IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BONITA CHRISTIANSON,

Plaintiff,

v.

EAU CLAIRE AREA SCHOOL DISTRICT,

Defendant.

OPINION AND ORDER

99-C-341-C

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In this civil action for monetary damages, plaintiff Bonita Christianson contends that her employer, defendant Eau Claire Area School District, failed to reasonably accommodate her disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Subject matter jurisdiction is present under 28 U.S.C. § 1331. Defendant has moved for summary judgment, arguing that it provided reasonable accommodations to plaintiff and that because it acted in a good faith manner it cannot be held liable for compensatory damages. Defendant has also requested that this action be tried in Eau Claire pursuant to 28 U.S.C. § 1404(c). Plaintiff has moved for partial summary judgment on the issue of reasonable accommodation, arguing that defendant failed to reasonably accommodate her asthmatic

condition.

For the purpose of these cross-motions for summary judgment only, the parties have stipulated that: (1) a material issue of fact exists concerning whether plaintiff is disabled within the meaning of the Americans with Disabilities Act; (2) although defendant was aware of plaintiff's asthmatic condition, material issues of fact exist regarding whether that condition rose to the level of a disability under the act; and (3) plaintiff was qualified for the position of aide for handicapped children she held with defendant during the 1995-96 school year. The parties have also agreed that deposition exhibits 1-48 should be admitted as part of the record.

In moving for partial summary judgment on the issue of reasonable accommodation, plaintiff attempts to meet the elements of a prima facie case by relying on the parties' stipulation. However, because one of the elements she must show in order to succeed is that she had a disability within the meaning of the act and the parties have stipulated to their disagreement over that issue, any ruling on plaintiff's motion would be an advisory opinion. See Barr v. Mateo, 355 U.S. 171, 172 (l957) ("[A]n advisory opinion cannot be extracted from a federal court by agreement of the parties") (citing Swift & Co. v. Hocking Valley Railway Co., 243 U.S. 281, 289 (1917)). Therefore, I will not address the merits of plaintiff's motion for partial summary judgment. I have incorporated undisputed facts proposed by plaintiff to the extent that they enhance an understanding of the relevant events, and I have read the

arguments made in plaintiff's briefs as responsive to defendant's motion for summary judgment.

A showing by defendant that it reasonably accommodated plaintiff's asthma would be dispositive of its potential liability; therefore, defendant's motion for summary judgment is not a request for an advisory opinion. Because I conclude that outside duties were an essential function of plaintiff's position and that no reasonable jury could find that defendant did not make reasonable accommodation for plaintiff's asthma, defendant's motion for summary judgment will be granted.

The parties have failed to comply in all respects with this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was sent to each party with the Preliminary Pretrial Conference Order on July 27, 1999. In some instances, the parties have failed to state the reason for opposing a proposed fact, failed to cite to facts in the record to support their opposition to the proposed fact or cited record evidence that does not place the proposed fact into dispute. In making the following findings of material and undisputed fact, I have disregarded any proposals or responses that do not comply with this court's summary judgment procedures.

UNDISPUTED FACTS

A. Employment with Defendant Prior to Meadowview

In 1986, plaintiff Bonita Christianson began employment with defendant Eau Claire Area School District as a substitute teacher and a substitute aide. She worked as a substitute teacher and aide until the winter of the 1991-1992 school year, when she accepted a long-term temporary special education aide position.

For the 1992-93 school year, plaintiff was hired in a permanent capacity as a full-time aide for handicapped children at the Sherman elementary school. She worked in that position at Sherman for nearly three years, working seven hours a day for a total of 35 hours a week. Plaintiff's duties included assisting children off and onto buses in the morning and afternoon, supervising afternoon recesses on a rotating basis and, at times, supervising noon recesses. While plaintiff worked at Sherman, there were times where her asthma interfered with her outside duties because of high humidity or cold air. On those days, the principal and plaintiff's co-workers arranged for other personnel to cover plaintiff's outdoor duties so that she could perform indoor duties.

