

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

THELMA LOUISE DUNFORD,)	
Plaintiff)	
v.)	Civil Action No. 1:99CV00137
)	
FOOD LION, INC.,)	<u>REPORT AND</u>
Defendant)	<u>RECOMMENDATION</u>
)	BY: PAMELA MEADE SARGENT
)	United States Magistrate
)	Judge

This case is before the court on the defendant’s motion for summary judgment, (“Defendant’s Motion”), (Docket Item No. 20). Defendant’s Motion was referred to the undersigned for recommended decision pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). Oral argument on Defendant’s Motion was held before the undersigned on June 4, 2001. The undersigned has considered the parties’ legal arguments and supporting documents. As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I. Facts

The plaintiff in this action, Thelma Louise Dunford, seeks equitable relief and damages from the defendant, Food Lion, Inc., based upon the defendant's alleged violation of the Americans with Disabilities Act, ("ADA"), 42 U.S.C.A. § 12101 *et seq.* (West 1995 & Supp. 2000). Dunford claims that Food Lion violated the ADA by failing to make reasonable accommodations for her and by constructively discharging her. Dunford also seeks damages under Virginia law for intentional infliction of emotional distress. Many of the facts are undisputed in this matter.

Dunford is a former employee of Food Lion, who worked in Food Lion's Tazewell, Virginia, store as a cake decorator in the deli department from August 1993 until March 1998. Dunford claims that she is allergic to certain cleaning agents and chemicals, which, if exposed to them, cause her to suffer sinus congestion, resulting in facial swelling and headaches. During Dunford's employment, Food Lion had a policy of requiring every full-time employee to work two closing shifts per week. Those working the closing shift in the deli department were required to clean utensils, dishes, the counters and the floor using specific cleaning agents which Dunford alleges triggered these allergic reactions.

Initially, Dunford was supervised by her sister, Kathy Neal.

Despite Food Lion's policy, Neal tried not to assign Dunford to the closing shift. When Dunford was required to work the closing shift, Neal had other employees do all of the cleaning. In January 1998, Connie McGuire became Dunford's supervisor. McGuire began scheduling Dunford to work two closing shifts per week. Many times only one employee worked this closing shift in the deli. Therefore, if Dunford worked this shift, she was required to perform all the cleaning duties. Dunford resigned from her employment with Food Lion in March 1998.

Dunford admits that she was able to perform all duties required of her as a cake decorator for Food Lion, with the exception of cleaning with certain chemicals. Also, Dunford admits that she is currently employed as a cake decorator with Wal-Mart in Claypool Hill, Virginia, performing essentially the same job as she held with Food Lion, with the exception of being required to clean with certain chemicals. Dunford has produced no evidence that she suffers any impairment in her ability to breathe at times other than when exposed to certain cleaning chemicals.

II. Analysis

The standard for review for a motion for summary judgment is well-settled; the court should grant summary judgment only when the

pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1109 (1991); and *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). A genuine issue of fact exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587-88; *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 850 (4th Cir. 1990); *Ross*, 759 F.2d at 364-65; *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980). In other words, the nonmoving party is entitled to have “the credibility of his evidence as forecast assumed.” *Miller*, 913 F.2d at 1087 (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). Therefore, in reviewing the Defendant’s Motion, the court

must view the facts and inferences to be drawn from these facts in the light most favorable to the plaintiff.

Food Lion argues that summary judgment should be entered in its favor because there is no genuine dispute in material facts and it is entitled to judgment as a matter of law because:

1. Dunford is not a “qualified individual” under the ADA;
2. Dunford does not suffer from a “disability” for purposes of the ADA; and
3. Dunford has no claim under Virginia law for intentional infliction of emotional distress.

(Memorandum In Support Of Motion For Summary Judgment, (“Defendant’s Brief”), (Docket Item No. 21), at 1.) At the June 4, 2001, hearing, plaintiff’s counsel conceded that the facts of the case did not support a claim for intentional infliction of emotional distress.

Dunford alleges that Food Lion unlawfully discriminated against her in violation of the ADA by refusing to accommodate her sensitivity to certain cleaning agents and constructively discharging her by requiring her to work with these cleaning agents. Unlawful discrimination under the

ADA may be proven by showing either direct evidence of unlawful intent or by indirect evidence under the burden-shifting scheme of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir. 1997) abrogated on other grounds by 192 F.3d 462, 469 n. 8 (4th Cir. 1999). In this case, there is no direct evidence, such as conduct or statements, to show a discriminatory motive for the contested employment decision. Therefore, under the *McDonnell Douglas* scheme, Dunford bears the burden of establishing a prima facie case.

To establish a prima facie case for discrimination under the ADA, a plaintiff must show that:

1. She is a “qualified individual;” and
2. She suffers from a “disability.”¹

See Halperin, 128 F.3d at 197.

To be considered “qualified,” an individual must be able to perform the “essential functions” of the position she held. *See* 42 U.S.C.A. § 12111(8) (West 1995 & Supp. 2000). The “essential functions” of a position are the “fundamental job duties” of the position. 20 C.F.R. §

¹A plaintiff also must show that she suffered from an adverse employment action because of her disability to establish a prima facie case. *See Baird v. Rose*, 192 F.3d 462, 469-70 (4th Cir. 1999). This third element is not at issue on the pending motion.

1630.2(n) (2000). In this case, Food Lion asserts that Dunford is not a “qualified” individual in that she is unable to perform the required cleaning, which is an “essential function” of the position. Food Lion has offered the deposition testimony of Neal in support of this. Dunford, on the other hand, asserts that cleaning is not an essential function of the cake decorating position. In support of her argument, Dunford offers as evidence the fact that Food Lion accommodated her request to be exempt from the cleaning duties for a period. Because I believe that the evidence presents a genuine issue of material fact on this question, I find that the entry of summary judgment is inappropriate on this issue.

Food Lion also argues that summary judgment should be entered in its favor because the undisputed facts show that Dunford does not suffer from a disability. To have a “disability” under the ADA, a plaintiff must show that she:

1. Suffers from a physical or mental impairment that “substantially limits” one or more “major life activities;”
2. Has a record of such an impairment; or
3. Is regarded as having such an impairment.

42 U.S.C.A. § 12102(2) (West 1995 & Supp. 2000).

Dunford alleges that she is disabled under the ADA because her

alleged chronic sinusitis, bronchitis and occupational asthma substantially limit the major life activity of breathing.² (Answers to Defendant’s First Interrogatories to Plaintiff, (Docket Item No. 14), at 4.) Food Lion does not dispute that breathing is a major life activity. *See* 29 C.F.R. § 1630.2(i) (2000). Food Lion does, however, argue that Dunford’s alleged impairments do not “substantially limit” her ability to breathe. (Defendant’s Brief at 9.) In particular, Food Lion cites a number of cases in which courts have held that a plaintiff who suffers from respiratory reactions to certain irritants does not suffer from an impairment that “substantially limits” the ability to breathe. *See, e.g., Muller v. Costello*, 187 F.3d 298, 313-14 (2nd Cir. 1999) (evidence that plaintiff suffered from asthma aggravated by second-hand smoke exposure at work was insufficient to show that major life activity of breathing was substantially limited where plaintiff engaged in substantial physical activity outside work without problems); *Maudlin v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992) (a sensitivity to certain chemicals does not substantially limit any major life activities); *Nugent v. Rogosin Institute*, 105 F.Supp.2d 106, 113-

²Contrary to her counsel’s legal arguments, Dunford has not asserted that her alleged impairment substantially limits any major life activity other than breathing. Even if Dunford did assert that her impairment substantially limited her ability to work, this argument would fail based on the undisputed fact that Dunford could perform work which did not require exposure to these particular cleaning agents. *See Gupton v. Commonwealth of Virginia*, 14 F.3d 203, 205 (4th Cir. 1994) (citing *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986)) (plaintiff in Rehabilitation Act claim must show more than that impairment bars him from one particular job to establish that an impairment substantially limits ability to work).

14 (E.D. N.Y. 2000) (plaintiff who suffered from asthma attacks triggered primarily by exposure to allergens present at work was not substantially limited in her ability to breathe); *Rhoads v. Federal Deposit Insurance Corp.*, 956 F.Supp. 1239, 1246-47 (D. Md. 1997) (where plaintiff claims that ability to breathe is substantially limited only when exposed to irritants in her workplace environment, she has not met her burden to prove that she suffers from a disability).

Plaintiff's counsel has provided no legal authority to the contrary, and I cannot find that the Fourth Circuit has addressed this specific issue. Nonetheless, I am persuaded that the cases cited by Food Lion set out the proper rule of law. The Fourth Circuit has held that for an impairment to "substantially limit" a major life activity it must significantly restrict an individual's ability to perform that activity. *Halperin*, 128 F.3d at 199, citing *Runnebaum v. NationsBank*, 123 F.3d 156, 167 (4th Cir. 1997). Furthermore, the Fourth Circuit has held that, in determining whether an impairment significantly restricts an individual's ability to perform a major life activity, the court may "consider the nature and severity of the impairment, its duration or expected duration, and any permanent or long term impact." *Williams v. Channel Masters Satellite Sys. Corp.*, 101 F.3d 346, 349 (4th Cir. 1996). The Fourth Circuit also has recognized that temporary nonchronic medical conditions are not considered disabilities.

Halperin, 128 F.3d at 199. While Dunford claims to suffer from a chronic condition, its impact on her ability to breathe is transient and occurs only when she is exposed to certain chemicals. Dunford also has produced no evidence that she suffers from any impairment of her ability to breathe when she is not exposed to these certain chemicals, whether at work or otherwise. That being the case, based on the above-cited authority, I find that the undisputed facts show that Dunford does not suffer from an impairment that substantially limits a major life activity.

I also reject Dunford's argument that she should be considered disabled because Food Lion "regarded" her as suffering from an impairment that substantially limited a major life activity. The undisputed evidence shows that Food Lion, through Dunford's supervisor, McGuire, thought and expected that Dunford suffered from no impairment.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

There is no genuine issue of material fact and summary judgment

should be entered in Food Lion's favor on the following grounds:

1. The facts do not state a claim for intentional infliction of emotional distress;
2. Dunford does not suffer from an impairment that substantially limits a major life activity; and
3. Dunford is not "disabled" as required by the ADA.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I find that the entry of summary judgment in the defendant's favor is appropriate. Therefore, I will recommend that Defendant's Motion be granted.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified

proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence or recommit the matter to the magistrate [judge] with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: July _____, 2001.

UNITED STATES MAGISTRATE JUDGE