

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

HEATHER MARIE RUSH,)	
)	
Plaintiff,)	Civil Action No.: 7:04cv00093
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
VERIZON VIRGINIA, INC.,)	By: Samuel G. Wilson
)	United States District Judge
Defendant.)	
)	

Plaintiff Heather Marie Rush brings this suit pursuant to the Americans With Disabilities Act (ADA), claiming that her employer, Verizon, Inc. (Verizon), engaged in a course of discrimination based on Rush's bipolar disorder. Rush claims that Verizon discriminated against her by disciplining and discharging her, by subjecting her to a hostile work environment, by refusing to accommodate her disability, and by retaliating against her. The matter is before the court on Verizon's motion for summary judgment. Rush has failed to present evidence sufficient to raise a triable issue of fact in relation to her disparate treatment, hostile work environment, and accommodation claims. The court further finds that Rush suffered no injury whatsoever as a result of Verizon's alleged acts of retaliation, making that claim a nonstarter. Thus, the court grants summary judgment to Verizon on all of Rush's claims.

I.

Rush worked as a customer service and sales associate, answering customer calls and promoting Verizon products and services at Verizon's Roanoke, Virginia call center from February 28, 2000, until her resignation on May 2, 2003. In October 2001, a psychiatrist diagnosed Rush with

bipolar II disorder, a condition that Rush claims caused severe mood swings, limited her ability to control her emotions, and made it difficult for her to perform her job duties. Rush took time off work on several occasions to see various health care providers about her condition, and Verizon typically counted Rush's absences as excused absences that did not count against her for disciplinary purposes. Rush also occasionally asked to be relieved from phone duty due to her condition, and Verizon claims that they relieved her whenever possible.¹

Rush claims that Verizon's course of discrimination began in October 2002, citing several incidents. On October 2, 2002, Rush was involved in a verbal altercation with a coworker regarding Rush's use of medical leave. That incident resulted in an informal warning to Rush and her coworker. On October 7, 2002, one of Rush's supervisors issued her a written warning for falling below "adherence guidelines" for six months. Adherence guidelines tracked the percentage of on-the-clock time an employee spent logged into the system and available to take customer calls. Rush informed her supervisors that she was taking medication that required her to take frequent restroom breaks, and her supervisors asked her to document the extra time spent in the restroom so that they could make the necessary adjustments when making future adherence evaluations. Verizon even went so far as to develop a new tracking form for Rush to use.²

On October 15, 2002, Rush asked to be relieved from overtime; her manager denied her

¹As a telecommunications services provider, Verizon falls under strict federal and state regulation. According to Verizon, compliance with those regulations required Verizon to refuse Rush's requests to leave on some occasions.

²By that time, however, Rush had stopped taking the medication in question, so it was never necessary for Verizon to actually implement the new form.

request, though, citing call volumes and staffing requirements. Rush complained to her union representative, who, in turn, conferred with management. One of Rush's supervisors allegedly commented that Verizon had "bent over backward" for Rush. Another supervisor emailed Rush and suggested that Rush discuss with her physician whether her job with Verizon was the right job in light of her health issues. That supervisor eventually apologized to Rush, and Rush admits that the two had no further problems during Rush's tenure with Verizon.

On March 20, 2003, Rush was issued a warning for failing to make proper disclosures to a customer during a randomly monitored customer call. Rush did not deny that she had violated the policy; rather, she complained that she should not have been on call duty at all because she had requested that she be pulled from call duty while adjusting to new medications. Rush did not explain these circumstances to the supervisor who issued the warning, and she did not seek recourse through the union for the warning.

In April of 2003, one of Rush's supervisors placed her on a "Development Plan" to counter Rush's lagging sales numbers. The plan required Rush to attempt to sell additional services on 100 percent of the calls she handled. Rush complains that the plan set unreasonable goals and that she was not removed from the plan even after her sales numbers increased.

On May 2, 2003, Rush resigned from Verizon. Rush claims that she did so because she was afraid that Verizon was going to terminate her for absenteeism. Rush had recently improperly filed a leave request with Verizon's central leave office, and the days she missed were counted against her. Rush had filed an appeal, hoping to rectify the matter, but she claims that she was made to fear that she was going to be fired. This fear was compounded when she was asked to re-file paperwork on a

previously approved absence. As a result, she tendered a written resignation³ on May 2, 2003. Three days later, Rush attempted to rescind her resignation, claiming that she was not “in [her] right state of mind” when she resigned. Verizon refused to allow Rush to withdraw her resignation, even after the union filed a grievance and asked Verizon to treat it as an accommodation. Several days after Rush’s resignation, Verizon’s central attendance office ruled on Rush’s appeal and granted her leave request.

Finally, Rush claims that Verizon retaliated against her for filing claims with the Equal Employment Opportunity Commission and the Virginia Council on Human Rights. According to Rush, a prospective employer attempted to verify Rush’s employment with Verizon by calling the Roanoke call center. An unidentified employee at the call center allegedly informed the prospective employer that he/she could not provide any information about Rush. Rush has not alleged that Verizon departed from standard operating procedure; nor has she pointed to any other instances when calls regarding past employees were handled differently. The inquiring employer still hired Rush without receiving confirmation of Rush’s employment with Verizon.

II.

Verizon has provided “a legitimate, nondiscriminatory reason” for the actions Rush cites as disparate treatment, shifting the burden to Rush to reveal Verizon’s reasons as false or mere pretext.⁴

³Rush’s letter of resignation stated, “I am resigning from the company today. I just do not believe it provides me with the best quality of life. I am happy I was able to gain experience and the knowledge I did.”

⁴Throughout its opinion, the court assumes, without deciding, that Rush’s bipolar disorder qualifies as a disability under the ADA and that Rush was otherwise qualified to perform the duties of her position at Verizon. In other words, the court assumes, without deciding, that Rush can make out a prima facie case of discrimination.

See Raytheon Co. v. Hernandez, 540 U.S. 44, 49-50 & n3 (2003). Rush has not met this burden; therefore, Verizon is entitled to summary judgment on Rush's disparate treatment claim. Rush claims that Verizon engaged in a course of discriminatory conduct by disciplining her for attendance, professionalism, and productivity issues, by refusing, on occasion, Rush's requests for time off, and by denying certain of Rush's medical leave requests. Verizon, in turn, explains that each of the disciplinary actions taken against Rush was taken in accordance with policy and were precipitated by Rush's own job performance, that the central attendance authority only denied or reviewed Rush's medical leave requests when Rush herself erred by improperly or belatedly filing her requests, and that Rush's requests for medical leave were only denied when logistics or adherence to regulations left Verizon with no choice. Rush has presented to the court no evidence suggesting that Verizon's explanations are false or a mere pretext for discrimination, so Verizon is entitled to summary judgment.⁵ See id.

III.

Rush also claims that she was constructively discharged as a result of the hostile work environment created and preserved by Verizon. A constructive discharge occurs when a "reasonable person" would feel compelled to resign and the employer has acted specifically intending to foster a resignation. See Bristow, 770 F.2d at 1255. Rush claims that Verizon constructively discharged her,

⁵Further, the actions cited by Rush did not have a tangible effect on the "terms, conditions, or benefits" of Rush's employment and, therefore, cannot form the basis of a disparate treatment claim. See Von Gunten v. State of Md., 243 F.3d 858, 869 (4th Cir. 2001) ("[T]erms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from disciplinary procedures."). In fact, despite numerous disciplinary incidents, Verizon never placed Rush above "step two" on Verizon's four-step disciplinary policy, meaning that Rush was never in danger of having actual remedial action taken against her.

citing Verizon's disciplinary actions, which never placed her in danger of remedial action, and her supervisor's suggestion that she reevaluate her job in light of her health, a comment made eight months prior to Rush's resignation and a comment for which her supervisor apologized. Evidence of these incidents alone is insufficient to raise a triable issue as to whether Rush was constructively discharged, especially in light of the manner in which Rush left and the placid content and tone of her resignation letter. See supra note 3.

IV.

Rush alleges that Verizon failed to accommodate her disability in a number of ways, but she has not presented sufficient evidence concerning any of these alleged failures to accommodate to raise a triable issue of fact. An employer with notice of an employee's disability must make a requested reasonable accommodation if doing so would allow the employee to perform the essential functions of her position. See Rhoads v. Federal Deposit Insurance Corp., 257 F.3d 373, 387 (4th Cir. 2001). However, an employer is not required to make an accommodation if doing so would cause undue hardship, Farrish v. Carolina Commercial Heat Treating, Inc., 225 F. Supp. 2d 632, 637 (M.D.N.C. 2002), and the ADA does not require an employer to allow an employee to work only when illness permits. Id. (citing Walders v. Garrett, 765 F.Supp. 303, 313 (E.D.Va.1991)).

Rush claims that Verizon failed to accommodate her disability by initially rejecting one of her medical leave requests,⁶ by refusing to allow her to leave early on various occasions, by refusing to

⁶It is undisputed that Verizon ultimately did approve Rush's medical leave request after an appeal. According to Verizon, it was only denied in the first place because Rush failed to timely file the request.

allow her to work off line for a day, by issuing her a warning due to her failure to meet adherence guidelines, and by rebuffing Rush's attempts to withdraw her resignation. It is undisputed that Verizon frequently granted Rush time off and approved her requests for medical leave. Assuming Rush could show that Verizon occasionally did refuse time off due to logistical and compliance issues, the ADA did not require Verizon to simply grant Rush time off on demand, and Verizon was not required to give Rush time off when doing so would cause an undue hardship. See id. As for Verizon's warning regarding adherence guidelines, it is undisputed that, upon learning of Rush's medical issue, Verizon did take steps to accommodate her, even going so far as to develop a special form that would allow Rush to track her restroom time and her supervisors to make necessary adjustments when making adherence calculations. Finally, Rush claims that Verizon failed to accommodate her by rebuffing her attempts to withdraw her resignation. The court finds that Verizon ceased to owe Rush any duty under the ADA upon her resignation, which Verizon was entitled to treat as final. Thus, Verizon was under no obligation to rehire Rush after she tendered a resignation. See Bristow, 770 F.2d at 1256 n.5. Thus, the court grants Verizon's motion for summary judgment.

V.

Finally, Rush claims that Verizon refused to give information to a prospective employer in retaliation for her filing claims with the Equal Employment Opportunity Commission and the Virginia Council on Human Rights by refusing. It is undisputed, however, that the prospective employer hired Rush. Because Rush suffered no injury from Verizon's alleged act of retaliation, the court will not examine the claim further and grants summary judgment to Verizon.

VI.

For the reasons stated herein, the court grants Verizon's motion for summary judgment on each of Rush's claims.

ENTER: This ____ day of December, 2004.

UNITED STATES DISTRICT JUDGE

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

HEATHER MARIE RUSH,)	
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Plaintiff,)	Civil Action No.: 7:04cv00093
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v.)	<u>FINAL ORDER</u>
)	
VERIZON VIRGINIA, INC.,)	By: Samuel G. Wilson
)	United States District Judge
Defendant.)	
)	

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the Defendant's motion for summary judgment is **GRANTED**. This action shall be stricken from the docket of this court.

ENTER: This ____ day of December, 2004.

UNITED STATES DISTRICT JUDGE