

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

RACHEL V. PETTUS,) CIVIL ACTION NO. 5:99CV000103
Plaintiff,)
v.) ORDER
AMERICAN SAFETY RAZOR)
COMPANY,)
Defendant.)
JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly
this day

ADJUDGED ORDERED AND DECREED

as follows:

(1) The October 6, 2000 Report and Recommendation of the Magistrate Judge shall
be, and hereby is, ACCEPTED.

(2) The defendant's August 10, 2000 Motion for Summary Judgment shall be, and
hereby is, DENIED.

(3) All dispositive motions having been ruled upon, and discovery having been
completed, the parties shall contact the Clerk of the Court upon receipt of this order to
schedule the matter for trial.

The Clerk of the Court hereby is directed to send a certified copy of this order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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RACHEL V. PETTUS,) CIVIL ACTION NO. 5:99CV000103
Plaintiff,)
v.) MEMORANDUM OPINION
AMERICAN SAFETY RAZOR)
COMPANY,)
Defendant.)
JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the defendant’s motion for summary judgment in this action for wrongful termination under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12112 et. seq. The above-captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. § 636 (b)(1)(B). The Magistrate Judge returned his Report and Recommendation on October 6, 2000, recommending that the court deny the defendant’s motion for summary judgment. The defendant timely filed objections to the Report and Recommendation, to which the plaintiff responded. The court has performed a *de novo* review. *See* 28 U.S.C. § 636 (b)(1)(C). Having thoroughly considered the entire case and all relevant law, the court is in agreement with the Report and Recommendation and, for the reasons stated herein, shall deny the defendant’s motion for summary judgment.

I.

The plaintiff, Rachel Pettus, began working for the defendant, American Safety Razor, Co. (“ASR”) in Verona, Virginia in 1970 and continued through her termination in 1998. Pettus began as a clerk-typist, and ended her career with ASR as a drafting aide in the engineering department. Throughout her career with the defendant, or at least from 1980 through 1996, the plaintiff has received annual merit-based pay increases, along with evaluations of her performance wherein the plaintiff’s supervisors consistently rated her performance at “fully satisfactory” or better.

Since 1991, the plaintiff allegedly has suffered from cervical myelopathy and restless leg syndrome, both of which contribute to limitations on the plaintiff’s ability to walk and talk. As a result, the plaintiff’s work attendance was interrupted by sick leave, scheduled doctor visits, and eventually, short-term disability leave.

It is undisputed that, sometime prior to June 1997, several of the plaintiff’s supervisors directed comments to the plaintiff about her ability to walk and talk, such as “Hurry up, Speedy,” which the plaintiff characterizes as derogatory comments about her physical disability. Other than these comments, the plaintiff reports no formal counseling as to deficiencies of her job performance. On June 3, 1997, the plaintiff attended a meeting with several supervisors and personnel representatives, who advised the plaintiff to take short-term disability leave or be fired. The plaintiff followed this advice and took short-term disability

leave beginning June 10, 1997.¹ When the plaintiff was on leave, the defendant hired temporary workers to perform the plaintiff's job duties.

In early January 1998, the plaintiff mailed to the defendant's personnel department a letter from the plaintiff's treating physician, clearing the plaintiff to return to work. The defendant requested a second medical opinion, and refused to permit the plaintiff to return to work absent the second opinion.² After twice rescheduling the plaintiff's appointment, Dr. Puzio examined the plaintiff on March 13, 1998 and reported back to the defendant later that month. However, Dr. Puzio's initial report contained no definitive statement on the plaintiff's ability to return to work. The defendant, at whose request the second opinion was sought, requested no clarification for the deficiencies in Dr. Puzio's March report.³ While the plaintiff was awaiting clearance from a second doctor to return to work, she was receiving no income because her six-month period of paid, short-term disability leave had expired in January. On June 8, 1998, the parties met again to discuss the plaintiff's return to work. At that meeting, the defendant's representatives suggested that the plaintiff take long-term disability leave, because they were of the opinion that this presented the best financial option to the plaintiff. The plaintiff, although earning no income at the time, maintained that she

¹ In December 1997, the plaintiff completed applications for long-term disability leave. At her deposition, the plaintiff explained that this was done as a precautionary measure in the event that she would be unable to return to work at the end of her short-term leave.

² As it is unnecessary to resolve the instant motion, the court herein takes no position on the propriety of the defendant's request for a second opinion.

³ Nor did the plaintiff, although the plaintiff has already presented the defendant with a letter from her own doctor clearing the plaintiff to return to work.

wished to return to work rather than seek disability.

The defendant alleges that, during the June 8, 1998 meeting, the supervisors with whom the plaintiff met were aware that the plaintiff's position would soon be terminated as part of an overall corporate restructuring. Although the defendant claims to have been acting in the plaintiff's best financial interest when they suggested that she take long term disability leave, the information about the allegedly imminent elimination of the plaintiff's position was not disclosed to the plaintiff. On June 15, 1998, the plaintiff again met with Dr. Puzio, who informed the plaintiff that the defendant had sent him paperwork regarding qualifying the plaintiff for long-term disability. The plaintiff again expressed a desire to work. On June 25, 1998, Dr. Puzio officially cleared the defendant to return to work, thereby providing the defendant with the second opinion they had required in order for the plaintiff to resume employment. Five days later, on June 30, 1998, the plaintiff's supervisor informed her that her position in the Verona plant had been eliminated, and that the plaintiff was terminated, effective immediately. In September 1998, other positions in the Verona plant were eliminated or transferred to Tennessee. However, the plaintiff claims that the duties for which she had been responsible continued to be performed in the Verona plant until at least December 1998.

The plaintiff has brought this action under the ADA for unlawful discrimination, claiming that the defendant fired her not because of some corporate restructuring, but due to the plaintiff's disability.

II.

Before the court is the defendant's motion for summary judgment. A party is entitled to summary judgment when the pleadings and discovery show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). All facts and reasonable inferences that can be drawn therefrom must be interpreted in the light most favorable to the non-moving party. *See Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990). However, the non-movant may not rest upon mere allegations and denials of the pleadings, and must assert more than a "mere scintilla" of evidence in support of her case in order to survive an adverse entry of summary judgment. *See Anderson*, 477 U.S. at 248. Of particular relevance to the instant case, courts must take special care when considering a motion for summary judgment in a discrimination case because motive is often the critical issue. *See Beall v. Abbott Laboratories*, 130 F.3d 614, 619 (4th Cir. 1997) (citing *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996)).

III.

The core liability provision of the ADA states:

No covered entity⁴ shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

The plaintiff alleges that she was fired because of her disability, thereby charging the defendant with discriminatory termination of employment, in violation of the ADA.

In order for the plaintiff to make a prima facie case of discrimination under the ADA, the plaintiff must show, by a preponderance of the evidence, that (1) she is a member of a protected class; (2) she was discharged; (3) at the time of her discharge, she was meeting the employer's legitimate expectations with respect to the duties of her employment; and (4) the circumstances of her discharge could raise a reasonable inference of discrimination. *See Ennis v. NABER*, 53 F.3d 55, 58 (4th Cir. 1995). The parties agree that the plaintiff is both a member of a protected class and that she was fired from her employment with the defendant. However, the defendant contends that it is entitled to summary judgement because the plaintiff fails to establish the third and fourth prongs, thereby failing to make out her prima facie case as a matter of law. The plaintiff, on the other hand, contends that there are genuine issues of material fact as to the third and fourth prongs of the test for discrimination under the ADA.

A.

⁴ There is no dispute that ASR is a covered entity under the ADA.

In order to show that the plaintiff is a “qualified individual” under the ADA, the plaintiff has the burden of showing that she was meeting the defendant’s legitimate expectations at the time of her termination. *See* 42 U.S.C. § 12112(a); *Ennis*, 53 F.3d at 58 (third prong). The defendant argues that the plaintiff has not produced sufficient evidence to meet this burden. In essence, the defendant’s position is that irregular or unreliable attendance is close to a per se showing that a person is not meeting the employer’s legitimate expectations, unless the employee’s tasks can be performed away from the office. (Def. Obj. at 2-3). Defendant argues that the plaintiff’s attendance was essential, and that her absence rendered her unable to perform at a satisfactory level. However, the evidence does not support fully the defendant’s position.

Despite notations that the plaintiff had considerable absences, the defendant consistently gave the plaintiff satisfactory evaluation reports, which noted that the plaintiff completed her tasks in a timely, and error-free manner, and granted the plaintiff merit-based pay increases. The defendant does not account for the apparent contradiction between the satisfactory reviews and the argument that, based on absenteeism, the plaintiff’s performance was less than satisfactory. In *Tyndall v, National Education Centers, Inc.*, 31 F.3d 209, 214 (4th Cir. 1994), the Fourth Circuit found that the plaintiff was not a “qualified individual” under the ADA because the plaintiff’s attendance problems rendered her unable to fulfill the essential functions of her job. In *Tyndall*, there was no dispute that the quality of the plaintiff’s performance was good, but the court found that an inquiry into attendance was necessary. *See id.* at 213. In the instant case, the defendant had the full opportunity to reflect

in the evaluations any performance problems that resulted from the plaintiff's attendance. Although the defendant fully was aware of the plaintiff's absences when completing her evaluations, the defendant nonetheless found the plaintiff's performance satisfactory and furthermore, worthy of bonuses. Indeed, despite the defendant's protestations that the plaintiff was not meeting its legitimate expectations, there is no outward manifestation of this problem in the plaintiff's personnel file, and the parties dispute whether the plaintiff was ever counseled for on her job performance. Although the defendant alleges that the plaintiff is not a "qualified individual" under the ADA because her performance did not meet the defendant's legitimate expectations, the defendant never has alleged that absenteeism or resulting subpar performance played a role in the plaintiff's discharge. Unlike *Tyndall*, where the plaintiff was discharged⁵ because of an attendance conflict, the plaintiff allegedly was terminated due to a strategic corporate restructuring decision. Furthermore, until the defendant prevented the plaintiff's return to work, the defendant has never alleged that the plaintiff had more absences that she was entitled to under the terms of her employment.⁶

Based on the foregoing, and bearing in mind the respective duties of the parties in determining a motion for summary judgment, the plaintiff has produced sufficient evidence to

⁵ In *Tyndall*, the plaintiff and employer signed a report that their separation was "mutual." 31 F.3d at 212.

⁶ For example, although the defendant repeatedly refers to the 180 days during 1997 that the plaintiff was absent, the plaintiff was on short term disability leave from June through December 1997. Defendant does not argue that the plaintiff was not entitled to this leave. In fact, the record is uncontradicted that the plaintiff's supervisors told her in June 1997 to take short term leave or be terminated. Certainly, the defendant could have no legitimate expectations that the plaintiff would perform while she was on leave.

support her argument that she is a “qualified individual” under the ADA because she was meeting the defendant’s legitimate business expectations. Accordingly, defendant’s motion for summary judgment on the grounds that the plaintiff failed to make out the third prong of the prima facie case of discrimination shall be denied.

B.

To make a prima facie case of discrimination under the ADA, the plaintiff must establish by a preponderance of the evidence, that the circumstances of her discharge could raise a reasonable inference of discrimination. *See Ennis*, 53 F.3d at 58 (fourth prong). The series of events preceding the plaintiff’s discharge all revolve solely around the plaintiff’s disability. *But cf. id.* (discharge preceded by clear violation of performance standards); *Shiflett v. GE Fanuc Automation Corp.*, 960 F. Supp. 1022 (W.D. Va. 1997) (discharge preceded by confrontation between plaintiff and supervisor), *aff’d* 151 F.3d 1030 (4th Cir. 1998) (unpublished table decision). A reasonable juror could find that the events precipitating the plaintiff’s discharge and their close relation to the defendant’s disability -- specifically, the derogatory comments, the ultimatum of disability leave or termination, the requirement of a second opinion to return to work, and the termination on the heels of the return of a second opinion that was favorable to the plaintiff -- raise a reasonable inference of discrimination.

The defendant argues that there is no reasonable inference of discrimination as a matter of law, because the defendant was entitled to seek a second medical opinion. The defendant argues that, because of the plaintiff’s history of taking leave, returning from leave, and shortly thereafter taking leave again, it was reasonable for the defendant to request a

second medical opinion when the plaintiff sought to return to work in January 1998. The court agrees that the defendant's argument is one inference that could be drawn from the request for a second opinion. However, the plaintiff's argument, that the request for a second opinion raised a reasonable inference of discrimination based on the plaintiff's disability, is also plausible. Because it is the defendant who has moved for summary judgment, reasonable inferences must be made in favor of the plaintiff. *See Liberty Lobby*, 477 U.S. at 255. Even assuming, *arguendo*, that the defendant was entitled to request a second opinion under the ADA, it is the events surrounding the discharge, in their totality, which raise the reasonable inference of discrimination in this case.

The final decision of credibility, and what inferences should be drawn from the behavior of the parties properly is within the province of a jury. *Id.* However, for the purpose of deciding the defendant's motion for summary judgment, the court draws all reasonable inferences in favor of the plaintiff and finds that, consistent with the Report and Recommendation, the defendant is not entitled to summary judgment on the grounds that the plaintiff has failed to make out all four prongs of prima facie case of discrimination.

IV.

The *McDonnell Douglas* burden shifting scheme applies to ADA cases. *See Ennis*, 53 F.3d at 57; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Accordingly, once the plaintiff satisfies her burden of making a prima facie showing of discrimination under the ADA, the burden shifts to the defendant to set forth a legitimate, nondiscriminatory reason for the plaintiff's discharge. The defendant argues that the legitimate

nondiscriminatory reason for the plaintiff's termination was the corporate decision to eliminate the plaintiff's position (and others) from the defendant's Verona, Virginia location. At this stage, the defendant bears the burden of production, not persuasion, and the burden can involve no credibility assessment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (citing and quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)). Accordingly, the proffered reason of legitimate business decisions is sufficient to meet the defendant's burden.

V.

Once the defendant meets its burden of production, the burden shifts back to the plaintiff, who always retains the ultimate burden of persuasion to show that the real reason for the plaintiff's termination was illegal discrimination. *See Reeves*, 530 U.S. 143 (citing and quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). The defendant argues that, as a matter of law, the plaintiff has failed to show any evidence of pretext, thus entitling the defendant to summary judgment.

Plaintiff argues that the defendant's corporate reorganization is just a pretext, because her termination effectively occurred in January, 1998, but the actual reorganization and termination of all other similarly situated employees occurred in September, 1998. Furthermore, as recounted *supra*, Part I, the sequence of events preceding the plaintiff's termination, beginning around mid-1997 and continuing through the official termination date of June 25, 1998, are sufficient to permit a reasonable fact finder to determine that the defendant's proffered justification for the plaintiff's termination is unworthy of credence. *See*

Reeves, 530 U.S. at 147 (“Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive”). The defendant placed certain limitations the plaintiff’s ability to return to work. When the plaintiff met the defendant’s demands, the plaintiff was still not permitted to return to work but, rather, was terminated. When taken in the light most favorable to the plaintiff, the refusal to permit the plaintiff’s return to work, coupled with arguably mocking comments from the plaintiff’s supervisors as to the plaintiff’s physical disabilities and the subsequent threat that she take leave or get fired, raise a reasonable inference that the defendants proffered non-discriminatory reason is pretextual.

The defendant argues that there can be no pretext because the plaintiff was terminated by corporate executives who were not aware of her disability. However, nowhere in the record does the defendant account for the fact that the other employees whose positions were terminated , were terminated months after the defendant. This lends credence to the plaintiff’s argument that the decision to terminate the plaintiff was based on the plaintiff’s disability, and not the corporate restructuring. Recognizing established precedent, the court is reluctant to second-guess certain business decisions. *See Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000). For example, in *Rowe*, the Fourth Circuit did not find unlawful discrimination where a disabled salesman was fired, along with another salesman, when the company reconfigured its sales territories and the plaintiff did not show evidence of pretext. *See id.* at 831. Contrary to *Rowe*, however, the plaintiff has produced evidence that casts doubt on the defendant’s proffered reason for termination. *But cf. id.* at 830. Although there

is no dispute as to the defendant's corporate restructuring, it appears from the current record that the restructuring resulted in several terminations in September 1998, but that the plaintiff was prevented from returning to work as early as January, 1998. The difference in timing, combined with the series of events from mid 1997 through mid 1998, casts doubt on the defendant's proffered reason for termination.

“Undoubtedly, the application of a neutral rule that applies to disabled and nondisabled individuals alike cannot be considered discrimination on the basis of disability.” *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 n.6 (4th Cir. 1999). Assuming, *arguendo*, that the terminations for the defendant's corporate restructuring constituted a neutral rule or policy, the even application of this rule to the plaintiff and others would not be considered discrimination. *See id.* However, the plaintiff has presented sufficient evidence that the terminations were not applied evenly to her with respect to other employees. This, too, lends to the plaintiff's argument that the defendant's proffered reason lacks credence.

Considering all of the evidence presently before the court, drawing all reasonable inferences in favor of the plaintiff, a reasonable fact finder could conclude that the defendant's termination of the plaintiff was discriminatory. In the absence of evidence directing a reasonable fact finder to conclude that there was no discrimination, the prima facie case combined with evidence of pretext in this case entitles the plaintiff to survive summary judgment. *See E.E.O.C. and Santana v. Sears Roebuck & Co.*, --F.3d -- (4th Cir. 2001).

VI.

In accordance with the foregoing, the Report and Recommendation shall be accepted

and the defendant's motion for summary judgment shall be denied. An appropriate order shall this day enter.

ENTERED: _____
Senior United States District Judge

Date