IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LORETTA M. EMERSON
f/k/a LORETTA M. RUBENZER,

Plaintiff,

v.

NORTHERN STATES
POWER COMPANY,

Defendant.

OPINION AND
ORDER

99-C-809-C

- -

This is a civil action for monetary and injunctive relief in which plaintiff Loretta M. Emerson contends that defendant Northern States Power Company violated her rights under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12213, by discriminating against her in the terms and conditions of her employment and by failing to reasonably accommodate her disability. Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Presently before the court is defendant's motion for summary judgment. Defendant argues that it is entitled to summary judgment because plaintiff is not a qualified individual with a disability and even if she is, defendant provided her with reasonable accommodations. In response, plaintiff argues

that she was a qualified individual with a disability because her brain trauma and injury substantially limited the major life activities of learning, memory and concentration and working or alternatively, that defendant regarded her as having such an impairment and that she had a record of an impairment. Plaintiff argues that defendant is liable because she was able to perform the essential duties of her job and defendant failed to make reasonable accommodations for her and fired her because of her disability. Defendant's motion will be granted. Although plaintiff has adduced evidence sufficient to create a dispute whether she was disabled because of her cognitive impairments and panic attacks, plaintiff has failed to show that she was a "qualified individual with a disability" who was able to perform the essential functions of a telephone consultant with or without a reasonable accommodation.

For the sole purpose of deciding defendant's motion for summary judgment, I find the following facts proposed by the parties to be material and undisputed.

UNDISPUTED FACTS

A. Associate Phone Consultant Position

On or about January 17, 1994, plaintiff Loretta Emerson (then Rubenzer) was hired by defendant Northern States Power Company to be a student operator in its Eau Claire office. Between May 1994 and June 6, 1996, plaintiff worked part-time as an associate phone

consultant in defendant's customer information center. In that position, plaintiff worked an average of forty hours each week.

An associate phone consultant was responsible for answering incoming customer telephone calls and handling customer requests for information or complaints. In 1995 and 1996, defendant had a written job description for the associate consultant position. Twenty percent of the position was processing customer calls regarding gas emergencies and electric outages using the data dispatch system. Approximately 5-15% related to handling gas emergencies, such as gas leaks, and electric emergencies, such as downed power lines. On average, plaintiff handled two to five sensitive calls relating to gas issues each week and two to five sensitive calls relating to electrical issues each week, with more calls during storms and severe weather. Plaintiff spent the majority of her time as an associate consultant handling tenant changes, billing disputes and marketing matters. She was supervised by a group of "team advisors," including Lori Krings, Mark Gilles, Jana Tollefson and Dan Carroll.

In 1994 and 1995, plaintiff received written performance reviews. In 1994, plaintiff received an overall rating of 115, placing her between the "meets performance requirements" category and the "exceeds performance requirements" category. In 1995, plaintiff received an overall rating of 121, placing her in the "exceeds performance requirements" category. Krings was not aware of any problems with plaintiff's performance in 1994 and 1995. In 1994 and

1995, vice-president of corporate services Pat Watkins's responsibilities included human resources issues. Watkins was aware of plaintiff's good job performance prior to her accident.

B. Plaintiff's Accident

On or about October 1, 1995, plaintiff fell while she was rollerblading and hit the back of her head, causing her to suffer a contusion on the inside of her brain and a skull fracture. On October 1, she was admitted to a hospital for three days for treatment. Her primary treating physician was Dr. Michael Murphy, a practicing neurologist.

On October 6, 1995, plaintiff was readmitted to the hospital for further care of her head injury. On October 12, 1995, she was discharged with a diagnosis of head trauma and described occipital skull fracture, basilar skull fracture, bifrontal hemorrhagic contusions, temporal subdural hematoma and sphenoid sinus hemorrhage. Plaintiff was also diagnosed as suffering from anosmia (a loss of sense of smell and a significant change in the sense of taste) and severe headaches. That same day, plaintiff was referred to outpatient speech and language therapy with Carol Hosmann, a speech language pathologist.

On November 30, 1995, Hosmann prepared a written report titled “Speech-Language Pathology Discharge Report” for plaintiff's medical records, in which she summarized plaintiff's attendance at two one-hour therapy sessions in October 1995. In her report, Hosmann made

the following assessment of plaintiff:

> Ms. [Emerson] was seen on 10/16/95 and 10/18/95 for one hour sessions. The California Verbal Learning Test (CVLT) and the Sbordone were administered to determine her ability for new learning, memory, and mental control/attention. Results of the CVLT indicated that Ms. [Emerson] had moderate impairment in learning new information, encoding, and retrieval of information. On the Sbordone, Ms. [Emerson] refused to do several tasks which required too much concentration/mental control. She stated "it's laboring, frustrating for me. . . ." It should be noted that the tasks she did complete were accurate with normal processing time.

Following plaintiff's injury, she had difficulty with her memory, including retaining new information. Under "summary/recommendations," Hosmann wrote:

> Ms. [Emerson] demonstrated moderate impairments in memory and concentration and reported significant fatigue. Therapy goals were not met due to Ms. [Emerson]'s decision to return to work. Follow-up conversations with Ms. [Emerson] and her supervisor indicated that she is managing quite well for daily routines at home and at work. It is recommended that Ms. [Emerson] contact us at any time [] should she have questions or concerns regarding her condition.

Dr. Murphy reviewed Hosmann's report, agreed with it and relied upon it in his care and treatment of plaintiff. Other than Hosmann's evaluation, Dr. Murphy did not use any objective procedures for measuring plaintiff's cognitive abilities or conduct a neuropsychiatric evaluation of plaintiff. On October 23, 1995, Dr. Murphy released plaintiff for limited work (20 hours a week) and on October 31, 1995, he released plaintiff for full-time work (20-40 hours a week) without medical restrictions.