In February 1995, plaintiff applied for and secured a full-time position as an aide for handicapped children at Manz elementary school. During the time that plaintiff worked at Manz, her asthma did not create any problems that required accommodation.

B. Employment at Meadowview Elementary School

1. Plaintiff's duties

On July 6, 1995, defendant reassigned plaintiff to Meadowview elementary school to assist teacher Robin Becker with the K-5 emotionally disturbed student population at Meadowview. At Meadowview, plaintiff's outdoor duties included assisting children off and onto buses and supervising students during noon and afternoon recesses. These duties required that she be outdoors for up to 25 minutes each day for morning bus duty, 15-25 minutes for afternoon bus duty, 25 minutes for lunch recess duty and 15 minutes for afternoon recess duty. Typically, the outdoor supervision of the lunch recess ran from 11:55 a.m. - 12:20 p.m. and the outdoor supervision of the afternoon recess ran from 2:00 - 2:15 p.m.

2. Additional part-time aide

Before November 10, 1995, Becker and plaintiff discussed the possibility that a part-time aide might be hired to work with Becker at Meadowview. Becker would then be assisted by both plaintiff and the part-time aide. Plaintiff suggested to Becker that if the prospective new aide were scheduled to work from 12:00 - 3:00 p.m., he or she could cover plaintiff's outdoor noon recess duty. In November 1995, defendant hired a new employee, Alicia Hilderman, to work as a part-time aide for handicapped children at Meadowview, assisting

Becker with the emotionally disturbed students. Defendant scheduled Hilderman to work Monday through Friday, from 12:20-3:20 p.m. Hilderman had the same qualifications as plaintiff and both were assigned to work with the entire emotionally disturbed student population at Meadowview with the exception of one student.

3. Asthma concerns

On several occasions, starting in September 1995, plaintiff told Ilene Doty, Meadowview's principal that prolonged and repeated exposures to excessive cold air and to humid air would cause problems for her asthma.

Between September 25, 1995 and June 4, 1996, plaintiff's physician, Dr. Barry Rhodes wrote several letters to Don Lillrose, personnel director for defendant, advising Lillrose of plaintiff's asthma condition. Plaintiff took a medical leave of absence between September 25 and 29, 1995.

4. Accommodations

On October 27, 1995, plaintiff wrote Doty, saying "Twenty to twenty-five minutes in this [cold and humid] air today puts me at risk for a major asthma episode. I have asked repeatedly to have these duties changed. . . . I cannot be exposed to cold, damp air three times

a day." On November 1, 1995, Lillrose informed plaintiff of defendant's intention to place her on an unpaid leave of absence at the end of the work day on November 10, 1995, because of her inability to carry out the essential functions of her position. Defendant intended to place plaintiff on a preferential rehire list and explained what that would mean. On November 8, 1995, plaintiff met with Lillrose, Doty, Todd Teske (Director of Special Education), Stephen Weld (defendant's attorney), Kathy Ayres (Grievance Chairperson), Pat Lightfoot (union representative) and Pat Underwood (union representative), to discuss the content of Dr. Rhodes's most recent letter and plaintiff's situation at work. At the meeting, it was agreed that the effective date of the previously announced unpaid leave of absence would be extended to December 10, 1995, in order to allow time for the union to submit a proposal for adjustments to plaintiff's work schedule that would avoid the layoff. On or about November 28, 1995, the union proposed the following changes to plaintiff's schedule: for morning bus duty, plaintiff would remain inside the school's front door until 7:55 a.m. with one student who arrived early, then would go outside to greet the other children when they arrived by bus; for noon recess duty, plaintiff would exchange an indoor noon duty for her outside noon duty if the air temperature was below 10° or below 0° windchill, or if high humidity, fog or mist existed; for afternoon recess, plaintiff would exchange an indoor duty for the outdoor duty on days on which such conditions existed.

In a memorandum to Lillrose responding to the proposals, principal Doty stated that the suggested modification of the morning bus duty reflected plaintiff's existing practice. She objected to the proposal that another aide be allowed to trade indoor duties for plaintiff's outdoor noon and afternoon recess duties on the ground that emotionally disturbed students need consistency and do not adapt well to change.

