

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

SCOTT L. MARSHALL,)	
)	Civil Action No. 7:00CV00087
Plaintiff,)	
)	<u>MEMORANDUM OPINION</u>
v.)	
)	
WAL-MART STORES, INC.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendant.)	

Plaintiff Scott L. Marshall brings this action against his former employer Wal-Mart Stores, Inc., (“Wal-Mart”) alleging violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and malicious prosecution under Virginia law. Marshall alleges that Wal-Mart discriminated against him because of his alleged dyslexia and that Wal-Mart fabricated a criminal charge of petit larceny against him. This court has jurisdiction over Marshall’s ADA claim pursuant to 28 U.S.C. § 1331 and has exercised supplemental jurisdiction over his malicious prosecution claim pursuant to 28 U.S.C. § 1367. This matter is before the court on Wal-Mart’s motion for summary judgment. Finding that Marshall cannot establish a *prima facie* case of discrimination, the court grants Wal-Mart’s motion for summary judgment on Marshall’s ADA claim. Marshall has indicated that if the court were to grant summary judgment on his ADA claim, then he would prefer that the court dismiss his supplemental claim without prejudice. Therefore, having granted summary judgment on his ADA claim, the court dismisses Marshall’s malicious prosecution claim without prejudice.

I.

Scott L. Marshall began working for Wal-Mart’s store in Galax, Virginia (the “Galax store”), in June 1988. By all accounts, Marshall was an exemplary employee who loved working

for Wal-Mart. Marshall alleges that he has dyslexia, which hinders his reading of words but not numbers. Over the course of his employment, Marshall told numerous employees at the Galax store that he has dyslexia or, at least, that he has a reading disorder. When Marshall had difficulty reading at work, he simply asked one of his managers for assistance, all of whom were willing to do so. (Marshall Dep. at 158.)

On October 31, 1992, Terry Sartain became the Galax store's manager. At that time, Marshall worked in the lawn and garden department. Shortly after Sartain's arrival, friction arose between him and Marshall. Marshall believes that Sartain disliked him because of his alleged dyslexia. In addition, Marshall states that Sartain repeatedly complained about Marshall's reading disorder. In April 1993, Sartain "demoted" Marshall from the lawn and garden department to third shift receiving. According to Marshall, third shift receiving was "the dumping ground" where Wal-Mart sent employees before shipping them "out the door." (Marshall Dep. II at 161-62.) Marshall alleges that his reading disorder was Sartain's motivation for demoting him.

Marshall contacted Bob Brown, the district manager in charge of the Galax store at that time, about the demotion. Brown found the demotion unwarranted and offered Marshall his choice of positions in the Galax store. Marshall responded that he would work as a stockman. Ultimately, Marshall's demotion to third shift receiving lasted three days. Further, although Marshall called it a demotion, he did not suffer any loss or reduction in pay.

After the demotion, Marshall alleges that Sartain continued to harass him because of his reading disorder. Thus, Marshall alleges that he sent a letter to various members of Wal-Mart's senior management in Arkansas in April or May of 1993. In that letter, Marshall complains of unfair and discriminatory treatment by Sartain. Sartain denies that he ever saw the letter before

preparing for his deposition, denies that he was ever questioned about the letter by his superiors in 1993, and denies that he made the statements attributed to him by Marshall in the letter.

Marshall, however, did not file a charge of disability discrimination with the Equal Employment Opportunity Commission (“EEOC”) in 1993.

On August 7, 1993, Sartain left the Galax store because he was promoted to a district manager position in another state. After Sartain left, Rick Johnson became the Galax store’s manager. Marshall and Johnson had a good working relationship and, in November 1996, Johnson made Marshall a support team manager on a temporary basis.

On February 1, 1997, Sartain reentered Marshall’s life when he assumed responsibility for the Galax store as a district manager. Thereafter, Marshall approached Sartain about the assistant manager training program. Marshall discussed his reading disorder with Sartain and assured Sartain that it would not adversely affect his ability to perform the job. Sartain had concerns about Marshall’s eligibility and informed Marshall that he would contact Wal-Mart’s home office in Bentonville, Arkansas about the matter.

Accordingly, Sartain spoke with Alfred Rodriguez, one of Wal-Mart’s regional personnel managers. According to Sartain, Rodriguez informed him that Marshall’s alleged dyslexia was not a bar to becoming an assistant manager. In an unrelated matter, Rodriguez visited the Wal-Mart store in late 1996 or early 1997. On that trip, Rodriguez spoke with various employees, some of which raised concerns about Marshall’s reading disorder. At the end of that trip, Rodriguez had a conversation with Johnson about Marshall, Marshall’s reading disorder, and the concerns raised by other employees whom he spoke with that day. Rodriguez did not ask Johnson to take any action toward Marshall, and Rodriguez never said another word about it to

Johnson. (Johnson Dep. at 120-21.)

Sartain did not promote Marshall to the assistant manger program. In fact, Sartain did not promote any employee at the Galax store to the assistant manager program during his tenure as district manager (February 1, 1997, through August 1, 1998). Thus, Marshall remained on the Galax store's support team. Although Marshall contends that Sartain refused to promote him because of his reading disorder, he did not file a charge of disability discrimination with the EEOC in 1997.

Near the end of July 1998, Marshall detained Kristi Reavis, a Galax store employee, after work to view a videotape that he made of her at her workstation. The next day, Reavis and her mother, also a Galax store employee, approached Sartain about the incident. Sartain then spoke with Johnson about the incident and instructed Johnson to demote Marshall and take him off of the support team. However, Johnson did not follow Sartain's orders because he did not agree with Sartain on the matter.

On August 1, 1998, shortly after the Reavis incident, Sartain again left the Galax store and had no further responsibility or authority over it. Fred Bunch, a district manager working out of Winston-Salem, North Carolina, succeeded Sartain as the district manager in charge of the Galax store. Shortly thereafter, at the request of David Norman, the regional manager in charge of the Galax store and Bunch's superior, Bunch visited the Galax store and met with various employees. Although it is not clear whether Bunch spoke with Marshall on that visit, apparently Bunch and Marshall spoke on one occasion. During that conversation, Marshall told Bunch about his reading disorder and the problems that he had with Sartain. That conversation lasted approximately five minutes and appears to be the only time that Bunch personally spoke with

Marshall. During a lunch in September 1998 with five employees of the Galax store, Bunch received a number of complaints and concerns that Marshall had not been conducting himself in an appropriate manner. (Bunch Aff. ¶ 7.) After that lunch, Bunch filed a report with Norman detailing those complaints and concerns. (Bunch Aff. Ex. A.)

In late August 1998, Lonnie Lineberry, a detective with the Galax City Police Department, arrested a Wal-Mart customer for shoplifting. While questioning that customer, Lineberry learned that a number of Wal-Mart employees possibly were operating a theft ring out of the Galax store. With that information, Lineberry contacted Bobby Sykes, an acquaintance of Lineberry and Wal-Mart loss prevention officer, and asked Sykes to assist him in his investigation into the theft ring. Sykes reported that conversation to his supervisor, Art Binder, the district loss prevention manager, who told Sykes that he would notify Sykes' store manager so that Sykes would be available to work with Lineberry. (Sykes Dep. at 23.) Thereafter, Lineberry and Sykes worked together to effect the arrest and interrogation of Marshall along with other Wal-Mart employees. Ultimately, the investigation resulted in the conviction of seven employees. However, Marshall was not convicted.

With respect to Marshall, Sykes claimed that three unidentified women told Lineberry that they had seen Marshall take drills and other tools from the Galax store and put them into his automobile's trunk. (Sykes Dep. at 31, 63.) In contrast, Lineberry stated that his information concerning Marshall's alleged theft came from Mark Sizemore and Sandra Largen. Lineberry did not have information concerning Marshall's alleged theft from anyone other than Sizemore and Largen. (Lineberry Dep. at 15.) Sizemore and Largen, however, have both stated that they did not see Marshall steal anything from Wal-Mart. (Sizemore Aff. ¶ 3; Largen Aff. ¶ 2.)

Based on the information that he allegedly obtained from Sizemore and Largen, Lineberry obtained a criminal complaint and an arrest warrant for Marshall on a charge of petit larceny on September 8, 1998. The next morning, Sykes and Lineberry went to Marshall's house to arrest him. Sykes and Lineberry then took Marshall to the Galax Police Department for questioning. Both Sykes and Lineberry interrogated Marshall, although Marshall testified that Sykes did most of it. (Marshall Dep. at 60-61.) At the police station, Marshall denied any wrongdoing and was completely cooperative.

Before leaving the police station, Sykes told Marshall that, because of his arrest, Marshall was suspended for two weeks and needed to stay out of the Galax store. (Marshall Dep. II at 153.) Shortly after the incident, Bunch learned about the criminal charge against Marshall and that Binder, Sykes' superior, had suspended Marshall until resolution of the criminal charge. Bunch also learned that Marshall once had been in the Galax store while suspended. Marshall was confused about his suspension, primarily because Wal-Mart never advised him of its details or provided him with a written document stating that he was suspended.

On October 2, 1998, more than two weeks after his arrest but before resolution of the criminal charge, Marshall again entered the Galax store to pick up his paycheck and to purchase a tricycle. Marshall's presence in the store was reported to Bunch via telephone. Bunch instructed Ann Shupe, an assistant manager at the Galax store, to approach Marshall and tell him that he had to leave the store immediately. Shupe and John Hicks did as instructed by Bunch. However, Marshall initially refused to leave, insisting that he had done nothing wrong. (Marshall Dep. at 101-02.) Marshall maintains that he never raised his voice with Shupe because he did not want to cause a scene. In contrast, Shupe maintains that Marshall was unruly and aggressive and caused a

scene. Marshall eventually left the store as Shupe requested.

After the encounter, Shupe called Bunch and told him that Marshall had refused to leave the store, was unruly and aggressive, and had caused a scene. Upon hearing her report, Bunch instructed Shupe to discharge Marshall. However, Marshall had left the store by the time Shupe returned to the location of the encounter, and, thus, she could not do so. Bunch then prepared a letter of termination. Although that letter never successfully reached him, there is no question that Wal-Mart discharged Marshall on October 2, 1998.

Bunch maintains that it was his decision alone to discharge Marshall, an act within his authority as district manager. He maintains that he based his decision on the report that he received from Shupe concerning Marshall's behavior in the store on October 2, 1998, which he considered to be the latest example of the type of problems that had been reported to him during his lunch with the five employees in September. (Bunch Aff. ¶ 13.) In contrast, Marshall maintains that Bunch discharged him because of his alleged dyslexia.

On November 4, 1998, Marshall appeared before the General District Court for the City of Galax in response to the criminal charge. No witnesses appeared to testify against him. Consequently, the court dismissed the criminal charge with prejudice.

Finally, on February 4, 2000, Marshall filed a complaint in this court against Wal-Mart alleging violation of the ADA. Marshall alleges that Wal-Mart's decision to discharge him was motivated by discriminatory animus on the basis of his alleged dyslexia. Marshall also brings a malicious prosecution claim under Virginia law, claiming that Wal-Mart fabricated the criminal charge of petit larceny against him. Wal-Mart has moved for summary judgment on all claims.

II.

Marshall first asserts that he has dyslexia and that Wal-Mart discharged him because of his dyslexia in violation of the ADA. The ADA provides a “clear and comprehensible national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). To that end, the ADA prohibits an employer’s discrimination “against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] discharge of employees” *Id.* at 12112(a). For claims of unlawful discharge under the ADA, the Court of Appeals for the Fourth Circuit has established two alternative schemes. The first scheme applies if the employer admits that the alleged disability played a role in the employee’s discharge. See Tyndall v. National Educ. Ctrs., 31 F.3d 209, 212 (4th Cir. 1994); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1028 (W.D. Va. 1997). In contrast, if the employer claims that the employee’s discharge was unrelated to the alleged disability, then the court applies a burden-shifting scheme akin to that established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Ennis v. National Ass’n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (applying McDonnell Douglas scheme to an ADA claim); Shiflett, 960 F. Supp. at 1028 (same). Here, Wal-Mart denies that Marshall’s alleged disability played a role in his discharge. Instead, Wal-Mart maintains that it discharged Marshall because of the events that transpired at the Galax store on October 2, 1998. Consequently, the court will apply the burden-shifting scheme to Marshall’s ADA claim.¹

¹ Ultimately, the case’s outcome should not be dependent on the proof scheme applied by the court. Rather, proof schemes “simply aid litigants and courts by imposing some order on their analysis of employment discrimination claims. But accepting a certain methodology does not necessarily entail slavish obeisance to multi-prong tests; common sense ought not to be thrown to the wind.” See Shiflett, 960 F. Supp. at 1028 (citations omitted). Therefore, if it becomes

Under the burden-shifting scheme, Marshall has the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. See Ennis, 53 F.3d at 58. If Marshall successfully establishes a *prima facie* case, then the burden shifts to Wal-Mart to provide a legitimate, nondiscriminatory reason for the discharge. See id. If Wal-Mart meets that burden, then the burden shifts back to Marshall to demonstrate that the reason provided by Wal-Mart is a pretext for intentional discrimination. See id. In effect, the scheme is “a means to fine-tune the presentation of proof and, more importantly, to sharpen the focus on the ultimate question—whether the plaintiff successfully demonstrated that the defendant intentionally discriminated against [him or] her.” Id. at 59.

Applying the burden-shifting scheme, Marshall has the initial burden of proving a *prima facie* case of discrimination. To do so, Marshall must prove that: (1) he was protected under the ADA; (2) he was discharged; (3) at the time of the discharge, his job performance met the legitimate expectations of his employer; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. See id. Here, neither party disputes that Wal-Mart discharged Marshall. In addition, Wal-Mart does not directly address the third prong. Consequently, the court only will address the first and fourth prongs.

A.

To be protected under the ADA, an individual must be a “qualified individual with a disability.” 42 U.S.C. § 12112(a). The ADA further defines “disability,” see id. § 12102(2), and “qualified,” see id. § 12111(8). To be “qualified,” the ADA requires that Marshall be “an

apparent that Marshall has presented sufficient evidence of unlawful discrimination, then the fact that a certain prong of the burden-shifting scheme is not met will not defeat his claim. See id.

individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment condition that such individual holds or desires.” Id. § 12111(8). Because an individual is not qualified unless he or she is “an individual with a disability,” Marshall necessarily must first satisfy the statutory definition of “disability.”

The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Id. § 12102(2). The court emphasizes that it is not enough to show only that the individual has, has a record of, or is regarded as having a physical or mental impairment. Rather, under all three definitions, the individual also must show that the impairment substantially limits one or more of the individual’s major life activities.² Further, determining whether an individual is disabled under the ADA must be made on a case-by-case basis. See Ennis v. National Ass’n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995) (rejecting notion that an individual can be *per se* disabled under the ADA). Here, Marshall claims that he satisfies each definition of disability under § 12102(2). Therefore, the court will consider the issue under all three definitions.

First, Marshall maintains that he is disabled under § 12102(2)(A) because he has an impairment, dyslexia, that substantially limits one or more of his major life activities. In support of its motion for summary judgment, Wal-Mart does not dispute that dyslexia is an “impairment” for purposes of the ADA, but rather maintains that Marshall has failed to adduce any evidence

² The phrase “such an impairment” in §§ 12102(2)(B) and (C) refers back to the language in § 12102(2)(A); namely, “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” See Betts v. Rector & Visitors of the Univ. of Virginia, 113 F. Supp. 2d 970, 978 n.7 (W.D. Va. 2000).