C. Plaintiff's Return to Work as an Associate Consultant

At the time plaintiff returned to work, defendant was in the process of implementing a new computer system and new phone system. The new phone system was relatively easy to learn, but plaintiff had difficulty learning and retaining information regarding the new computer system; as a result, she asked management staff and training personnel frequent questions. Plaintiff was told that she was asking too many questions and asking the same questions more than once. Plaintiff met with management in May, June and July 1996, and discussed her problems with memory, retention and learning. Defendant decided to monitor plaintiff's calls because of its concerns about plaintiff's performance. Krings told Tollefson that the monitoring showed that plaintiff did not deal with calls she should have been able to handle and that she made errors in issuing service orders. At some point, plaintiff told vice-president Watkins about her injury and her problems with supervision in the customer information center. Watkins was aware that plaintiff was making mistakes in routine procedural matters. He was concerned about how she performed in training.

Beginning in February 1996, plaintiff filed a number of complaints with defendant about Krings. After an investigation, defendant found plaintiff's complaints about Krings to be unsubstantiated.

Krings completed a “Review of Progress” form for plaintiff's performance through April

1996. Under the category "Results Driven, Problem Solving & Decision Making," Krings wrote, "Needs to use resources available -- reference tables on-line help. Once knowledge is obtained, needs to be retained." Under the category "Communication," Krings wrote "Needs improvement. If resources were used, skills would improve." Under "Innovation/Process Improvement," Krings wrote "Great ideas -- needs to work on following them through, rather than relying on someone else to finish. Research for feasibility."

In April 1996, eight full-time phone consultant vacancies were posted. Thirteen people, including plaintiff, applied for the vacant positions. A full-time phone consultant was guaranteed a 40-hour work week and had more stable benefits and greater job security than a part-time consultant. On or about April 26, 1996, plaintiff was interviewed and evaluated for a full-time position but was not selected for the position.

When plaintiff arrived at work on April 27, 1996, she was disappointed that she had not been selected for a full-time job. That day, she suffered an anxiety attack while at work, starting when one of her co-workers told her that he felt bad that she had not been selected for a full-time position. (The parties use the terms "panic attack" and "anxiety attack" interchangeably.) She was not handling a phone call at the time of the attack. Defendant directed one of plaintiff's co-workers to drive her to the emergency ward for immediate care for her anxiety attack. Plaintiff had never had an anxiety attack before that day. On April 29,

1996, plaintiff was able to return to work and perform her duties without medical restrictions.

Shortly after plaintiff's first anxiety attack, plaintiff went to Dr. Murphy, who prescribed her medication to prevent future attacks. Plaintiff was supposed to use the anti-anxiety medication when she felt the onset of an anxiety attack. She used the anti-anxiety medication infrequently, if at all. Instead, plaintiff decided to avoid contact with Krings, with whom she had had a poor relationship since May 1994. Plaintiff's avoidance of Krings led to a concern about plaintiff's ability to be a team player and willingness to interact with Krings. The only time plaintiff had an anxiety attack outside of work was while she was on a vacation with her husband.

On June 6, 1996, plaintiff had a second anxiety attack while at work, experiencing chest pains, weakness in her legs, difficulty breathing and shaking. The second attack began when Tollefson tried to help plaintiff gain access to a new phone system. Plaintiff was not handling a phone call at the time of the attack. In an attempt to control the second attack, plaintiff took her prescribed medication and asked permission to leave work for the day, which her supervisors allowed. That same day, Krings called plaintiff at home to tell her that she had to see Dr. Donald Bodeau the following day to be evaluated for her fitness for duty because of her anxiety attacks. Krings also told plaintiff that she was being placed on a leave of absence.

Plaintiff did not want to be on a leave of absence.

Dr. Bodeau is an occupational medicine doctor at the Midelfort Clinic in Eau Claire Wisconsin. He is on contract with defendant to perform fitness for duty evaluations and give other medical opinions. Plaintiff saw Dr. Bodeau during June, July and August 1996. Dr. Bodeau's evaluation involved an assessment of plaintiff's ability to perform the job and activities of an associate phone consultant. In June 1996, Dr. Bodeau was aware that several individuals had identified substantial problems with plaintiff. Dr. Bodeau first met with plaintiff on June 7, 1996. His evaluation notes from that meeting state:

> A phone call from Janet Tollefson, a supervisor in her area, indicates that [plaintiff] has also been noted to have personality change going from being very funny and pleasant to paranoid and with easily hurt feelings. She has had significant performance issues particularly related to difficulty resolving some of the more complex yet routine issues of her job. In addition, there has been some difficulty in learning the new telephone system and computer system with increased emotionality, crying and early departure from the work place. She has been taken home twice over the past two months with these episodes.
>
> . . . .
>
> ASSESSMENT: Probable traumatic brain injury, approximately eight months status post injury. This sequelae appeared to indicate mood alteration, sudden personality change, learning ability, and panic attacks.
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> . . .
>
> PLAN: It is my opinion that she would benefit from further attention to optimizing medical control of her conditions. It appears that her behavior has been disruptive in the workplace both to her and coworkers and her performance

> appears to have suffered. I am encouraging her to take a short period of medical leave in order to help resolve these issues. I will attempt to contact her employer and make these arrangements, and in addition have obtained a release from her to contact Dr. Michael Murphy regarding my concerns.

On or about June 8, 1996, plaintiff was placed on a paid medical leave of absence because of Dr. Bodeau's initial examination. On June 19, 1996, Dr. Bodeau met with plaintiff for a follow-up fitness for duty evaluation. During the meeting, plaintiff indicated to Dr. Bodeau that she wanted to return to work as soon as possible. Dr. Bodeau understood that plaintiff continued to have problems with memory and learning as of June 19, 1996. Following the visit, Dr. Bodeau noted:

> Patient returns following two visits with Dr. Michael Murphy. She feels that she is significantly improved with less tendency towards the panic attacks. She continues to express anger towards her supervisor and characterizes her difficulties as representing a personality conflict. Dr. Murphy changed her medication approximately ten days ago. The Cylert was discontinued and Imipramine was increased to 10 mg t.i.d. She was also given a new prescription for Tegretol 200 mg b.i.d. She did not undergo formal neuropsychiatric testing, however, she did have subtle difficulty with visual and auditory processing. Dr. Murphy has expressed the opinion that she may return to work effective June 24th.
>
> . . .
>
> She is advised that if she cannot be diagnosed and treated medically but continues to have problems, these would be dealt with administratively by discipline in the workplace.
>
> . . . .

