1) the first certification from  
21 Dr. Bowman was deficient under the regulations; 2) Fred Meyer  
22 promptly notified Waters that Bowman's certification was deficient  
23 and gave her an opportunity to cure the deficiency within the time  
24 mandated by the regulations, see 29 C.F.R. § 825.305(c); and 3)  
25 Fred Meyer explained in the response that the consequence of  
26 missing the May 11, 2006 deadline would be delaying Waters's leave  
27 under 29 C.F.R. § 825.305(d).

1  
2 For the reasons already discussed, I conclude genuine issues  
3 of material fact preclude summary judgment for either Waters or  
4 Fred Meyer on this claim.

5 3. FMLA retaliation claim

6 Waters concedes the FMLA and OFLA retaliation claims, and  
7 withdraws them.

8 H. Waters's motion for summary judgment on Fred Meyer's  
9 Tenth Affirmative Defense

10 Waters moves for summary judgment on Fred Meyer's 10<sup>th</sup>  
11 affirmative defense, which is that accommodating Waters's  
12 disability would have created an undue hardship for Fred Meyer.  
13 Waters asserts that Fred Meyer cannot demonstrate that granting  
14 Waters leave for the three absences in May and June 2006 without  
15 assessing points under the attendance policy would have created an  
16 undue hardship. The existence of factual issues on reasonable  
17 accommodation precludes summary judgment in Waters's favor on this  
18 affirmative defense.

19 **Conclusion**

20 Fred Meyer's motion for summary judgment in its favor on all  
21 claims (doc. # 20) is DENIED except for those claims conceded by  
22 Waters. Waters's motion for partial summary judgment on the

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 FMLA/OFLA claims and on Fred Meyer's Tenth Affirmative Defense is  
2 (doc. # 24) is DENIED.

3 IT IS SO ORDERED.

4 Dated this \_\_26th\_\_\_\_ day of \_June\_, 2009.

5 /s/ Dennis J. Hubel  
6

7 \_\_\_\_\_  
8 Dennis James Hubel  
9 United States Magistrate Judge  
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