that proves he is in fact dyslexic and not merely illiterate.³ Similarly, Wal-Mart insists that Marshall must provide qualified expert testimony to establish that he has dyslexia, which Marshall has not done. Therefore, Wal-Mart contends that it is entitled to summary judgment because Marshall has failed to establish the existence of an element essential to his case; namely, that he has a disability. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Although Marshall insists that the evidence overwhelmingly supports his claim that he has dyslexia, an independent review of the record reveals otherwise. Marshall has adduced neither medical proof nor qualified expert testimony to support his allegation that he has dyslexia. He also has not identified a treating physician to testify about his alleged disability. In sum, Marshall's evidence consists of a list of Wal-Mart employees who Marshall claims are aware that he has dyslexia or, at least, that he has a reading disorder. (Pl.'s Mem. Opp'n Summ. J. at 43-44.) That evidence, however, only proves that Marshall told Wal-Mart employees—who then may have told other employees—that he suffers from dyslexia or a reading disorder. The Wal-Mart employees' "knowledge" of Marshall's dyslexia is based solely on his own statements to them. Moreover, the record contains no evidence that, while employed with Wal-Mart, Marshall ever provided Wal-Mart with any independent documentation supporting his claim that he suffers from dyslexia. In short, Marshall attempts to prove that he is dyslexic simply by having others repeat

³ The regulations define a "physical or mental impairment" as any "mental or psychological disorder, such as . . . specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). In its appendix to 29 C.F.R. Part 1630, the EEOC states that "an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment." 29 C.F.R. Pt. 1630, App. § 1630.2(j). That same section states that "an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment." Id.

that which he has told them. Thus, the court concludes that Marshall's evidence does not prove that he is dyslexic, but rather that he simply has told people that he is dyslexic.

In addition, Marshall attempts to rely on a letter purportedly provided to him on September 24, 1998, by one Pat McDaniel, who is named as the School Psychologist and Director of Pupil Personnel Services for Carroll County Public Schools. In that letter, McDaniel indicates that Marshall has a "specific learning disability, sometimes referred to as dyslexia," and that Marshall likely continues to need accommodations as he did while attending Carroll County Public Schools. (Pl.'s Mem. Opp'n Summ. J. Ex. 77.) It is well settled that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment. See Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993). Here, the letter was not attached to a sworn affidavit as required by Rule 56(e). See Fed. R. Civ. P. 56(e); see also Orsi, 999 F.2d at 92. Nor was the letter authenticated by its author in an affidavit or a deposition. See Orsi, 999 F.2d at 92. Additionally, because of those shortcomings, the court cannot conclude that McDaniel has personal knowledge of the matter contained in the letter, that he or she is qualified to testify to the matters stated therein, or that the letter is even what it purports to be.

In addition, the letter is laden with hearsay. In passing, Marshall conclusively asserts that the letter's contents are admissible because it qualifies as a business record of the Carroll County Public School System. The court finds Marshall's assertion unavailing. Federal Rule of Evidence 803(6) creates an exception to the hearsay rule for regularly kept records. That rule provides in relevant part:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted

business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness

Fed. R. Evid. 803(6). Clearly, the letter, which is dated September 24, 1998, was not kept in the regular course of Carroll County Public Schools' business. Instead, as Donna Marshall, the plaintiff's spouse, testified, the letter was the product of Marshall's attempt to obtain documentation of his alleged learning disability for his attorney. (D. Marshall Dep. at 14-15.) Had Marshall or his wife not contacted the Carroll County Public Schools, the letter would not have been prepared in its regular activity. Thus, the court concludes that the letter does not satisfy the regularly kept record exception to the hearsay rule. Consequently, the letter cannot be considered on this motion for summary judgment.

As it stands, Marshall's only evidence supporting his claim that he has dyslexia is his own bald assertion. That assertion, however, is nothing more than a conclusory allegation by the plaintiff himself. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (stating that, if the non-movant's evidence consists of nothing more than conclusory allegations, then the court must enter summary judgment for the movant). Marshall's evidence is not sufficient to support a verdict for him, as no reasonable jury could find that his evidence is sufficient to establish that he has dyslexia. See id. at 249. Consequently, the court concludes that Marshall is not disabled under 42 U.S.C. § 12102(2)(A).

For the same reason, the court finds that Marshall is not disabled under § 12102(2)(B). In order to assert successfully that he is disabled under § 12102(2)(B), Marshall must show that he has a "record of," 42 U.S.C. § 12102(2)(B), a physical or mental impairment that substantially limits one or more of his major life activities, see id. § 12102(2)(A). Marshall, however, has failed

to adduce any admissible evidence showing that he has a history or record of an impairment.

Thus, again, Marshall's evidence is not sufficient to support a verdict for him, as no reasonable jury could find that his evidence is sufficient to establish that he has a history or record of dyslexia. See Anderson, 477 U.S. at 249.

Finally, Marshall asserts that he is disabled under § 12102(2)(C).⁴ Under that subsection, an individual is disabled if the individual has been “regarded as having,” 42 U.S.C. § 12102(2)(C), a physical or mental impairment that substantially limits one or more of his major life activities, see id. § 12102(2)(A). Although the regulations provide three ways in which an individual may be “regarded as disabled,” only one of them is applicable.⁵ See 29 C.F.R. § 1630.2(l). Essentially,

⁴ As a preliminary matter, the court rejects Wal-Mart's argument that Marshall cannot rely on the “regarded as” definition of disability because he did not affirmatively allege in the complaint that he intended to rely on that particular definition. In his complaint, Marshall states that he is an “individual with a ‘disability’ within the meaning of ADA Section 392, 42 U.S.C. § 12102(2).” (Compl. ¶ 17.) The legal definition of “disability” under 42 U.S.C. § 12102(2) necessarily includes the “regarded as” definition. Thus, requiring Marshall to plead specifically each element of the ADA's definition of disability would be superfluous and contrary to the liberal notice pleading established by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8(a). Accordingly, Marshall's complaint provided Wal-Mart with adequate notice of his claim.

⁵ An individual also may be “regarded as disabled” under 42 U.S.C. § 12102(2)(C) if the individual:

- (1) *has* a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) *has* a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

See 29 C.F.R. § 1630.2(1)(1)-(2) (emphasis added). The court notes that both of those definitions require that the individual *has* a physical or mental impairment. Thus, the initial inquiry under those definitions is no different than the initial inquiry employed when analyzing a claim of disability under 42 U.S.C. § 12102(2)(A); namely, whether the individual has a physical or mental impairment. Having already concluded that Marshall failed to adduce evidence from which a reasonable jury could find that he has an impairment, the court necessarily must also conclude that

Marshall may qualify as disabled under § 12102(2)(C) if Wal-Mart mistakenly believed that he has a physical or mental impairment that substantially limits one or more of his major life activities, regardless of whether he actually has such an impairment. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999); see also 29 C.F.R. § 1630.2(1)(3). Again, the phrase “substantially limits one or more . . . major life activities” is applicable. Although the ADA does not define “major life activities” or “substantially limits,” the regulations provide guidance. The regulations include “working” as one of the “major life activities.”⁶ See Sutton, 527 U.S. at 480 (citing 29 C.F.R. § 1630.2(i)). In addition, the regulations define “substantially limits” as:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1); see also Sutton, 527 U.S. at 480. Applying those definitions to the analysis under 42 U.S.C. § 12102(2)(C), Marshall must show not only that Wal-Mart regarded him as having an impairment, but also that Wal-Mart regarded him as having an impairment that restricts his ability to work in comparison to the average person in the general population. See Betts v. Rector & Visitors of the Univ. of Virginia, 113 F. Supp. 2d 970, 979 (W.D. Va. 2000).

Irrespective of whether he actually has dyslexia, there is no question that Wal-Mart employees were under the impression that Marshall has dyslexia or, at least, that he has a reading

Marshall cannot satisfy the definition of “regarded as disabled” under either 29 C.F.R. § 1630.2(1)(1) or § 1630.2(1)(2). Consequently, neither of those definitions is applicable to the case at bar.

⁶ Although Marshall never indicates as such, the court presumes that he is arguing that Wal-Mart regarded him as disabled in the major life activity of working.

disorder. However, “the mere fact that an employer is aware of an employee’s impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that this perception caused the adverse employment action.” Id. (quoting Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996)). Rather, to survive summary judgment, Marshall must present evidence sufficient to show that Wal-Mart regarded him as incapable of working generally, rather than performing certain functions, because an impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one. See Sutton, 527 U.S. at 492-93; Murphy v. United Parcel Service, Inc., 527 U.S. 516, 523 (1999); see also 29 C.F.R. § 1630.2(j)(3)(i). Here, Marshall has offered no evidence to support the assertion that Wal-Mart regarded his alleged dyslexia as restricting his ability to work in comparison to the average person in the general population. Far from considering him to have a disability substantially limiting his ability to work, the plethora of commendations and performance reviews submitted by Marshall show that Wal-Mart regarded Marshall as an exemplary employee. (Pl.’s Mem. Opp’n Summ. J. Exs. 39-61.) Based on the record, Marshall has failed to present evidence of the existence of a material issue of fact sufficient to demonstrate that Wal-Mart regarded his disability as substantially limiting a major life activity. Consequently, the court concludes that Marshall is not disabled under 42 U.S.C. § 12102(2)(C).

In sum, the evidence presented is not sufficient for a reasonable jury to conclude that Marshall is disabled under any definition in 42 U.S.C. § 12102(2). Therefore, Marshall has failed to establish a *prima facie* case of unlawful discharge under the ADA. Accordingly, the court

grants Wal-Mart's motion for summary judgment on Marshall's ADA claim.⁷

B.

Even if he had established that he is disabled and, thus, protected under the ADA, Marshall cannot satisfy the fourth prong of the burden-shifting scheme. The fourth prong requires Marshall to show that his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995). Here, nothing in the record links Marshall's discharge to his alleged dyslexia. Instead, the record unambiguously reveals that Wal-Mart discharged Marshall after an encounter at the Galax store between Marshall and assistant manager Shupe on October 2, 1998. On that day, Marshall's presence in the Galax store was reported to Bunch, the district manager in charge of the Galax store. Although Marshall may have been confused about his suspension, Bunch knew that Marshall was suspended and expected Marshall to stay out of the store until the criminal charge against him was resolved. (Bunch Aff. ¶ 5-6.) In light of those facts, Bunch instructed Shupe to tell Marshall that he had to leave the store. Shupe then asked Marshall to leave the store as requested by Bunch, and Marshall initially refused, insisting that he had done

⁷ In his complaint, Marshall also alleges that Wal-Mart violated the ADA by:

(a) classif[ying] plaintiff on the basis of his disability in such a way that plaintiff was deprived of employment opportunities; (b) discriminat[ing] against plaintiff with respect to the terms, conditions, or privileges of employment because of his disability; (c) fail[ing] to identify and implement any needed reasonable accommodation

(Compl. ¶ 17.) However, on brief, Marshall neither addresses which incidents he is referring to nor which facts support those claims. Instead, he solely focuses on his discharge. Regardless, the court's conclusion that Marshall cannot establish that he is disabled under any definition under 42 U.S.C. § 12102(2) necessarily defeats any ADA claim that he intended to allege in his complaint.

nothing wrong. (Marshall Dep. at 101-02.) Although Marshall disputes the content of the encounter, it is undisputed that an encounter occurred. More importantly, although Marshall disputes the veracity of her statements, it also is undisputed that Shupe reported to Bunch that Marshall refused to leave the store, made a scene, and was unruly and aggressive. Bunch testified that, based on the information provided to him by Shupe, he made the decision to discharge Marshall for insubordination.⁸ (Bunch Aff. ¶ 13.) He also testified that he considered the encounter to be “the latest example of the type of people problems that had been reported” to him during the lunch in September 1998 with the five Galax store employees. That evidence, if uncontradicted, entitles Wal-Mart to summary judgment because it demonstrates that there is no causal connection between Marshall’s discharge and his alleged disability. See Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1031 (W.D. Va. 1997).

Accordingly, to survive summary judgment, Marshall must present affirmative evidence that his disability was a determining factor in Bunch’s decision to discharge him. See Ennis, 53 F.3d at 59. Here, apart from Marshall’s own speculation, nothing in the record links Marshall’s discharge to his alleged disability. First, Marshall has no evidence indicating that Bunch discharged him because of his alleged disability.⁹ Although Marshall told employees at the Galax

⁸ The court notes that several individuals testified as to the “reason” for Marshall’s discharge. Regardless of the actual words used, all of the reasons proffered refer back to the October 2, 1998, incident at the Galax store.

⁹ In addition, Marshall adduces no “direct evidence” that Bunch, the relevant decision-maker, harbored any discriminatory animus toward Marshall. To rise to the level of direct evidence, a statement “must be contemporaneous with the [adverse action] or causally related to the [applicable] decision-making process.” See Conley v. Village of Bedford Park, 215 F.3d 703, 711 (7th Cir.) (citations omitted). Here, the only direct evidence of discriminatory animus identified by Marshall pertains to statements by Sartain in 1992-93 and potentially in February 1997, which is almost two years before Marshall’s discharge. Also, Sartain left the Galax store

store that he believed Bunch was a “hit man” and was “there to finish what Sartain started,” he cannot adduce any evidence supporting that belief other than his own speculation. However, “[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion.” See Ennis, 53 F.3d at 62.

In addition, although Marshall may have presented sufficient evidence to support a strained relationship between him and Sartain, that “is too slender a reed upon which to base a finding of intentional discrimination.” Wilson v. Maryland-National Capital Park & Planning Comm’n, 1999 WL 279878, at *4 (4th Cir. May 6, 1999). Sartain left the Galax store two months before Marshall’s discharge and had no involvement in that decision. Further, there is no evidence that any animus Sartain may have harbored against Marshall was a factor, much less a motivating factor, in the decision by Bunch to discharge Marshall. In fact, Marshall himself testified that Sartain was the only individual at Wal-Mart who was “out to get him” because of his alleged disability. (Marshall Dep. at 86.)

Similarly, Marshall’s reliance on the conversation between Rodriguez and Johnson, in which Rodriguez questioned Johnson about Marshall’s reading disorder and employees’ concerns over that fact, does not save his claim. That conversation occurred nearly two years before Marshall’s discharge, and Johnson was not asked by Rodriguez to take any adverse action with regard to Marshall. (Johnson Dep. at 40-41.) Nor did Johnson take any adverse action. More importantly, there is no evidence that Rodriguez ever discussed Marshall with Bunch or that Rodriguez had any involvement in the decision to discharge Marshall. Thus, again, Marshall

two months before Marshall’s discharge and had no involvement in that decision. Because he adduces no direct evidence of discriminatory animus, Marshall has to rely on the burden-shifting scheme.

adduces only speculation that his discharge was the result of intentional discrimination.

In sum, Marshall's evidence requires "all too many leaps and unjustifiable inferences" before the trier of fact could reasonably conclude that any causal connection exists between his discharge and his alleged disability. See Shiflett, 960 F. Supp. at 1031. Accordingly, the evidence presented is not sufficient for a reasonable jury to find that the circumstances of Marshall's discharge indicate that Wal-Mart discriminated on the basis of his alleged disability. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Because he cannot point to any circumstance surrounding his discharge that credibly raises an inference of unlawful discrimination, Marshall has failed either to make an adequate showing of an essential element of his *prima facie* case, or to demonstrate that there is a genuine issue of material fact as to that element. See id. Consequently, the court grants Wal-Mart's motion for summary judgment on Marshall's ADA claim. Having concluded that Marshall cannot establish a *prima facie* case of discrimination and having granted summary judgment on that basis, the court need not reach the second and third steps of the burden-shifting scheme.

III.

Marshall also asserts a claim of malicious prosecution under Virginia law. The court exercised supplemental jurisdiction over that claim as requested by Marshall in his complaint. (Compl. ¶ 2.) Marshall has indicated that if the court were to grant summary judgment on his ADA claim, then he would prefer that the court dismiss his supplemental claim without prejudice. Therefore, having granted Wal-Mart's motion for summary judgment on his ADA claim, the court will dismiss Marshall's malicious prosecution claim without prejudice.

IV.

For the reasons stated, the court grants Wal-Mart's motion for summary judgment on Marshall's ADA claim. The court also dismisses Marshall's malicious prosecution claim without prejudice. An appropriate order will be entered this day.

ENTER this ____ day of February, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

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

SCOTT L. MARSHALL,

Plaintiff,

v.

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Civil Action No. 7:00CV00087

FINAL ORDER