> At this point I will release her to work effective June 24th to a nonsafety sensitive position similar to that she previously held. I recommend that she be tried in the nonsafety sensitive for a period of time. If she continues to have cognitive difficulties in performance decrement in the workplace, neuropsychiatric testing will be available either through my office or Dr. Murphy. Recheck in three to four weeks.

After Dr. Bodeau met with plaintiff on June 19, 1996, he wrote a letter to plaintiff in which he stated, "I believe we need to further document your recovery from the cognitive and behavioral difficulties." A copy of this letter was sent to defendant's director of human resources, Dick Collier.

D. Plaintiff's Return to Work in the Billing Department

On June 20, 1996, Krings called plaintiff and told her that she would be working in defendant's billing department for a period of two months, after which time Dr. Bodeau would reevaluate whether she could return to her position in the customer information center. On June 24, 1996, plaintiff returned to work in a temporary position in the billing department. In the billing department, plaintiff was supervised by Trudy Poppehagen. Plaintiff had no problem with her temporary assignment to defendant's billing department where she received the same number of hours and the same rate of pay as she had as an associate phone consultant. Plaintiff worked in the billing department until October 1996, the date of her termination.

From the time of her injury through her transfer to the billing department, plaintiff handled all safety-sensitive calls in an appropriate manner. Plaintiff's supervisors were not aware of any problems in her performance of this aspect of her job. Plaintiff did not indicate to management that she thought she could not handle safety-sensitive calls and she did not find them to be stressful.

Defendant's employees had team meetings periodically to discuss training, procedural matters and employee concerns. Plaintiff was not allowed to attend team meetings while she was working in the billing department. Defendant denied plaintiff's requests to attend training sessions relating to the customer information center and to complete the peer review process while she worked in the billing department.

E. Final Medical Evaluations

At some point, plaintiff was required to attend counseling sessions with Vicki Hoffman, defendant's counselor, to work on plaintiff's communication skills.

On July 17, 1996, plaintiff met with Dr. Bodeau for a third time. Plaintiff failed a test in which she was supposed to count forward to and backward from 200 in increments of 3 and 7. Dr. Bodeau thought that during their meeting, plaintiff had difficulty with calculation and trouble communicating clearly, becoming almost incoherent at times. Following the visit, Dr.

Bodeau noted:

> This patient has been working in a non-safety sensitive billing area. She states that it is going well and she feels she is under little stress. When asked about her previous work area, she gets extremely agitated and describes a conspiracy centered on her last supervisor. She has not seen Dr. Murphy since her last visit here and discontinued Tegretol when her prescription ran out. She also voluntarily reduced [I]mipramine to 10 mg b.i.d.
>
> . . .
>
> Her affect is extremely agitated with loss of coherence.
>
> . . .
>
> She is referred to the Luther Hospital Behavioral Health Department for evaluation by Dr. Dale Thomas and colleagues. Arrangements are made for this to occur Friday, July 19th. She will continue to be limited from safety-sensitive work at her place of employment pending the results of this evaluation. I plan to see her in follow-up upon the completion of testing.

On or about July 19, 1996, Dr. Dale Thomas, a licensed psychologist, began a neuropsychological examination and testing of plaintiff. Plaintiff recalls that Dr. Thomas's neuropsychological examination included a 500-question personality test and that she was able to read and understand the test without assistance, complete the test in a timely fashion and answer all the questions. Plaintiff also recalls that Dr. Thomas's neuropsychological examination tested eye/hand coordination and physical object manipulation skills and that she was able to complete the tasks that were explained to her, understand the directions of the person administering the test, perform the tests in a timely fashion and perform the tests

without any trouble. Following his examination, Dr. Thomas issued preliminary and supplemental reports, which he gave to Dr. Bodeau. In his preliminary report, Dr. Thomas noted, "Diagnostic impressions are of an acute anxiety disorder with probable panic attacks; history of severe traumatic brain injury with anxiety symptoms." Following his evaluation, Dr. Thomas wrote:

> On the basis of recent testing there appears to be evidence that this woman had endured a significant neuro-trauma injury, yet the bulk of her neuropsychological testing is within normal limits. There may have been some changes in terms of personality dynamics which will be examined further by interviews with her significant other and perhaps with her daughter if she makes herself available for such a consultation. It is not unusual to find a person who previously had been quite articulate and bright to recover from such a neuro trauma injury, but yet have minor difficulties in psychosocial aspects of functioning. It is still early in her recovery and it is likely that continued improvement in these areas may be found. The possibility of a personality change due to a traumatic brain injury should be examined in order to be ruled out.

When tested by Dr. Thomas, plaintiff functioned at an average level. Dr. Thomas talked with plaintiff about his evaluation and told her that he could see no reason why she should be restricted from returning to defendant's customer information center. Plaintiff agreed with Dr. Thomas's assessment.

Dr. Bodeau had verbal and written communications with various management personnel at defendant about plaintiff's condition. Dr. Bodeau's main contact was Glenda Blanchard, then-administrator of personnel development. On August 6, 1996, Dr. Bodeau

wrote a letter to Blanchard to report on plaintiff's fitness for duty evaluation, stating:

> Detailed testing of personality, reasoning, and cognitive skills was performed. I have discussed her results in detail with Dr. Dale Thomas, Ph.D., the clinical psychologist who performed and oversaw her testing. Ms. [Emerson], displayed normal cognitive skills, reasoning, and personality profiles. She had mild evidence of anxiety, but was able to overcome that promptly. [] [N]o psychiatric or psychological diagnoses were identified, and there is no evidence that any treatment would be appropriate for her. In conjunction with testing, several individuals who knew her prior to her head injury were consulted and described no evidence of significant personality change.
>
> In short, she demonstrates normal mental functioning to the best of our current ability to test. It is my medical opinion that she may safely return to employment within the capacity she held prior to the fitness for duty evaluation. There is no evidence of disability that would require accommodation under the Americans with Disability Act. If she should have further performance difficulties, it is my recommendation that those be dealt with through appropriate administrative and disciplinary mechanisms in place at [Northern States Power].

On August 14, 1996, Dr. Bodeau had a final follow up visit with plaintiff and noted:

> This patient returns to discuss the results of her neuropsychiatric testing. Reference is made to the report of Dr. Thomas in which cognitive capabilities appear to be well-maintained. Final diagnostic impression is that of post concussion syndrome with anxiety and occasional panic features, although, these appear to be quite subtle in evaluation.
>
> On the basis of these findings, I have no continuing medical justification for keeping her away from the safety sensitive position she formerly occupied. I believe she is scheduled to meet with the Human Resource Department on the 16th, and pending that conference, she is released from medical restrictions from the position she occupies. I counseled her for approximately 25 minutes today and would suggest that she remain in the position she had occupied on a

> temporary basis if possible as this seems much less stressful for her and less likely to stimulate any of the anxiety attacks. She has now voluntarily discontinued all medication due to the low perceived level of stress and low need in the current position. Follow-up p.r.n. (Copy sent to Dr. Murphy).

Dr. Murphy disagreed with the conclusions in Dr. Bodeau's August 14 letter. Dr. Murphy thought Dr. Bodeau's description was incomplete and that plaintiff's symptoms would not always be "subtle."

On August 6, 1996, Blanchard had a phone conversation with Dr. Bodeau. Her notes from that meeting state, "Can't find any medical reason for panic attacks to last more than a few minutes. . . . [Northern States Power] has bent over backwards to uncover the cause for condition-none physical." Throughout her notes, Blanchard refers to plaintiff's "performance problem."

On August 16, 1996, plaintiff had a meeting with Tollefson, Krings and Blanchard to discuss plaintiff's return to work as an associate phone consultant at the customer information center. During the meeting, plaintiff was given a "written reminder," which is the second step in defendant's progressive discipline policy. Defendant did not give plaintiff an oral reminder; however, defendant has the discretion to skip steps within the disciplinary policy. The "written reminder" came in the form of a memorandum dated August 19, 1996, written by Krings and Tollefson. The written reminder states, ". . . there is no documented medical reason for your

anxiety attacks." During a meeting on August 19, 1996, Krings told plaintiff that she would be allowed to take a five-minute break to compose herself if she had an anxiety attack. Defendant thought that a five-minute break was acceptable and would have returned plaintiff to her position in the customer information center with this understanding.

A document titled "Disciplinary Actions or Notices in Ms. [Emerson's] File" includes a summary of a meeting between Krings and plaintiff on August 19, 1996:

> The issue of Ms. [Emerson]'s anxiety attacks was discussed. Ms. [Emerson] stated she did not know how to prevent the anxiety attacks. [Northern States Power] confirmed with Ms. [Emerson] the two things she indicated she needed from [Northern States Power] in the event of an anxiety attack. First, she would need to talk with a supervisor and second, she would need a brief break.
>
> Ms. [Emerson] was advised that the first requirement was acceptable with the understanding that a supervisor might not be available at all times.
>
> With regard to the required break, [Northern States Power] had consulted with Dr. Bodeau who advised that a five-minute break should be sufficient to allow Ms. [Emerson] to compose herself following an anxiety attack. Ms. [Emerson] was advised that such a brief break would not cause a significant disruption to the workflow, unless it happened on a frequent or regular basis. If a five-minute break was insufficient, Ms. [Emerson] was instructed to get medical documentation. Ms. [Emerson] questioned whether a five-minute break would be adequate. Ms. [Emerson] said she knew she was more vulnerable after the accident, but not by choice. She said that she does not handle conflict well, and that the difference is obvious.

In response to the "written reminder" and the discussion about the adequacy of a five-minute break, plaintiff decided to consult Dr. Murphy. Dr. Murphy told plaintiff that she

would need more than a five-minute break if she had an anxiety attack at work; however, Dr. Murphy did not indicate how much time plaintiff would need. On August 25, 1996, Dr. Murphy sent a letter to defendant to address how much time plaintiff would need to recover in the event of an anxiety attack. Dr. Murphy wrote:

> Ms. [Emerson] has been followed in this office since her fall and subsequent head injury in October, 1995. Since that time, she has made excellent recovery, but still retains symptoms of post-concussive syndrome, with decreased ability to handle significant variations in daily pattern and additional psychosocial stressors.
>
> Cognitively, she is markedly improved, but she still suffers from episodes not dissimilar from classic panic attacks. These episodes are structural in nature. They are related to her head injury, but occasioned by interpersonal reactions and, though temporary and not harmful, they are very unpleasant for Ms. [Emerson]. The actual episode is typically brief, but the amount of time that it takes to recover is variable and is frequently longer than the 5 minutes that she has been 'allowed.'

When Dr. Murphy spoke of plaintiff's "decreased ability to handle significant variations in daily pattern," he was referring to her difficulty with learning new things and making adjustments to new situations.

On September 26, 1996, Dr. Bodeau wrote a letter to Sue Hartman at defendant, stating:

> I have been unsuccessful in contacting Dr. Murphy regarding his August 25th letter on the subject of Ms. [Emerson]. I have reviewed his letter as well as the Midelfort Clinic evaluation and have the following recommendations.

> Ms. [Emerson] sustained a significant head injury in October, 1995. She performs at an average cognitive level on detailed neuropsychiatric testing. In addition, evaluation and consultation with family members and friends describe no significant postinjury change in personality, mood or overall affect. Nevertheless, her physician states that she continues to have decreased ability to handle significant variations in daily patterns and additional psychosocial stressors. Her recovery time from these upsets is frequently longer than the five minutes felt to be acceptable in the workplace.
>
> Given these considerations as well as the job description provided for a consultant in the customer information center, it is my opinion that she should be reassigned out of the gas-sensitive activities that she has found so stressful. This transfer will be essentially permanent for at least quite [sic] long-term as her postconcussive symptoms are unlikely to resolve in less than one to two additional years.
>
> She may be offered similar work within the company without the emergency response requirement of the gas-sensitive positions as this is unlikely to create the same types of stresses and variations in daily pattern that she has experienced such difficulty with. I recommend that [Northern States Power] consider such a job as an available long-term accommodation to her needs.

At the time Dr. Bodeau wrote this letter, plaintiff had not reached her recovery plateau. Both Dr. Bodeau and Dr. Murphy thought that plaintiff's anxiety attacks were related to her brain trauma. According to Dr. Murphy, people with significant closed head traumas usually do not get better in less than a year and often it takes a couple of years for recovery and the symptoms often wax and wane.

F. Plaintiff's Termination

In a memorandum dated October 4, 1996, plaintiff's supervisor Tollefson wrote:

> As you know, as a result of recent health concerns, we have been waiting for a final analysis of your ability to perform the essential functions of your position as a Consultant in the Customer Information Center. Until an answer was received, we have had you temporarily assigned to work in the Customer Accounting Department in a light duty position.
>
> We have received a letter from Dr. Bodeau which states that you should be reassigned out of gas-sensitive activities. He stated that you should be reassigned to a position that does not involve the emergency response requirement of the gas-sensitive position. (Copy of Dr. Bodeau's letter is attached.) He also noted that your necessary recovery period could take up to one or two years. The light duty position cannot be extended for that period of time, and must necessarily be terminated now that we have received Dr. Bodeau's final analysis.
>
> After careful analysis of the position of Consultant, we are unable to find a way to accommodate your restrictions in that position, as the emergency response duties are an essential function to the position. Therefore, you will not be able to return to that position.

Plaintiff believes that she had a cognitive disability in 1996. Plaintiff identified two accommodations that she believes defendant should have made for her in 1996 but that defendant did not make. First, defendant denied plaintiff's requests that she be supervised by someone other than Krings. Plaintiff did not indicate that defendant had to remove Krings as her supervisor in order for her to return to the customer information center and defendant understood that plaintiff wanted to return to her position in the customer information center.

Second, plaintiff thought defendant could have transferred gas/electric emergency calls to someone else but defendant was unwilling to do so. Defendant could have taken steps to reduce the possibility that she would have to deal with emergency calls. In the spring of 1996, defendant implemented a routing system to route particular types of calls to different agents. The routing system had a telephone prompt designed to route a call to the most qualified agent to handle the subject matter of the call. Each agent was asked to express a preference and was assigned a special number. By using the routing system, defendant could have taken measures to minimize the number of safety-sensitive calls that were routed to plaintiff. Defendant considered whether to have one of three people with whom plaintiff worked in a team assist her in the event of an emergency. Although plaintiff's co-workers might have been available in the event that plaintiff could not handle a safety-sensitive call because of an anxiety attack, defendant rejected that option because it was too uncertain. Defendant could not guarantee that if plaintiff had returned to work at the customer information center she would not receive and have to handle gas/electric emergency calls. Ultimately, defendant did not transfer plaintiff back to the customer information center because of the possibility that plaintiff would suffer an anxiety attack that interfered with her ability to handle a safety-sensitive call.

In a memorandum to plaintiff dated October 4, 1996, Tollefson wrote:

> To accommodate your restrictions, we have looked for other options in the Company. The following list identifies the options that we have available for

you:

1. One open position is that of an Administrative Specialist II (posting attached). Because the position is a full-time position and you are a part-time employee, you would need to apply for the position and show that you have the necessary skills to do the work. Your application would be reviewed and considered in the same manner as all other applicants for that position. The posting for this position has come down, effective October 2, 1996. However, considering your circumstances, we will accept a late application from you provided it is submitted to me or Dick Collier no later than 12:00 noon on October 7, 1996.

2. A second open position is that of Cash Processor. This is a temporary, part-time position which will begin around the 15th of October and continue for approximately eight weeks. The term of this position depends on the term of the current employee's leave for the birth of her child. This position is being offered to you. The rate of pay for the position is $9.40/hour and the anticipated hours of work are 8 hours per week. (4 hours on Mondays and 4 hours on Tuesdays). If you wish you accept this position, please respond to me or Dick Collier no later than 12:00 noon on Monday, October 7, 1996. If you accept this position, you will be paid at your current rate until the day you begin working as a Cash Processor. You will then be paid the $9.40 per hour rate for the time worked and the Consultant pay will cease.

3. If neither position works out, your employment will be terminated effective October 31, 1996. However, in lieu of notice of termination, the Company will pay you at your current hourly rate, calculated at forty hours per week, and you will not be required to report to work after 3:30 p.m. on Thursday, October 3, 1996. During this time, you will be an employee of the Company and, if any other positions should open up, you will have the opportunity to apply as an employee of the Company.

In response to this memorandum, plaintiff asked why she could not return to the phone center. She was referred to Dr. Bodeau's letter of September 26, 1996. Plaintiff applied for the

administrative specialist position but was not interviewed or chosen for the position. Plaintiff rejected the job as cash processor. Plaintiff's employment with defendant was terminated pursuant to the October 4, 1996 memorandum.

Defendant's postings from June 1996 through January 1, 1997, indicate that there were numerous job openings for which plaintiff was qualified; defendant never contacted plaintiff regarding the majority of these openings. On October 21, 1996, Blanchard called plaintiff to tell her about a consultant position that had been posted for a customer service center in Minnesota and suggested that plaintiff apply. Following that conversation, plaintiff spoke to Dick Collier and asked him why defendant thought she could act as a consultant in the customer information center in Minnesota but not in Wisconsin. Collier indicated that she could perform the job in Minnesota because she would not be required to handle safety-sensitive calls. (It is disputed whether Collier told plaintiff that she was fired because of her performance during that conversation.)

G. Plaintiff's Vocational Rehabilitation Expert

Jay Smith is a vocational rehabilitation expert. He performed a vocational evaluation of plaintiff. He concluded that she had substantial limitations in the major life activity of working because the limitations associated with her brain trauma, including her ability to

handle significant variations in daily routines and inordinate stress, precluded her from 47% of all occupations. According to Smith's report, plaintiff held the following positions following her termination from defendant. First, plaintiff worked for Doherty Employment Group in Hallie, Wisconsin. In that position, she worked on-site at a factory where she had to schedule and hire factory workers on a daily basis. Plaintiff found this position to be stressful because she had to find temporary factory employees each morning. From April 1997 to April 2000, plaintiff and her husband worked for Augusta Housing Management where plaintiff did the marketing, bookkeeping and certifying of subsidized apartments and assisted her husband with the maintenance. During plaintiff's employment with Augusta, she supplemented her income by working for other agencies and companies, including working as a booking agent at a modeling agency for three to four months and as an order processor at Pleasant Company in winter 1998. Since May 1, 2000, plaintiff and her husband have been co-managers of properties for Horizon Management in Chippewa Falls, Wisconsin.

OPINION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c);

Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. See Celotex v. Catrett, 477 U.S. 317, 322 (1986).

II. AMERICANS WITH DISABILITIES ACT

In pertinent part, the Americans with Disabilities Act provides:

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

42 U.S.C. § 12112(a). Under the act, two distinct categories of disability discrimination claims exist: disparate treatment and failure to accommodate. See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). In a claim of the former type, the plaintiff alleges that an employer has taken an adverse action against a disabled person because of a bias against persons with that type of disability. See § 12112(b)(1). In the latter category are those cases in which an employer refuses to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." §12112(b)(5)(A).

Before an employer can be held liable for either kind of discrimination, the employee must demonstrate that she was disabled. A person is disabled within the meaning of the act if she suffers from "(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." See 42 U.S.C. § 12102(2). The Supreme Court has set forth a three-step inquiry to determine whether a plaintiff is disabled under § 12102(2)(A), see Bragdon v. Abbott, 524 U.S. 624 (1998): (1) whether plaintiff's condition is a physical or mental impairment, id. at 632; (2) whether the impairment affects a major life activity, see id. at 637; and (3) whether plaintiff's impairment was a substantial limitation on the identified major life activity, see id. at 639. The determination whether a plaintiff is disabled under the act is made at the time of the employment decision. See Weiler v. Household Finance Corp., 101 F.3d 519, 524 (7th Cir. 1996).

A. Is Plaintiff Disabled under § 12102(2)?

1. Disabled under § 12102(2)(A)

a. Mental impairment

In interpreting the ADA, courts may rely on the definitions provided in the regulations promulgated by the Equal Employment Opportunity Commission to implement the ADA.

Under the regulations, a mental impairment is defined as "Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). Plaintiff contends that her brain injury and trauma resulted in a cognitive impairment. "Cognition" is defined as a "[g]eneric term embracing the mental activities associated with thinking, learning, and memory." Stedman's Medical Dictionary 377 (27th ed. 2000). Plaintiff also contends that her brain injury and trauma caused her to experience panic attacks. For purposes of summary judgment, I will assume that cognitive impairments and panic attacks constitute mental impairments under the ADA.

b. Whether the impairment affects a major life activity

Plaintiff contends that her impairments affect the following major life activities: learning, memory and concentration and working. "'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt., App. § 1630.2(i)(1999). The EEOC regulations define major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i). However, "[t]his list is not exhaustive." 29 C.F.R. pt., App. § 1630.2(i); see also Bragdon, 524 U.S. at 638

("Rather than enunciating a general principle for determining what is and is not a major life activity, the . . . regulations instead provide a representative list.") "When analyzing whether an unlisted activity constitutes a major life activity, 'the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'" Sinkler v. Midwest Property Management Limited Partnership, 209 F.3d 678, 684 (7th Cir. 2000) (quoting Bragdon, 524 U.S. 638). "When considering an activity's significance, we ask whether an activity is significant within the meaning of the ADA, not whether it is significant to a particular person." Id.

Although learning and working are identified specifically as major life activities in 29 C.F.R. § 1630.2(i), plaintiff fails to cite any authority to support her contention that memory and concentration constitute major life activities under the ADA. She combines her argument that she was substantially limited in the life activities of learning, memory and concentration. See Plt.'s Br. at 3 ("plaintiff claims that her brain trauma and injury substantially limited two different types of major life activities," specifying learning, memory and concentration and working). The EEOC has stated that "For some people, mental impairments restrict major life activities such as learning, thinking, *concentrating*, interacting with others, caring for oneself, speaking, performing manual tasks, or working." EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 8 FEP Manual (BNA) 405: 7461,

7467-68 (March 25, 1997) (emphasis added). In contrast, the Court of Appeals for the Tenth Circuit has held that concentration is not a major life activity, stating "Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself." Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999). Because plaintiff fails to provide support for her impairment in the activities of memory and concentration apart from her discussion of learning, it is not necessary to decide whether memory and concentration are major life activities. Instead, plaintiff's ability to remember and concentrate will be factored into the determination of her ability to learn and work. See, e.g., Krocka v. City of Chicago, 203 F.3d 507, 513 (7th Cir. 2000) (plaintiff asserted that he was unable to work because he was "more irritable, *less able to concentrate,* and more prone to fatigue than the average police officer").

c. Whether plaintiff's impairment was a substantial limit on the identified major life activity

The final step in deciding whether plaintiff is disabled is determining whether her mental impairments substantially limit her ability to learn or work. Substantially limited means that the impairment in question must be "significant," Byrne v. Board of Education, 979 F.2d 560, 563 (7th Cir. 1992) or "considerable" or "specified to a large degree," Sutton v. United Airlines, Inc. 527 U.S. 471, 491 (1999). The implementing regulations define "substantially limit" 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)(l). In determining whether an impairment is substantially limiting, three factors must be examined: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

i. learning

Plaintiff contends that she was substantially limited in her ability to learn because she had significant difficulties in learning the new computer and phone systems and asked frequent questions that she should have known the answer to or that were discussed previously. In support of her argument, plaintiff relies on the following medical records: supervisor Tollefson's comment to Dr. Bodeau that plaintiff was having difficulty resolving some of the more complicated but routine issues of her job; Dr. Bodeau's June 7, 1996 note about plaintiff's learning ability; Dr. Bodeau's June 19 note that "If [plaintiff] continues to have cognitive

difficulties in performance decrement in the workplace, neuropsychiatric testing will be available either through my office or Dr. Murphy"; and plaintiff's difficulty with mathematical calculation at her July 17 meeting with Dr. Bodeau. Plaintiff also points out that she was not likely to recover for one to two years. Defendant disputes that plaintiff was substantially impaired in her ability to learn, pointing to Hosmann's November 20, 1995 report in which Hosmann noted that plaintiff had "moderate impairment in learning new information, encoding, and retrieval of information" and to Dr. Thomas's July 19, 1996 report in which he stated that "the bulk of [plaintiff's] neuropsychological testing is within normal limits." On the basis of plaintiff's difficulties at work and the medical evidence, I find that a reasonable trier of fact could find that plaintiff's cognitive impairments substantially limited her ability to learn.

ii. working

Plaintiff contends that she is substantially limited in her ability to work because she is unable to handle psychosocial stressors or significant variations in her daily routine. Defendant responds by pointing out that plaintiff's sole medical restriction at the time she was terminated was that she be allowed an unlimited amount of time to recover from panic attacks when necessary.

To establish a substantial limitation on the major life activity of working, plaintiff must show that she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); Sutton, 527 U.S. at 491 (quoting § 1630.2(j)(3)(i)). Courts may consider the following additional factors when deciding whether an impairment substantially limits an individual's ability to work:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii). "The inquiry is an individualized one: whether this plaintiff's impairment constitutes a significant barrier to [her] employment." Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944, ___, 2000 WL 994327, at *7 (7th Cir. July 19, 2000). "'[T]he

court must consider the effect of the impairment on the employment prospects of that individual with all of his or her relevant personal characteristics.'" Id. (quoting Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 784 (3d Cir. 1998)).

Although it is unclear how plaintiff is defining jobs with "psychosocial stressors," it seems that most jobs have psychosocial stressors; as a result, jobs with such stressors do not seem to constitute a class of jobs under 29 C.F.R. § 1630.2(3)(i). See Stedman's Medical Dictionary 1479 (27th ed. 2000) (defining "psychosocial" as "Involving both psychologic and social aspects"); cf. Stauffer v. Bayer Corp., No. 3:96-CV-661RP, 1997 WL 588890, at *8 (N.D. Ind. 1997) ("'Stress inducing' jobs, or stressful jobs, however, are not recognized as a class of jobs or a broad range of jobs under the ADA."). Similarly, plaintiff has failed to provide support for the idea that jobs with significant variations in daily routines constitute a class under 29 C.F.R. § 1630.2(3)(i). In support of her claim that she is substantially limited in her ability to work, plaintiff relies almost solely on the opinion of a vocational expert that she was substantially limited in her ability to work because the limitations associated with her brain trauma, including her ability to handle significant variations in daily routines and inordinate stress, precluded her from 47% of all occupations. Although plaintiff's subsequent employment history belies her assertion that she was unable to work in a broad range of jobs, the disability determination must be made at the time of the employment decision. Plaintiff's submission of

the expert report is sufficient to create a triable issue whether she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs" because of her panic attacks. § 1630.2(j)(3)(i).

2. Record and "regarded as"

I need not address the argument that plaintiff had a record of a cognitive impairment or panic attacks under § 12102(2)(B) or that defendant regarded her as disabled because of her cognitive disabilities or panic attacks under § 12102(2)(C), having found that she has set forth sufficient evidence to establish that she was substantially limited in her ability to learn because of her cognitive impairment and that she was substantially limited in her ability to work because of her panic attacks.

B. Disability Discrimination

Before an employer can be held liable for disparate treatment or failure to accommodate under the ADA, the employee must demonstrate that she was a "qualified individual with a disability." 42 U.S.C. § 12112(a); see Stevens v. Illinois Department of Transportation, 210 F.3d 732, 736 (7th Cir. 2000). A "qualified individual with a disability" is defined in relevant part as: "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." 42 U.S.C. § 12111(8). To be "qualified" within the meaning of the act, plaintiff must show 1) that she satisfied the prerequisites of her position by possessing "the requisite skill, experience, education and other job-related requirements" and 2) that she can perform the essential functions of the job with or without a reasonable accommodation. See Ross v. Indiana State Teacher's Association Insurance Trust, 159 F.3d 1001, 1013 (7th Cir. 1998) (citing Tyndall v. National Education Centers, 31 F.3d 209, 213 (4th Cir. 1994)). For purposes of this motion, the parties do not dispute that plaintiff satisfies the first requirement. Therefore, to determine whether plaintiff is a "qualified individual," this court must determine whether she can perform the essential functions of the job and, if not, whether any reasonable accommodation would enable her to perform those functions. See Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999).

The ADA defines an "essential function" as a "fundamental" job duty of the employment position the individual with a disability holds; it excludes functions that are "marginal." 29 C.F.R. § 1630.2(n). Essential functions are largely determined by the employer. See Leisen v. City of Shelbyville, 153 F.3d 805, 808 (7th Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676-78 (7th Cir. 1998). Defendant contends that answering emergency calls (calls relating to gas emergencies and electric outages) constitutes an essential function of the job of telephone consultant in defendant's customer information center and that

the possibility that plaintiff would be unable to answer such calls consistently made her unqualified for the position. Plaintiff argues that answering emergency calls were not an essential part of her position and even if they were, she never had a problem answering such calls.

The undisputed facts demonstrate that the job description for plaintiff's position listed answering emergency calls as an essential function and that plaintiff handled two to five sensitive calls relating to gas issues each week and two to five sensitive calls relating to electrical issues each week, with more calls during storms and severe weather. That the majority of her time was spent dealing with tenant changes, billing disputes and marketing matters does not negate the importance of the 4-10 emergency calls she dealt with each week. Defendant has demonstrated that answering emergency calls was among the "fundamental job duties" of a phone consultant in the customer information center. See 29 C.F.R. § 1630.2(n)(1).

Plaintiff argues that she was able to perform the essential functions of her job as a telephone consultant without accommodation, pointing out that from the time of her injury through her transfer, she handled all safety-sensitive calls in an appropriate manner. Although plaintiff did not experience a panic attack during a safety-sensitive call, plaintiff's treating doctor wrote on August 25, 1996 that the amount of time it would take plaintiff to recover from a panic attack would be "variable." Because of the time-sensitive nature of emergency

calls, an essential function of the job was to handle the emergency calls immediately. Defendant was not required to take the chance that plaintiff would experience a panic attack and need an undetermined amount of time to recover before handling the call appropriately. Because plaintiff was not able to perform one of the essential functions of her job without a reasonable accommodation, the next question is whether plaintiff could perform safety-sensitive calls with a reasonable accommodation.

It is well settled that an employer need not accommodate a disability by giving up an "essential function" of the employment position. See Miller v. Illinois Dep't of Corrections, 107 F.3d 483, 484 (7th Cir. 1997) ("Under the ADA, the employer avoids all liability if the plaintiff would have been fired because incapable of performing the essential functions of the job"). Once the finding is made that answering emergency calls are an essential function of plaintiff's position, Miller suggests that the act does not require defendant to accommodate plaintiff's panic attacks by removing emergency calls from plaintiff's responsibilities on a permanent basis. However, this case is more complex. Plaintiff's inability to perform an essential function of her job would have been only sporadic. She would have been unable to deal with an emergency call only if she answered such a call while she was experiencing a panic attack or the call triggered a panic attack. Plaintiff suggests that it was reasonable for defendant to allow her to return to her position in the customer information center with the understanding that she might require

more than five minutes to recover from a panic attack and that defendant could have routed emergency calls to other consultants or allowed her to rely on other consultants in the event she had a panic attack during a safety-sensitive call.

It cannot be argued that defendant was required to give plaintiff sufficient time to recover from a panic attack if she was in the middle of handling a safety-sensitive call. The other two possible accommodations, to route emergency calls away from plaintiff or to rely on plaintiff's co-workers in case of a panic attack, are not realistic because of the impossibility of predicting plaintiff's need for accommodation. Therefore, to accommodate plaintiff in this way, defendant would have to insure that an additional phone consultant was available everyday to cover for plaintiff in the event of her receiving an emergency call and having a panic attack at a time when all the other consultants were busy with other calls, a scenario that is not altogether unlikely in case of a severe storm. Plaintiff's argument that it was reasonable for defendant to have her co-workers cover for her depends entirely on the assumption that another telephone consultant would always be available. Plaintiff's suggested accommodation would have required defendant to hire someone else or utilize existing employees to perform essential duties of plaintiff's position. Such an accommodation goes beyond the dictates of the act.

It was not reasonable for plaintiff to have expected defendant to accommodate her panic

attacks by transferring an entire function to another employee. See Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir. 1996); Laurin v. Providence Hosp., 150 F.3d 52, 57 (1st Cir. 1998); Barber v. Nabors Drilling U.S.A., Inc., 127 F.3d 461, 468 (5th Cir. 1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995). In Cochrum, the Court of Appeals for the Seventh Circuit held that it was not a reasonable accommodation for a miner whose job involved drilling bolts into the mine ceiling to have a helper for work over his head. See id. at 912 ("We cannot agree that [plaintiff] would be performing the essential functions of his job with a helper."). The court cited Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir. 1991), in which the plaintiff sued his employer, the Postmaster General of the United States Postal Service, under the Rehabilitation Act of 1973, contending that he was discriminated against because of his handicapping kidney disease. The plaintiff suggested as a reasonable accommodation that lifting and handling requirements be waived for him or that other postal employees working with the plaintiff be assigned to lift mail bags for him. The court held that because lifting and handling requirements were essential functions of the job and that waiving the requirements or assigning them to other workers was an effort to eliminate an essential function of the job, the plaintiff's suggestions were not reasonable. See id. Similarly, in Laurin, the plaintiff was a nurse who was susceptible to seizures when tired. She requested her employer to accommodate her by allowing

her to pass her third shift rotations to another nurse. The Court of Appeals for the First Circuit held that it was not reasonable to require an employer to make accommodations that required reallocating essential functions in a manner that made other workers' jobs more difficult.

Plaintiff's position as a telephone consultant required that she be able to answer a variety of types of calls, including safety-sensitive calls. Accommodating plaintiff's disability to insure that she could perform the essential functions would have involved reallocating an essential function to another employee, eliminating an essential function or hiring an additional employee as a backup, none of which are reasonable accommodations under the act. See Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 950 (8th Cir. 1999). Plaintiff's argument is also weakened by the nature of her job and the duties she is not always able to perform: answering emergency calls is a responsibility that must be performed whenever the need arises. Defendant had a strong interest in insuring that emergency calls could always be handled in a safe and timely manner. Plaintiff has failed to present evidence to show that a specific, reasonable accommodation was available that would have allowed her to perform the essential functions of her job.

Although plaintiff suggests that defendant should have transferred her to a different position, she does not allege that she ever asked defendant about an alternative position. Employees who wish to be accommodated with an alternative job have at least some obligation

to propose that job to the employer. See DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th Cir. 1998) (because ADA plaintiff did not propose alternative job whose essential functions she could perform, defendant entitled to summary judgment). Plaintiff cannot claim that defendant refused to accommodate her because she fails to allege that she raised the question of a different job at the time of her discharge, even though she now submits evidence that there were numerous job openings for which she was qualified. In the absence of such evidence, plaintiff may not go to trial on her claim that defendant failed to reasonably accommodate her by transferring her to another position.

Perhaps sensing the flaw in her accommodation theory, plaintiff hedges her bet and states that it is unclear whether she needed help answering emergency calls at all. This undercuts and contradicts her earlier argument that her panic attacks substantially limited her major life activity of working. This hedging is not helpful to her cause for two reasons. First, if plaintiff did not need the assistance of another consultant to deal with emergency calls in case she was having a panic attack, she cannot show that she was disabled within the meaning of the act. Second, plaintiff cannot create a genuine dispute of material fact by disagreeing with herself: either she could handle emergency calls at all times, in which case she was not disabled within the meaning of the act, or she could not handle them, in which case she is not "qualified" because the accommodation she required is not reasonable. Because plaintiff has failed to

adduce sufficient evidence to establish that she is a "qualified individual with a disability" because she was unable to perform the essential functions of her job with or without a reasonable accommodation, she is not entitled to the protection of the ADA. Accordingly, defendant's motion for summary judgment will be granted on plaintiff's reasonable accommodation claim and disparate treatment claim.

ORDER

IT IS ORDERED that defendant Northern States Power Company's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 20th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge