

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

BERTHA RUTH LAWSON,)	
)	
Plaintiff,)	Civil Action No. 7:00CV00851
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, DEPARTMENT OF VETERANS AFFAIRS)	By: Samuel G. Wilson,
)	Chief United States District Judge
)	
Defendants.)	

This is an action brought by plaintiff Bertha Ruth Lawson, proceeding pro se, against Anthony Principi, Secretary of Veterans Affairs, Department of Veterans Affairs (“Secretary”). Lawson alleges the Veterans Affairs Medical Center, Salem, Virginia (“VAMC”), unlawfully discriminated against her based on her race, age, gender, and disability. Lawson also claims that she was retaliated against for filing an EEOC complaint. This court has jurisdiction pursuant to 28 U.S.C. § 1331. This matter is before the court on the Secretary’s motion for summary judgment. Finding that the Plaintiff has failed to establish a prima facie case of discrimination or retaliation, the court grants the Secretary’s motion for summary judgment.

I.

Bertha Ruth Lawson, an African-American female born August 6, 1939, was a long-time employee of the VAMC. Lawson was a Licensed Practical Nurse (“LPN”), GS-6, and was assigned to work in the psychiatric ward. In 1992, Lawson injured her lower back while on duty and was placed on light duty in the psychiatric ward.

While on light duty, Lawson was not allowed to work on the closed or restricted ward.

Some of the patients in the closed ward were physically active and acutely psychotic. LPNs working in the closed ward had to be able to participate in a take-down of a patient in order to possibly defend themselves or other patients. Lawson was not allowed to work in the closed ward because her back injury prevented her from handling the patients. Additionally, Lawson's back injuries prevented her from pushing the medication cart used by LPNs. After Lawson was placed on light duty, other members of the nursing staff had to absorb the duties that Lawson was unable to perform.

On June 21, 1994, Dr. James Leipzig, Lawson's physician, sent a letter to the VAMC stating that, due to Lawson's back pain, she was permanently restricted from lifting more than 15 to 20 pounds. Additionally, Leipzig recommended that Lawson refrain from repetitive bending and twisting, and sitting should be restricted to 15 to 20 minutes at a time and no more than two to four hours per day.

On December 21, 1994, Mary Raymer, Director of Nursing at the VAMC, sent a letter to Lawson stating that Lawson was unable to meet the physical requirements of her LPN job. Raymer stated that the VAMC was prepared to accommodate Lawson by finding alternatives for her work. Raymer sent the same letter to three other nurses who were also working in a light duty capacity for some length of time. These other nurses were white females, all over the age of forty.

On January 12, 1995, Raymer sent identical letters to Lawson and the other three nurses offering each of them a job as a medical clerk or disability retirement. The letter stated that these two choices were the only alternatives. The letter further stated that the medical clerk position was mostly sedentary with some walking, standing, and bending while carrying light loads. The

letter specifically stated that the Medical Administration would be able to fully accommodate the current medical restrictions imposed on Lawson by her physician. The position of medical clerk was a GS-4 level position, a reduction from Lawson's current level of GS-6. Raymer's letter to Lawson, however, stated that if Lawson accepted the medical clerk position, then she would be eligible for compensation benefits from the Department of Labor for the difference between her current GS-6 salary and the GS-4 salary. The letter also stated that Lawson would receive formal classroom and on-the-job training for the medical clerk position.

One of the nurses accepted the medical clerk position and two of the nurses pursued disability retirement. Lawson, however, did not elect either option. Lawson did not choose the medical clerk position because she felt that it exceeded her physical limitations, was too stressful, and was demeaning. Despite the fact that Raymer's letter stated that Lawson would have to choose between the medical clerk job and disability retirement, Lawson remained an LPN working on light duty.

On March 20, 1995, Lawson filed an EEOC complaint alleging that the VAMC unlawfully discriminated against her on the basis of her sex, race, color, religion, age, and physical disability.¹ After Lawson filed her EEOC complaint, she received a "satisfactory" rating on her performance evaluation. Evidently, this was a downgrade from some of the "outstanding" ratings she had received in the past. Additionally, although Lawson previously had been granted some leave without pay ("LWOP") and sick leave, she was later denied advance sick leave.

Stephen Coppersmith, Lawson's immediate supervisor in the psychiatric ward, proposed a

¹In her deposition, Lawson stated that she was dropping the allegation of discrimination based on religion. (Lawson, Dep. at 61-62.)

light duty assignment for Lawson. This light duty assignment would have allowed Lawson to continue working as a light duty LPN in the psychiatric ward indefinitely. Apparently, Lawson supported this proposal and wanted to continue working as an LPN. (Lawson, Dep. at 18, 30-31.) However, the VAMC rejected Coppersmith's proposal because the duties listed in the proposal were not full time functions. There was no permanent light duty in nursing services. Lawson, however, continued to work as a light duty LPN.

In late 1994, Lawson began medical treatment under Dr. Verna Lewis. On April 25, 1995, Dr. Lewis directed that Lawson continue in light duty status. However, on June 21, 1995, Dr. Lewis reexamined Lawson and released her to return to work in an unrestricted capacity as an LPN. On June 30, 1995, VAMC returned Lawson to full nursing duties.

In October 1995, Lawson was involved in an automobile accident in which she suffered upper back and neck injuries. In February 1996, Lawson further injured her upper back and neck in another automobile accident. These injuries forced Lawson to retire on December 17, 1996. (Lawson Dep. at 19.) Until her retirement, Lawson remained an LPN working in the psychiatric ward.

II.

On a motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the non-moving party. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). However, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion

for summary judgment; the requirement is there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the moving party has supported its motion with depositions or affidavits, then the non-moving party cannot rely on mere allegations in its response, and instead must provide specific facts demonstrating that there is a genuine issue for trial. Anderson, 477 U.S. at 250. The non-moving party cannot manufacture a genuine issue of material fact through mere speculation, or by simply building one inference upon another. Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985).

III.

Lawson has alleged discrimination based on her race, gender, and age in violation of Title VII. In order to establish a prima facie case of discrimination, a plaintiff must establish that: (1) she is a member of a protected class; (2) she was performing satisfactorily; (3) she suffered an adverse employment action; and (3) other similarly situated employees received more favorable treatment. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506-510 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994).

Lawson is a member of a protected class with respect to race, gender, and possibly age. She is an African-American; she is a female; and she was 53 years old in 1992 at the time she initially injured her back. However, Lawson has not suffered any adverse employment action. “‘Evidence that the terms, conditions, or benefits of employment were adversely affected’ is the sin qua non of an ‘adverse employment action.’” Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001). Title VII does not apply to the “many interlocutory or mediate decisions having no immediate effect upon employment conditions.” Page v. Bolger, 645 F.2d 227, 233 (4th Cir.

1981).

Lawson has not produced any evidence that the terms, conditions, or benefits of her employment were adversely affected. The January 12, 1995 letter sent to Lawson offering her the choice between reassignment as a medical clerk and disability retirement was not an adverse employment action. Despite the fact that the letter said these were Lawson's only options, Lawson was allowed to continue to work as an LPN in light duty status until her physician cleared her for performance of full nursing duties in June 1995. She was not forced into the job of medical clerk; nor was she fired for failing to make an election between the medical clerk job or disability retirement.

Lawson's other complaints of mistreatment by the VAMC also do not rise to the level of adverse employment action. The fact that Lawson received a "satisfactory" grade on her performance evaluation instead of "outstanding" is not an adverse employment action. A downgrade of a performance evaluation is not an adverse employment action unless that downgrade is used as a basis to detrimentally alter the terms or conditions of the recipient's employment. Von Gunten, 243 F.3d at 867. Lawson's "satisfactory" grade on her performance evaluation did not lead to any loss of pay or any other change in the terms or conditions of her employment; therefore, it was not an adverse employment action.

The denial of Lawson's request for advanced sick leave was also not an adverse employment action. The "terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies." Id. at 869. The enforcement of a generally applicable sick leave policy to deny Lawson her advanced sick leave does not constitute an adverse employment action.

There is no evidence to indicate that Lawson was forced to accept early disability retirement. In fact, Lawson's own testimony in the deposition indicates that she accepted disability retirement due to additional injuries she suffered to her upper back and neck in two automobile accidents (Lawson Dep. at 19, 46.)

Furthermore, Lawson fails to offer any evidence that the VAMC's actions were the result of discrimination based on race, gender, or age. Lawson was one of four nurses who was working on long term light duty who received the January 12, 1995 offer for reassignment. There is no evidence in the record to show that Lawson was treated less favorably than any other nurses having the same or similar disability as Lawson. Similarly, there is no evidence that the unsatisfactory job rating or the denial of advance sick leave was the product of any type of discrimination. Lawson has failed to establish that she was treated less favorably than any other employee in the VAMC with respect to performance evaluations or requests for sick leave.

Since Plaintiff has not established that she suffered any adverse employment action or that she was treated less favorably than other similarly situated employees, the court grants the Secretary's motion for summary judgment with respect to the allegations of discrimination on the basis of race, gender, and age.

IV.

Lawson also claims that she was discriminated against by the VAMC based on her back injury. The Rehabilitation Act, 29 U.S.C.A. § 794(a) (1994), and the American's with Disabilities Act ("ADA"), 42 U.S.C.A. § 12112 (1994), prohibit discrimination against a qualified individual with a disability. Because the language of the two statutes is substantially the same, the court applies the same analysis to both. Doe v. University of Maryland Medical System Corp., 50 F.3d

1261, 1265 n. 9 (4th Cir. 1995). In order to establish a violation of the Rehabilitation Act or the ADA, a plaintiff must prove: (1) that she has a disability; (2) that she is a “qualified individual” for the employment in question; and (3) that she suffered some adverse employment action because of her disability. Id. at 1264-65.

The Rehabilitation Act and the ADA require covered employers to reasonably accommodate qualified individuals with disabilities. However, an employer need not alter the “essential functions” of a job in order to accommodate a disabled employee. See 42 U.S.C. § 12111 (8) (“The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”). The ADA further requires that “consideration shall be given to the employer’s judgment as to what functions of a job are essential...” Id. If a disabled person cannot perform a job’s essential functions even with a reasonable accommodation, then the employer should look to reassignment, including reassignment to a lower grade position if necessary. See 29 C.F.R. § 1614.203(g); 29 C.F.R. § 1614.102(a)(9).² If a disabled person refuses to accept a reasonable accommodation, that employee is no longer considered to be “a qualified individual with a disability.” 29 C.F.R. § 1630.9(d).

Here, the VAMC offered Lawson a reasonable accommodation when it offered to reassign Lawson and the other three nurses on long term light duty to the position of medical clerk. While

²Administrative interpretations of the ADA by the enforcing agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance.” Porter v. United States Alumoweld Company, Inc., 125 F.3d 243, 246 (1997).

her back problems existed, Lawson could not perform the essential functions of a LPN. She could not go to the closed side of the psychiatric ward because her back problems prevented her from physically restraining the patients. Additionally, Lawson could not deliver medicine to patients because her back injuries prevented her from pushing the medication cart. Since Lawson could not perform the essential functions of her LPN position, it was reasonable for the VAMC to accommodate Lawson's injury by offering her the position of medical clerk. The VAMC assured Lawson that she would receive the training necessary for this job, and with the disability benefits, Lawson's salary would have been the same.

Lawson did not accept this reasonable accommodation because she felt that it was demanding, stressful, and demeaning. (Lawson Dep. at 55-56). She did not feel that it was a reasonable accommodation. (Lawson Dep. at 18). Apparently, Lawson wanted the VAMC to waive her lifting restrictions and allow her to work as an LPN despite the fact that she was physically unable to perform some of the essential requirements of the job. (Lawson Dep. at 18).

An employer, however, is not required to accommodate a disabled employee by placing her on permanent light duty when such an assignment prevents the employee from performing the essential duties of her position. The reasonableness of an accommodation is an objective determination. Lawson's subjective belief that the accommodation was not reasonable does not force the VAMC to abandon its policy and develop a new accommodation more to Lawson's liking. While the VAMC may have been required to provide a reasonable accommodation for Lawson, the VAMC was not required to provide Lawson with the accommodation of her choice. See Stewart v. Happy Herman's Cheshire Bridge, Inc. 117 F.3d 1278, 1285-86 (11th Cir. 1997) (“[a] qualified individual with a disability is not entitled to the accommodation of her choice, but

only to a reasonable accommodation.”). While an employee’s preference for one accommodation over another should be taken into account, “the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” 29 C.F.R. 1630.9 app. Indeed, the accommodation chosen by the employer need not be the “‘best’ accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated.” Id. See also Corrigan v. Perry, No. 97-1511, 1998 WL 129929, at **9 (4th Cir. March 24, 1998).

Any reasonable accommodation by an agency is sufficient to satisfy its legal obligation. Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 344-45 (7th Cir. 1996). The inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether the accommodation was one which the employee suggested. Beadle v. Hillsborough County Sheriff’s Department, 29 F.3d 589, 592 (11th Cir. 1994). If a disabled employee refuses to accept a reasonable accommodation, the employee is no longer considered to be a “qualified individual” with a disability. Since Lawson refused to accept the reasonable accommodation provided by the VAMC, she is not a “qualified individual” under the ADA or Rehabilitation Act.

Additionally, as previously noted, Lawson did not suffer any adverse employment action. Lawson was not forced to accept the medical clerk position; nor was she forced to accept disability retirement. Instead, she was allowed to stay in her LPN position until she accepted disability retirement due to additional injuries to her upper back and neck in automobile accidents.

In sum, the court finds that Lawson was not a qualified individual under the ADA or

Rehabilitation Act and suffered no adverse employment action; consequently, the court grants the Secretary's motion for summary judgment on Lawson's claim of disability discrimination.

V.

Lawson also claims retaliatory discrimination. In order to establish a Title VII retaliation case, a plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection existed between the protected activity and the asserted adverse action. Von Gunten v Maryland, 243 F.3d 858, 863 (4th Cir. 2001).

While Lawson did engage in a protected activity—filing an EEOC complaint—Lawson has failed to establish the second and third prongs of this test. Lawson has not established that the Secretary took any adverse employment action against her. The “satisfactory” performance evaluation and the denial of advanced sick leave were not adverse employment actions for the reasons stated above. Additionally, Lawson has failed to establish a causal connection between the filing of her EEOC claim and any asserted action on part of Secretary. Accordingly, the court grants the Secretary's motion for summary judgment on Lawson's retaliation claim.

VI.

For the reasons stated, the court will grant the Secretary's motion for summary judgment. An appropriate order will be entered this day.

ENTER: This ___ day of August, 2001.

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

BERTHA RUTH LAWSON,)	
)	
Plaintiff,)	Civil Action No. 7:00CV00851
)	
v.)	<u>FINAL ORDER</u>
)	
ANTHONY J. PRINCIPI, SECRETARY)	By: Samuel G. Wilson,
OF VETERANS AFFAIRS,)	Chief United States District Judge
DEPARTMENT OF VETERANS AFFAIRS)	
)	
Defendants.)	

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the motion of defendant Anthony J. Principi for summary judgment is **GRANTED**. It is further ordered that this case is stricken from the docket of this court.

ENTER: This August 21, 2001.

CHIEF UNITED STATES DISTRICT JUDGE