On December 5, 1995, personnel director Lillrose outlined his concerns about the union's proposal and suggested instead that defendant would reduce the number of recesses for which plaintiff was responsible by eliminating plaintiff's afternoon recess duties on Tuesdays, Wednesdays and Fridays. Defendant assigned Hilderman to supervise the afternoon recesses on Tuesday, Wednesday and Friday of each week, effective December 11, 1995 through January 31, 1996. Plaintiff was to confer with Dr. Rhodes about the counterproposal. On December 7, 1995, plaintiff agreed to accept defendant's counterproposal on a trial basis from December 11, 1995 until January 31, 1996. On January 31, 1996, defendant extended the trial basis afternoon recess schedule changes until the end of the 1995-96 school year.

When Hilderman was outside supervising the afternoon recesses, plaintiff covered indoor duties or tasks that otherwise would have been assigned to Hilderman. Hilderman's supervision of students on afternoon recesses did not create any problems for the emotionally disturbed students and specifically did not create problems related to any "lack of consistency" for those

students because they knew Hilderman and were used to working with her in the classroom.

Prior to Hilderman's employment at Meadowview, plaintiff assisted students to the building exits and onto their buses at the end of each day without the assistance of any other teacher's aide. After Hilderman began working at Meadowview, Becker advised plaintiff that two aides were not necessary to assist in this duty; plaintiff did not perform afternoon bus duty for the remainder of the 1995-96 school year.

On February 5, 1996, students were kept inside for both the morning and noon recesses because of cold outdoor temperatures; therefore, plaintiff had no outside duties. Plaintiff was familiar with the weather guidelines for Meadowview school: she was required to keep the children outdoors, unless she feared for their safety or a principal or teacher told her she could bring the children indoors. During the afternoon of February 5, Doty determined and then announced that the outside temperature was high enough that students could play outside at 2:00 p.m. for a fifteen-minute recess. Within ten minutes of going outside, plaintiff had to return from the playground to use an inhaler because she was having trouble breathing. Plaintiff left work immediately and sought treatment from Dr. Rhodes, who diagnosed her as having suffered an acute asthma attack. That day, Dr. Rhodes sent a letter to Lillrose providing details about plaintiff's attack and his treatment. Plaintiff did not ask Dr. Rhodes to write the letter.

On February 16, 1996, plaintiff's union filed a grievance on her behalf over plaintiff's asthma attack on February 5. During February 1996, there was additional correspondence between plaintiff's union and defendant related to the grievance filed on February 16.

Plaintiff returned to work on February 6, the day after her visit to Dr. Rhodes, and was required to continue her outdoor supervision of students at noon recesses and Monday and Thursday afternoon recesses. She continued to work on the reduced afternoon recess schedule until March 8. On March 8, principal Doty advised plaintiff that during the week of March 18, plaintiff would be assigned alternative (indoor) duties from 12:00 to 12:20. Hilderman supervised the noon recess during that week. During the 1995-96 school year, defendant's spring break was the week of March 11.

On March 22, 1996, defendant's attorney wrote union representative Underwood, proposing they resolve plaintiff's grievance by agreeing to Dr. Rhodes's temperature guidelines and continuing the reduced afternoon recess schedule that had been in place since December 7, 1995. In the letter, defendant urged plaintiff "to seek an alternative assignment for the 1996-97 school year as she is not able to perform the essential functions of her current position"; defendant stated that assigning another aide to cover plaintiff's outdoor duties was "not the best educational solution for the youngsters." As of March 22, 1996, defendant was concerned about plaintiff's ability to perform the essential outside functions of her aide position

because the unpredictability of weather conditions could have an adverse affect on her asthma. On March 27, 1996, the union accepted defendant's proposal, agreeing to resolve the grievance temporarily while reserving the right to renew the grievance at the end of the school year.

5. First placement on preferential rehire status

On March 25, 1996, Dr. Rhodes wrote personnel director Lillrose to say that

> Adverse weather conditions clearly have the potential of setting off increased asthma problems at this time. Therefore, I recommend that Bonita avoid inclement weather conditions as much as possible over the next week . . . Previous correspondence has noted some weather condition parameters that would appear to represent a risk factor for setting off Bonita's asthma condition. An additional parameter should include high humidity, likely in the 80% and above range. Days with fog and mist likely represent potential hazards for her due to the high humidity present on those days.

On or about March 25, 1996, Dr. Rhodes prepared a letter for plaintiff, advising "To whom it may concern" that plaintiff should not have outside work duties that week. On or about March 26, 1996, defendant's attorney wrote plaintiff, indicating that because she could not perform the playground duties required in her position as a special education aide, defendant was placing her on the preferential rehire list. This meant plaintiff would be on unpaid leave with no benefits or seniority accumulation until Dr. Rhodes indicated that she could return to outdoor duties.

On March 27, 1996, Underwood requested that plaintiff be placed on a leave of

absence under the Family and Medical Leave Act. Defendant agreed to allow plaintiff to take a paid leave by using sick leave until Dr. Rhodes determined that she was able to return to work.

On April 2, 1996, Dr. Rhodes indicated to Lillrose that plaintiff's asthma condition had improved and she could return to work. On April 6, 1996, defendant's attorney outlined the conditions of plaintiff's return to work and indicated that any agreement regarding plaintiff's return was a temporary measure. Plaintiff returned to work on April 17, 1996.

6. Second placement on preferential rehire status

On June 4, 1996, Dr. Rhodes sent Lillrose a report on plaintiff's recent medical visit and stated,

> She asked that I write this letter to try to better define her status. Basically, she is saying that she is being told that she cannot work in a position that entails outside work. Her feeling is that she has been able to work outside on most days except those that have extreme cold or extreme humidity. We were asked to define this specifically when it is near impossible to do so.

Dr. Rhodes sent the letter at plaintiff's request after the union's attorney had told plaintiff that she needed to obtain more clarifying information from her physician. On June 18, 1996, Lillrose advised Underwood that defendant did not believe that plaintiff could perform her outside duties at Meadowview school without potentially aggravating her asthma and that she

would be placed on preferential rehire status again.

Shortly afterward, plaintiff started receiving postings for vacancies in the district sent to her home. On October 10, 1996, plaintiff turned down an aide position at the Delong middle school because the position required cross-country skiing and Dr. Rhodes had indicated that skiing could aggravate her asthma significantly.

On November 19, 1996, plaintiff indicated her interest in an aide position at the McKinley charter school. On December 13, 1996, plaintiff declined the aide position at the McKinley charter school. In January 1997, plaintiff accepted a posting as an "exceptional education aide" at the Lowes Creek Early Learning Center.

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. FAILURE TO ACCOMMODATE

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). This case falls into the second category: plaintiff contends that her employer refused to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." § 12112(b)(5)(A).

To put into dispute the claim that defendant provided a reasonable accommodation, plaintiff must adduce evidence from which a jury could reasonably conclude that 1) she is disabled; 2) defendant was aware of her disability; 3) she was “qualified” for her position; and 4) her disability was a motivating factor in the adverse employment action. See Foster, 168 F.3d at 1033. In order to prevail on its motion for summary judgment, defendant must show

that plaintiff will be unable to prove her prima facie case at trial. If plaintiff was not "qualified" for her position within the meaning of the act, then plaintiff is not protected by the act and defendant did not violate the act by placing her on leave. Similarly, if defendant shows that it reasonably accommodated plaintiff's asthma, then there is no ADA violation.

The parties agree that there is a material question of fact whether plaintiff's asthma is a disability under the ADA. Setting aside that question for purposes of this motion, defendant maintains that outside duties were an essential function of plaintiff's position so that plaintiff's inability to perform them consistently made her unqualified for the position and that, even avoiding the essential function question, it provided reasonable accommodations in response to plaintiff's requests. Plaintiff argues that placing her on preferential leave status on two occasions was not a reasonable accommodation; rather, defendant should have required Hilderman to take over plaintiff's outside duties when the weather was cold or humid and allowed plaintiff to perform indoor duties during those periods.

A. Qualified Individual With a Disability

The term "qualified individual with a disability" is defined in relevant part as an "individual with a disability who, with or without 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 Ass'n Insurance Trust, 159 F.3d 1001, 1013 (7th Cir. 1998) (citing Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994)). For purposes of this motion, there is no dispute that plaintiff satisfies the first requirement: the parties have stipulated that plaintiff was qualified for the aide to handicapped children position she held with defendant during 1995-96. 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).

1. Essential function

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 performance of "outside duties" (supervision of children when they are outside during recess and boarding and leaving buses) constitutes an essential function of a full-time special education aide's position. Plaintiff does not dispute that outside duties were an essential function of her position and that she could not always perform those duties. She must show, therefore, that a reasonable accommodation would have enabled her to perform those functions.

2. 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"). Given that it is undisputed that outside duties were an essential function of plaintiff's position, Miller suggests that the act does not require defendant to accommodate plaintiff's asthma by removing outside duties 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 is only sporadic. On some cold and humid days, plaintiff is unable to perform her outside duties; she

is capable of performing other, indoor duties during those times. (For purposes of deciding this motion for summary judgment, I must make all inferences in favor of plaintiff, the non-moving party. Therefore, although there is some evidence in the record to suggest that at times plaintiff and her physician indicated that she should never perform outside duties, I assume throughout this discussion that plaintiff's asthma prevented her from performing her outside duties only on days when the weather was bad.)

Plaintiff suggests that it was reasonable for her to ask that her outside duties be transferred to another employee on the limited number of days when it was ill-advised for her to be outside. This argument finds some support in the case law. See, e.g., Haschmann, 151 F.3d at 602 ("[I]t is not the absence itself but rather the excessive frequency of an employee's absence in relation to the employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job.") However, the nature of the responsibilities that plaintiff is unable to perform consistently distinguishes this case from Haschmann. In Haschmann, the accommodation at issue was the plaintiff's request for a clearly defined period of absence of 2-4 weeks; the court noted that nothing in the record indicated that the plaintiff's physician was asked whether she would have the ability to do the essential functions of her job after that time period, with or without accommodation. See id.

In contrast, in this case, plaintiff requested an ongoing accommodation in which she would be relieved of her outside duties anytime the weather was cold or humid. It would be impossible for defendant to predict plaintiff's need for accommodation because that need is based on ever-changing weather conditions. Therefore, to accommodate plaintiff in this way, defendant would have to insure that an additional aide was available every day to cover for plaintiff if the weather was bad. Plaintiff's argument that it was reasonable for defendant to have Hilderman cover plaintiff's outside duties depends entirely on the assumption that Hilderman would always be available. Hilderman was a temporary part-time employee. Plaintiff's requested accommodation would require defendant to rehire Hilderman or someone else, regardless whether it would have done so without the need to accommodate plaintiff, converting the temporary part-time aide position to a permanent one. As discussed below, the case law indicates clearly that defendant is not required to make such an accommodation.

Defendant is not required to hire additional employees or to utilize existing employees to perform essential duties of plaintiff's position. In Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir. 1996), 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, stating, "[w]e 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.

I find persuasive an opinion by the Court of Appeals for the Eighth Circuit even though it is not binding precedent. In Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999), the plaintiff-employee proposed that her employer create a co-manager position in which the plaintiff would share managerial responsibilities, thereby making permanent a temporary arrangement under which plaintiff had shared some managerial duties with another employee when she first returned to work after becoming disabled. This is similar to the temporary accommodation defendant made for plaintiff in this case by allowing Hilderman to cover plaintiff's outdoor recess duties on certain days of the week and when the weather was bad. In Fjellestad, the Court of Appeals for the Eighth Circuit held that the ADA does not

require an employer to create a new position to accommodate a disabled employee or to shift the essential functions of the position to other employees. See Fjellestad, 188 F.3d at 950; see also 29 C.F.R. § 1630, App. § 1630.2(o). An employer is not obligated to hire additional employees or reassign existing workers to assist a disabled employee in her essential duties. See Fjellestad, 188 F.3d at 950.

Similarly, other district courts have held that the ADA does not mandate that an employer create a "light duty" or new permanent position. See Rucker v. City of Philadelphia, No. Civ.A.94-0364, 1995 WL 464312 at *2 (E.D. Pa. July 31, 1995) (citing Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1492 (M.D. Ala. 1994)). In Rucker, the court held that an employee failed to show he could perform essential functions of his position when he could not perform physically demanding aspects of the job and that eliminating a major part of the position was not required as reasonable accommodation.

Plaintiff's position as an aide to handicapped children requires the ability to perform a variety of functions, including outside supervision of recesses. Defendant is not required to change the essential duties of the position to accommodate her. The Court of Appeals for the Seventh Circuit has held that a plaintiff's proposed accommodation of splitting up the duties of a multi-task packager position was not reasonable, explaining that "if an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the

occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its *essential* duties." Malabarba v. Chicago Tribune Co., 149 F.3d 690, 700 (7th Cir. 1998) (quoting Miller, 107 F.3d at 485) (emphasis in original). In another opinion, Ross, 159 F.3d at 1015-16, the court held that where a substantial portion of the essential job duties of the plaintiff's position involved spending time outside the office in meetings at various locations, the plaintiff's requested accommodation of holding all teacher meetings at the plaintiff's office was "clearly unreasonable."

Plaintiff's argument is also weakened by the nature of her job and the duties she is not always able to perform: supervision of students at recesses is a responsibility that must be performed and must be performed at a specific time and on a daily basis. In Tyndall, 31 F.3d at 213, an opinion by the Court of Appeals for the Fourth Circuit (distinguished by the Seventh Circuit in Haschmann), the plaintiff was a teacher who missed almost forty days of work in a seven-month period, including the beginning of an instructional cycle for two consecutive years, and had requested permission to be absent a third time. The court noted that the plaintiff's teaching job "could not be performed away from the [school]; her position required that she teach the assigned courses during the scheduled class times and spend time with her students." Id. The court concluded that "regardless of the fact that she possessed the

necessary teaching skills and performed well when she was at work, Tyndall's frequent absences rendered her unable to function effectively as a teacher." Id. As was the case in Tyndall, plaintiff's frequent inability to perform her outside duties at Meadowview rendered her unable to function effectively as a teacher's aide.

The cases indicate that defendant was not required to accommodate plaintiff's desire to decrease her outside duties. It is undisputed that outside duties were an essential function of plaintiff's position. In November 1995, when defendant first intended to place plaintiff on leave, that decision came after plaintiff said that she could not be outside three times a day. Defendant worked with the union to accommodate plaintiff until March when plaintiff indicated she was unable to perform *any* outside duties; defendant then placed plaintiff on preferential rehire status, later converted to paid leave, until Dr. Rhodes cleared her to return to work. When Dr. Rhodes indicated during the summer of 1996 that plaintiff could not work in a position that entailed outside work, defendant placed plaintiff on preferential rehire status again, mailed job announcements to her home and eventually rehired her at another school.

An accommodation does not have to be the preferred accommodation in order to be reasonable. See Malabarba, 149 F.3d at 699 (citing Giles v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996)). See also Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1016 (7th Cir. 1996) ("The ADA does not obligate an employer to provide a disabled employee every

accommodation on his wish list."); Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996) (noting that decision of accommodation to be made remains with employer). Placing plaintiff on preferential rehire status was a reasonable accommodation in this case because an alternative position was not available immediately. Plaintiff could not perform all of the essential functions of her position. In order to insure that outside recesses were always supervised, defendant would have to make an additional aide available and change plaintiff's job responsibilities by deleting an essential duty. Such accommodations are more than the ADA requires.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion for partial summary judgment on the issue of reasonable accommodation is DENIED as a request for an advisory opinion;

2. Defendant's motion for summary judgment on plaintiff's claim of discrimination in violation of the Americans with Disabilities Act is GRANTED;

3. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this _____ day of March, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge