IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JUDITH A. ERICKSON,

Plaintiff,

v.

LARSON-JUHL, INC.,

Defendant.

OPINION AND ORDER

00-C-174-C

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In this civil action for monetary relief, plaintiff Judith A. Erickson contends that her employer, defendant Larson-Juhl, Inc., refused to reasonably accommodate her disability and then terminated her because of her disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12213. Plaintiff asserts also that defendant terminated her because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 - 634. Further, plaintiff contends that defendant retaliated against her by terminating her because she took medical leave under the Family Medical Leave Act, 29 U.S.C. §§ 2601 - 2654. Jurisdiction is present under 28 U.S.C. §§ 1332 and 1441(a). Now before the court is defendant's motion for summary judgment. Because I find that plaintiff is not "disabled" within

the meaning of the ADA, that younger employees were not treated more favorably than she was and that she was not discharged because of her medical absence, defendant's motion for summary judgment will be granted.

Also before the court are two motions regarding plaintiff's deposition and affidavit. Defendant filed a motion to strike the correction sheet for plaintiff's deposition because it was filed 22 days after the deadline. Plaintiff filed a motion to submit a supplemental affidavit after the motion for summary judgment had been fully briefed. Because plaintiff has failed to present a persuasive reason to extend the deadline for either filing, I will grant defendant's motion to strike the deposition correction sheet and deny plaintiff's motion to file a supplemental affidavit.

In her proposed facts, plaintiff relies upon three documents that do not pass evidentiary muster. First, plaintiff attempts to establish defendant's production needs through a document of defendant's referred to as a "position and output log." Plaintiff presents no evidence explaining what the document is, what the numbers mean, who the people listed on the document are, what positions they held for how long or how many hours they worked in any given position. For these reasons, I have not considered the position and output log for the purpose of deciding this motion for summary judgment. Second, plaintiff relies upon defendant's hire log as well as a record of part-time and temporary employees to try to establish

that defendant was hiring individuals in both full- and part-time capacities instead of returning plaintiff to work from layoff status. The log lists names and dates of hire but does not document how many positions were available, what positions individuals were hired to perform or how long full-time employees worked. Because of the incomplete nature of the hire log and the corresponding record, I have considered them as they relate to part-time and temporary employees but not as to full-time employees for the purpose of this opinion. Finally, plaintiff submits medical records in an effort to substantiate the extent of her physical impairment. All evidence submitted at the summary judgment stage is subject to the same evidentiary standards of admissibility as evidence presented in a courtroom. Because the medical records are not certified or authenticated, I did not consider them in this opinion.

From the facts proposed by the parties, I find the following to be material and undisputed for the purpose of deciding this motion.

FACTS

A. Parties

Plaintiff Judith Erickson is a former employee of defendant Larson-Juhl, Inc. Defendant is a Georgia corporation that has a manufacturing operation in Ashland, Wisconsin. It manufactures picture frame moldings, corner samples, ready-made picture frames, framed art

work and Framepac kits. Plaintiff was an employee at the Ashland plant from 1981 until she took voluntary layoff in January 1999. She was terminated on July 18, 1999, when she was 52 years old.

In her first position at the Ashland plant, plaintiff worked as a nailer for two or three years. After working as a nailer, plaintiff held at least six different manufacturing production positions over the more than seventeen years that she worked for defendant. In addition to her titled positions, plaintiff worked in many areas of the Ashland facility as needed to cover temporary increases in defendant's work demands. Beginning in 1987, and continuing for twelve years until her layoff in 1999, plaintiff held only one title: boxer. In this position, plaintiff boxed Framepac products, which are wooden and metal picture frame kits.

B. The 1998 Temporary Staff Reduction Policy and Layoffs

Typically, defendant experiences periods of weaker production needs during the first months of each calendar year. Until 1998, defendant had no formal policy regarding layoffs and workforce reductions. Instead, defendant had been able to absorb periods of weaker production needs with an informal system of brief voluntary layoffs. Under that procedure, employees who volunteered for layoff status generally were able to return to work in their regular jobs within a very short period of time. Plaintiff volunteered frequently for such

temporary periods of unemployment.

Beginning in at least October 1997, the management of the Ashland plant began informing employees that the Framepac product sales were declining and along with them, the production needs, and that the company as a whole was no longer going to support the Framepac product. In 1998, the Framepac product was removed from defendant's sales catalog. Defendant did not indicate that positions handling the Framepac product would no longer be necessary.

In the first quarter of 1998, defendant experienced a reduction in production needs that was greater than had been experienced in prior years. Defendant's management staff developed a Temporary Staff Reduction Policy in February 1998, believing that the Ashland facility might not be able to fully absorb the 1998 reduction by using the informal voluntary procedure that had worked in prior years. Under this policy, the management staff referred to layoffs as "special leaves." Defendant expected the 1998 workforce reduction to be temporary but stated in its written policy that it did not guarantee benefits to employees who remained on special leave longer than 90 days. Defendant never informed plaintiff about its policy and plaintiff's supervisor Robert Wedlund (Production Department Supervisor) did not know about the policy.

C. Plaintiff's 1998 Surgery, Return to Work and Work Restrictions

Plaintiff volunteered to take leave beginning March 2, 1998. Three days later, plaintiff had surgery on her right shoulder to repair an injury that had resulted from work-related problems that began in 1993. On March 5, 1998, plaintiff began requesting weekly disability benefits on March 5, 1998. She received full benefits during her leave. (Plaintiff characterizes her leave as "medical." Defendant characterizes the leave as "special" for the first three days and as both "special" and "medical" from that point forward. Because the protection of the FLMA supersedes defendant's policy as of the third day of plaintiff's leave, this difference in terminology is not material.)

On June 26, 1998, nearly four months after her shoulder surgery, plaintiff's treating physician released her to begin work on June 29, 1998. Plaintiff's physician imposed a temporary "sedentary" work level restriction with a 10-pound maximum lifting restriction, prohibited her from using her right arm above shoulder level and limited her to working four hours each day. At the time, the production needs in the Framepac area had not increased enough to warrant returning plaintiff to work as a boxer.

In early July, defendant contacted plaintiff's physician, inquiring whether the repetitive nature of plaintiff's duties at the Ashland facility plaintiff would cause further progression of her degenerative joint disease. In a letter dated July 14, 1998, the physician stated that he

could not guarantee that plaintiff would not reinjure her shoulder.

On July 28, 1998, plaintiff's treating physician reduced her work restrictions to the "light" level (weight restriction of 20 pounds with frequent lifting of up to 10 pounds) and continued limiting the use of her right arm above shoulder level. The restrictions limited plaintiff to eight-hour workdays, a restriction that defendant was able to accept for a limited time. Prior to her surgery in March 1998, Manager of Human Resources Nate Swiston had told plaintiff that she had to have her hourly restrictions removed or face termination.

By late July 1998, defendant had recovered from its 1998 work shortage and plaintiff's job was available again. On July 29, 1998, defendant required plaintiff to sign a document stating that she was to work within her restrictions and was to notify management immediately if she thought her physical condition was deteriorating. The document stated that failure to notify management of a worsening condition would be grounds for termination. Neither plaintiff nor her supervisor Wedlund is aware of any other employee who has been required to sign a similar document.

Plaintiff was returned to temporary light duty work in her former boxer position on July 29, 1998. Work restrictions established on September 28, 1998, indicate that plaintiff was able to lift a maximum of 50 pounds and a regular load of 25 pounds. She was no longer restricted from lifting her arm above shoulder level, but was still limited to working eight hours

each day.

D. The 1999 Layoffs

In January 1999, defendant's Framepac production needs as well as its overall production needs continued to decline. Although the drop in production was less dramatic than the previous year, defendant still needed to lay off staff. Defendant's management anticipated that the Ashland facility could meet its work force reduction needs by reducing the number of boxers by one person and by laying off one part-time employee. To carry out the 1999 layoffs, defendant followed the policy it had developed in 1998. As in 1998, defendant could not predict how long the 1999 layoffs would last. In January 1999, after management laid off the part-time employee, Production Department Supervisor Wedlund asked the boxers whether any of them wished to volunteer for layoff. Wedlund also told them that if no one volunteered, he would have to recommend someone for involuntary layoff. Wedlund told plaintiff that he thought the layoff would be for a short period of time but could make no guarantees. Wedlund represented to plaintiff that this layoff would follow the same procedure as it had in the past. As of that time, no employee had ever been terminated while on layoff status. Wedlund did not discuss any new layoff policy with plaintiff. Plaintiff believed that she would return to work shortly just as she had in the past.

In January 1999, four people held the position of sectional (or Framepac) boxer. Plaintiff, who was 52 years old at the time, was the second-youngest of the four boxers. The other boxers were Sun Yo Halvorson, age 56, who was hired in 1978; Sau Grage, age 55, who was hired in 1985; and Sharon Hendrickson, age 35, who was hired in 1984.

As in 1998, plaintiff volunteered for the 1999 layoff. Shortly after her layoff began on January 18, defendant's corporate office sent letters by mistake to both plaintiff and Rosemary Majetich, a part-time employee, stating that their employment had been terminated. Pursuant to defendant's policy, Human Resources Manager Swiston sent plaintiff a letter on January 13, 1999, informing her that her insurance coverage would continue for a period of 90 days. Plaintiff was never called back to work and her employment ended in July 1999.

If plaintiff had not volunteered, Wedlund would have selected her for the layoff because plaintiff's overall performance was the worst of the four boxers at that time. Plaintiff's production output was low because work-related injuries and her permanent work restriction caused her to miss work. Plaintiff's production numbers were above standard as to metal frame kits and overall the lowest and below standard as to wood frame kits that made up the majority of the boxing work.

From plaintiff's layoff in January 1999 through December 1999, defendant hired at least ten part-time and temporary employees. Of the temporary employees, at least three

worked for four months or longer. Despite this hiring, the production rate for metal and wooden frame kits declined steadily from 1996 through 2000. As of October 2000, more than 20 months after plaintiff's layoff began, defendant had not filled plaintiff's boxer position. Another boxer, Sharon Hendrickson, went on disability leave in November 1999, and as of November 2000, defendant had not returned her to the boxer position. Hendrickson is 17 years younger than Erickson. As of October 2000, defendant had only two employees working as boxers: Sun Yo Halvorson and Sau Grage, both of whom are older than plaintiff.

The part-time employee who was laid off at the same time as plaintiff was called back to work in February 1999. Rosemary Majetich is 23 years younger than plaintiff and has less seniority than plaintiff. Prior to her layoff, Majetich worked as a nailer. When she returned to work, she performed miscellaneous duties and not the duties of a nailer. As noted in defendant's 1998 Temporary Staff Reduction Guidelines, defendant was most interested in maintaining continued employment for those persons whom it considered key to stepping up production and who held positions requiring considerable training.

In an effort to increase sales, two weeks after the 1999 layoffs went into effect, defendant launched a promotional effort that involved sending "corner samples" of frames to hundreds of existing and potential customers. As a result of the sales promotion, the shipping area was overwhelmed with work. On February 22, 1999, Majetich was recalled to assist the

shipping department staff with the increased workload. The boxes Majetich was required to handle for the shipping job weighed an average of 45 to 55 pounds and some weighed 75 to 80 pounds. Swiston did not believe plaintiff could perform the shipping department tasks in light of her temporary lifting restrictions.

Majetich returned to her nailer position in early May 1999. Work for the nailer position increased at that time because the position is part of the manufacturing process for corner samples. As the sales promotion effort depleted the supplies of corner samples, Majetich's nailing skills were needed to make new samples. Although plaintiff had worked as a nailer for longer than Majetich, she was not considered for the position. When she last held the nailer position in the early 1980s, the equipment was very different.

In mid-March 1999, Swiston received a notice from plaintiff's treating physician indicating that plaintiff's temporary medical restrictions ("medium" work level: lifting a maximum of 50 pounds, with frequent lifting of 25 pounds) had changed to permanent restrictions. Other than her 50-pound lifting restriction, plaintiff's only other record of any physical limitation is a five to ten percent disability related to a carpal tunnel injury that does not prevent her from doing anything. In addition to these work restrictions discussed at her deposition, plaintiff stated the following in a later affidavit:

> among other things, I am substantially impaired in my ability to wash or comb my hair, use the restroom properly, wash my body, put on my makeup and

> clothing. My disability impairs my ability to lift and reach. I am unable to sleep. I cannot hold my grandchildren nor do my laundry or clean the house by myself.

At the time plaintiff's physician released her for restricted-duty work in March 1999, defendant still had no need for another boxer. Although personnel records establish that defendant made hires during 1999, those records do not indicate that any new hires worked as boxers. Because defendant did not need boxers, plaintiff continued on layoff status.

Plaintiff telephoned Wedlund almost weekly during the first couple of months of her layoff to see whether any work was available. Wedlund always told plaintiff that no work was available despite the concurrent hires. In late March 1999, Wedlund met with Swiston, the human resources manager, and the plant manager about plaintiff's layoff. They agreed that the layoff was not going to be short-term and that plaintiff should speak with Swiston rather than Wedlund.

On April 6, 1999, Swiston sent plaintiff a letter notifying her that her dental and health insurance coverage ended that month. The letter was a standard Consolidated Omnibus Budget Reconciliation Act (COBRA) notice defendant sent to all employees following a qualifying event for COBRA purposes. After plaintiff received the letter, Swiston told her by phone that the production needs had not yet picked up in the boxing area and explained that defendant did not have any additional work that plaintiff's work restrictions would allow her to do.

By this point, defendant realized that additional work in the boxing area was not forthcoming. Swiston discussed the situation with the company's Vice President of Human Resources. Because of plaintiff's long term employment with the company, they decided to offer her a severance package along with a general release. On or about April 21, 1999, Swiston met with plaintiff to explain the continued lack of work in the Framepac area and also to explain her eligibility for COBRA benefits. Swiston explained that it did not look very probable that defendant's production needs would increase to the point that the company would need another boxer. Swiston then explained to plaintiff that in recognition of her years of service with the company, defendant had prepared a severance package, which Swiston presented to her. Plaintiff said she would review the offer with her husband and her lawyer.

E. Temporary Summer Positions

In mid-April of 1999, several temporary positions became available for that summer: sample helper-sample labeler, production helper-un-boxing molding [sic] and production helper-shorts room. In April when plaintiff asked about job openings, Swiston told her about the three positions. Swiston told plaintiff that plaintiff's March 5, 1999 restrictions would not allow her to perform these jobs. Defendant did not engage in any interactive process to determine what accommodations could be made because defendant did not perceive plaintiff as having a

disability within the meaning of the Americans with Disabilities Act.

In late April, Swiston received a handwritten letter from plaintiff stating that her medical restrictions allowed her "to do quite a bit." In the letter, plaintiff stated also that she was "ready, willing and able to work" and pointed out that she could lift up to 50 pounds. In early May, Swiston spoke with plaintiff about the temporary positions. Plaintiff believed she could perform the jobs but Swiston reiterated that he believed the jobs would not be within plaintiff's March 1999 restrictions. Swiston said that he would prepare a letter describing the temporary summer jobs for her doctor to review. Plaintiff and Swiston agreed that they would abide by the doctor's recommendation. Plaintiff said that she would like to review the job descriptions before Swiston sent the letter to her physician.

On May 11, 1999, Swiston gave plaintiff a copy of the job descriptions. The next day, plaintiff called Swiston and indicated that she and her lawyer had approved the letter. The same day, Swiston mailed the letter. Swiston also sent a letter to plaintff on May 14, confirming that the letter was mailed. A couple days later, Swiston received a letter from plaintiff's lawyer stating that "[plaintiff] is in no way agreeing that the 'brief descriptions of the positions and duties' that you provided to [her physician] are accurate." Swiston was confused because he had understood that plaintiff and her attorney had approved the letter on May 12. Plaintiff believed that she could have performed those positions with reasonable

accommodations and that the positions' weight restrictions were not stated accurately in the letter.

The day after Swiston received the letter from plaintiff's lawyer, Swiston received a response from plaintiff's physician, stating that plaintiff could not perform two of the three jobs and might not be able to perform the third without suffering further deterioration of her shoulder. At that point, Swiston contacted the company's lawyer, who wrote a letter to plaintiff's lawyer on June 1, 1999, seeking further dialog. Since that time, Swiston has not had any further communications from plaintiff or her lawyer.

F. Plaintiff's Termination

Swiston intended that the 1998 Temporary Staff Reduction Guidelines would sever defendant's obligation to laid-off employees after 90 days. When plaintiff continued to contact defendant about job openings after the 90-day period, Swiston suspected that plaintiff did not realize her employment with defendant had ended.

Defendant had no clear policy statement or past practice regarding the status of employees on layoff for longer than 90 days. Swiston does not recall whether other employees have been placed on layoff status for more than 90 days. After contacting the company's Vice-President of Human Resources, Swiston concluded that the Ashland facility would continue to

carry persons on a list of laid-off employees for up to six months. After six months of layoff, if the employee had not been recalled from an indefinite layoff, the employment relationship would be terminated and the employee would be eligible for rehire. Although the policy was initiated in 1998, plaintiff is the only employee for whom the policy led to termination.

With the policy in mind, Swiston wrote to plaintiff on July 16, 1999, to inform her that her employment would be officially terminated as of July 18, 1999, six months after her layoff began. Although the letter welcomed plaintiff to apply for any future openings for which she was qualified and which fit within her medical restrictions, Swiston received no further communications from plaintiff.

Plaintiff thought that she "could have taken any other different job" at the Ashland facility with reasonable accommodations and that she has performed nearly all the jobs in the production department. Plaintiff cannot identify any jobs that were available from April 1999 to September 2000 for which she could have applied. Plaintiff believed that she would not be hired after receiving Swiston's letter of July 16, 1999.

Each year between 15 and 27 of defendant's employees take leaves of absence for various reasons, including work-related injuries and surgeries, non-work-related injuries and surgeries, illnesses, maternity, family medical problems and deaths in the family. Other employees have taken substantial periods of leave nearly as long or longer than plaintiff's 142

days of leave.

G. Current Lawsuit

On September 15, 2000, plaintiff was deposed. Three days later, the court reporter forwarded a copy of the deposition to plaintiff's lawyer along with an original deposition correction sheet to be completed by plaintiff. On October 30, 2000, the reporter forwarded the original sealed transcript of the deposition to defendant's lawyer without a completed deposition correction sheet because she had not received one from plaintiff. As of November 13, 2000, the reporter had not received a completed deposition correction sheet.

On November 1, 2000, defendant's lawyer filed plaintiff's original September 15, 2000 deposition without a deposition correction sheet. On November 9, 2000, defendant's lawyer received a copy of plaintiff's correction sheet for the first time as part of plaintiff's response to defendant's motion for summary judgment. On November 14, 2000, defendant filed a motion to strike plaintiff's deposition correction sheet.

On December 7, 2000, plaintiff filed a motion to submit a supplemental affidavit from plaintiff to be incorporated with plaintiff's memorandum of law in opposition to defendant's motion for summary judgment. At that time, briefing defendant's motion for summary judgment was complete and the close of discovery was less than three weeks away.

OPINION

A. Preliminary Motions

Before addressing the merits of the case, two preliminary motions must be resolved: defendant's motion to strike the correction sheet to plaintiff's deposition and plaintiff's motion to submit a supplemental affidavit.

1. Motion to strike correction sheet to plaintiff's deposition

F. R. Civ. P. 30(e) requires that any changes in form or substance to a deposition by a deponent be completed within 30 days after the deponent has been notified that the transcript is available for review. Defendant contends that plaintiff did not meet this deadline and, thus, that plaintiff's correction sheet should be stricken. See Dft.'s M. Strike, dkt. #53. The period of time from September 18, 2000 (transcript forwarded to plaintiff), to November 9, 2000 (deposition correction sheet received by defendant's attorney), is 52 days. Plaintiff has failed to present a persuasive reason for extending this deadline. Therefore, defendant's motion to strike plaintiff's correction sheet will be granted.

2. Motion to submit supplemental affidavit

Defendant filed its reply brief on its motion for summary judgment on November 20, 2000. More than two weeks later, plaintiff requested leave of the court to submit a supplemental affidavit to be incorporated with plaintiff's November 9, 2000 brief in opposition to summary judgment. See Plt.'s M. Supp. Affidavit, dkt. #67. This untimely motion, if granted, would work an injustice to defendant for two reasons. First, defendant no longer has the opportunity to conduct meaningful discovery to rebut the supplemental evidence. Second, the deadline has expired for defendant to respond to additional arguments relating to the motion for summary judgment. In addition to the unfairness, plaintiff's motion to file a supplemental affidavit is futile. Regardless whether her motion is granted, plaintiff cannot succeed on the merits of her case. For these reasons, I will deny plaintiff's motion to submit a supplemental affidavit.

B. Summary Judgment Standard

The standards for summary judgment are well known. 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). 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). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995). "This standard is applied with added rigor in employment discrimination cases where intent and credibility are crucial issues." Id. at 547 (quoting Sarsha v. Sears, Roebuck, & Co., 3 F.3d 140, 145 (7th Cir. 1995)).

C. Americans with Disabilities Act

In pertinent part, the Americans with Disabilities Act (ADA) 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 disparate treatment claim, 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 a failure to accommodate claim, the plaintiff contends that an 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).

Before an employer can be held liable for either kind of discrimination, the employee must demonstrate that she was disabled at the time the discrimination occurred. 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): (1) whether plaintiff's condition is a physical or mental impairment; (2) whether the impairment affects a major life activity; and (3) whether plaintiff's impairment is a substantial limitation on the identified major life activity. See Bragdon v. Abbott, 524 U.S. 624, 632, 637, 639 (1998). 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). To make out a claim under the ADA, a plaintiff must first show that she is disabled within the meaning of the act. See Best v. Shell Oil, 107 F.3d 544, 547-48 (7th Cir. 1997).

1. Substantial limitation on major life activity

A person is disabled within the meaning of the act if she suffers from a physical impairment that substantially limits one or more major life activities. See 42 U.S.C. § 12102(2). A major life activity is "substantially limited" when the person is unable to perform it or is significantly restricted in the manner, condition, or duration in which she can perform it in comparison to the general population. 29 C.F.R. § 1630.2(j) (1998). 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). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i). The appendix to the regulations states further that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. pt. 1630 app. § 1630.2(i). In determining whether an impairment is substantially limiting, factors for consideration include:

> 1) the nature and severity of the impairment;
> 2) the duration or expected duration of the impairment; and
> 3) the permanent or long term impact of the impairment, or the expected permanent or long term impact of the impairment.

29 C.F.R. pt. 1630 app. § 1630.2(j).

a. Other major life activities

Before addressing whether plaintiff was substantially impaired in her major life activity of working, I must determine whether she was substantially impaired in other major life activities. See 29 C.F.R. § 1630 app. § 1630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working."). To determine whether a person is substantially limited in a major life activity other than working, a court evaluates whether that person can perform the normal activities of daily living. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 n. 7 (5th Cir. 1995). Examples of major life activities include caring for oneself, performing manual tasks, lifting and reaching. See 29 C.F.R. § 1630.2(i); 29 C.F.R. § 1630 app. § 1630.2(i).

Plaintiff asserts that she is severely limited in her ability to perform basic manual tasks and to care for herself. Although she did not mention these impairments at her deposition, plaintiff avers without further detail in a later affidavit that her major life activities outside of working are "substantially impaired." Plt.'s Aff., dkt. #41, at 3.

Plaintiff contends that her alleged disability is the result of a shoulder and a carpal tunnel injury. See Plt.'s Br. Opp. Sum. J. at 3. At the same time, plaintiff admits that the carpal tunnel injury does not prevent her from doing anything. See Plt.'s Dep., dkt. #28, at 92-

93. On the basis of this admission, the carpal tunnel injury cannot be considered a disability under the ADA.

In opposing defendant's motion for summary judgment, plaintiff carries the burden of demonstrating the existence of disputed issues of material fact. Vague references to a range of activities are simply insufficient to create a triable question of fact whether plaintiff suffered "substantial limitations" on those activities. Plaintiff provides a laundry list of activities in which she is "severely limited" without describing the exact nature and severity of those limitations or their projected duration or impact. Plaintiff states in a conclusory manner that she cannot do the laundry or clean the house by herself. Although the precise extent of plaintiff's impairment is impossible to ascertain from her statement, a limitation on the ability to perform certain aspects of housework does not amount to a substantial limitation in the ability to care for oneself. See McKay v. Toyota Motor Mfg., U.S.A., Inc., 878 F. Supp. 1012, 1014 (E.D. Ky. 1995) (inability to mop not substantial limitation). Even when the facts are viewed in the light the most favorable to plaintiff, her broad descriptions do not provide enough detail to establish a substantial limitation on the major life activities of performing manual tasks or caring for oneself.

b. Working as a major life activity

To establish that she has substantial limitation on the major life activity of working, a plaintiff must show that she is unable to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person of comparable training, skills and abilities. See Bolton v. Scrivener, 36 F.3d 939, 942 (10th Cir. 1994). The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working. See Homeyer v. Stanley Tulchin Associates, 91 F.3d 961 (7th Cir. 1996). Because the determination whether plaintiff is disabled under the ADA is made at the time of the employment decision at issue, see Weiler, 101 F.3d at 524, I will consider plaintiff's physical condition only at the time of her layoff and subsequent termination in 1999.

That plaintiff could lift 50 pounds demonstrates that she was not substantially limited in her ability to work. The average person of training, skills and abilities comparable to plaintiff cannot lift 50 pounds frequently throughout the day. Several courts of appeals have held that far more severe lifting restrictions do not substantially limit the major life activity of working. See Halperin v. Abacus Technical Corp., 128 F.3d 191, 200 (4th Cir. 1997) (inability to lift more than 20 pounds not substantial limitation on major life activity of working); Thompson v. Holy Family Hospital, 121 F.3d 537, 540 (9th Cir. 1997) (inability to lift more than 25 pounds not substantial limitation on major life activity of working); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (in and of itself, inability to lift more

than 25 pounds not substantial limitation on major life activity of working); but see Lowe v. Angelos Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996) (inability to lift over 15 pounds creates triable issue of fact whether major life activity substantially limited). From these cases, I conclude that plaintiff's lifting restriction to 50 pounds on a rare basis is not a substantial limitation on the major life activity of working.

Plaintiff's other work restriction meets a similar fate. That she was limited to working eight hours a day does not separate her from the average person of comparable training, skills and abilities. To the contrary, an eight hour workday is typical for the average manual laborer. See Berg v. Norand Corp., 169 F.3d 1140, 1145 (8th Cir. 1999) (holding that diabetic employee limited to 40 to 50 hour workweek was not substantially limited in major life activity of working and thus was not disabled under the ADA); but see Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 949-50 (8th Cir. 1999) (employee's permanent thirty percent impairment of her upper right extremity and restrictions that limited her to working 35 - 40 hours per week with no more than three consecutive days of work created a triable issue whether employee's impairments substantially limited major life activity of working). The fact that defendant may expect (or even require) its employees to work more than eight hours a day does not change the fact that plaintiff is fully capable of working a full eight hour day. Moreover, nothing in the record suggests that plaintiff was restricted to working forty hours a

week as long as she did not work more than eight hours on a given day. Plaintiff fails to show that her impairment was of the severity, duration and impact that would entitle her to the protection of the ADA. On the basis of this evidence, no reasonable jury could conclude that plaintiff's physical impairments amounted to a "disability" as the ADA defines that threshold concept.

2. Record

In addition to persons with substantially limited major life activities, the ADA defines persons with disabilities as those who have a record of a disability. See 42 U.S.C. § 12102(2)(B). Under the act, the record must establish convincingly and unequivocally that the plaintiff suffers from disabilities that substantially impair her ability to perform major life activities. See Davidson v. Midlefort Clinic, Ltd., 133 F.3d 499, 510 n.7 (7th Cir. 1998) ("What 12102(2)(B) requires is not simply a diagnosis, but a record reflecting the kind of impairment that would impose a substantial limitation on one or more of the plaintiff's major life activities.")

Plaintiff presents two pieces of evidence in support of her argument that she has a record of a disability. First, she relies on medical reports that were developed pursuant to a workers' compensation claim. These reports were not considered for the purpose of deciding this motion

because they lack proper certification and authentication. Even if these reports had been considered, the fact that they may show that plaintiff has been diagnosed with a "disability" does not establish that plaintiff had substantial limitations on her major life activities. See Harrington v. Rice Lake Weighing Systems, Inc., 122 F.3d 456, 460 (7th Cir. 1997) (standards for establishing disability under ADA are considerably more stringent than those under Wisconsin workers' compensation statutes). Second, plaintiff points to work restrictions mandated by her physician. The restriction in place at the time plaintiff was terminated limited her to lifting 50 pounds. As discussed above, a 50-pound lifting limit by itself does not constitute a substantial impairment. Neither record demonstrates that plaintiff had an impairment that substantially limited her life activities. For that reason, neither record establishes convincingly and unequivocally that plaintiff's physical difficulties were disabilities under the act.

3. "Regarded as"

"The 'regarded as' provision of the ADA is designed to combat stereotypes employers may hold about impairments that are not, in themselves, substantially limiting." Harrington, 122 F.3d at 459; see also Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538, 541 (7th Cir. 1995) ("regarded as disabled" element of act consistent with preamble of act

"in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination"). A plaintiff may meet the "regarded as" test in three ways:

(1) The individual may have an impairment that is not substantially limiting but is treated by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment that is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

See 29 C.F.R. § 1630.2(l).

Plaintiff frames her argument under the first category. She contends that defendant treated her impairment as substantially limiting when it determined that it did not have any jobs available for which she was qualified. Plaintiff relies on the fact that defendant knew about plaintiff's medical condition and, as a result, required her to sign an agreement in July 1998 when she returned to work after her shoulder surgery stating that she would work within her work restrictions. Although this evidence establishes that defendant was aware of plaintiff's impairment, it does not indicate that defendant regarded plaintiff as substantially impaired. On the contrary, defendant returned plaintiff to her former boxer position in July 1998 as soon

as her physician approved her for work. The agreement suggests that defendant believed plaintiff was capable of working in her former position as long as she worked within the restrictions imposed by her physician.

During her 1999 layoff, three temporary jobs became available. Initially, plaintiff agreed that the open positions required lifting in excess of her work restrictions. Although plaintiff later took issue with the weight requirements of the positions, nothing in the record indicates that defendant had appropriate job openings but refused to return plaintiff to work because it mistakenly believed she was substantially impaired. To the contrary, during the course of plaintiff's 1999 layoff, defendant's production needs did not pick up so the company did not hire anyone to fill plaintiff's boxer position. Plaintiff points out also that defendant did not engage in an interactive process to find a reasonable accommodation for plaintiff during her 1999 layoff as required under the ADA. Defendant did not do so because it did not believe that plaintiff had a disability under the act. Defendant knew that plaintiff had a physical impairment but the facts do not indicate that the company regarded plaintiff as substantially limited in her ability to work.

Perhaps sensing the flaw in her accommodation theory, plaintiff hedges her bet and states that she "could have taken any other different job" at the plant. This undercuts and contradicts her earlier argument that her lifting restrictions substantially limited her major life

activity of working. This hedging is not helpful to her cause for two reasons. First, if plaintiff was able to perform the duties of production positions requiring heavy lifting, 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 the lifting requirements of "any other different job," 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 cannot prove from the undisputed facts that she had a disability under the ADA, it is not necessary to analyze whether she is a "qualified" individual with a disability.

D. Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) makes it unlawful for an employer "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). This protection extends to employees who are between 40 and 70 years old. See 29 U.S.C. § 631(a). To succeed on an ADEA claim, a plaintiff must establish that she would not have been terminated "but for" her employer's intentional age-based discrimination. See Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d

391, 396 (7th Cir. 1997).

A plaintiff may prove a violation of the ADEA in two ways:

> She may try to meet her burden head on by presenting direct or circumstantial evidence that age was the determining factor in her discharge. Or, as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), . . . and later adapted to age discrimination claims under the ADEA.

Chiaramonte, 129 F.3d at 396 (internal quotations omitted).

The McDonnell Douglas method involves a three-part analysis: (1) the plaintiff must first show by a preponderance of the evidence that a prima facie case of age discrimination exists; (2) if the plaintiff is successful, the defendant must provide a legitimate, non-discriminatory reason for the adverse employment action; and finally (3) if the defendant provides a legitimate reason, plaintiff must prove, again by a preponderance of the evidence, that the reason provided by the defendant is a pretext for discrimination. See Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1141 (7th Cir. 1998). At all times the ultimate burden of persuading the trier of fact remains with the plaintiff. See Weisbrot v. Medical College of Wisconsin, 79 F.3d 677, 681 (7th Cir. 1996).

The elements making up a prima facie case under the McDonnell Douglas burden-shifting method vary slightly depending on the situation under which the discrimination allegedly occurred. In most discharge cases, the plaintiff must show that she was replaced by

a younger employee. See, e.g., Mills v. First Federal Savings and Loan Association of Belvidere, 83 F.3d 833, 843 (7th Cir. 1996). In a reduction in force case, however, because the discharged employee is generally not replaced by anyone, the plaintiff need demonstrate only that a younger worker was treated more favorably. See Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324, 1331 (7th Cir. 1995).

The present case is a reduction in force case. Although plaintiff attempts to introduce evidence to support her belief that defendant did not eliminate her boxer position, the output log on which she relies without further explanation or annotation does not document her belief. In contrast, defendant presents evidence that it eliminated plaintiff's position because its production needs decreased. Therefore, to establish a prima facie reduction in force case, plaintiff must show the following four elements: (1) she was in the protected age class; (2) she was meeting her employer's legitimate expectations; (3) she was discharged; and (4) the employer treated persons younger than plaintiff more favorably. See Wolf v. Buss (America) Inc., 77 F.3d 914, 919 (7th Cir. 1996). Furthermore, plaintiff must show that those alleged to have received more favorable treatment from defendant were both "substantially younger" and "similarly situated" to plaintiff. See Fisher, 139 F.3d at 1141.

Defendant does not dispute that plaintiff satisfies the first three elements of a prima facie case. Plaintiff was 52 years old when she was terminated and she was meeting defendant's

legitimate expectations. Plaintiff must still satisfy the fourth element: that substantially younger and similarly situated employees were treated more favorably than plaintiff.

Initially it should be noted that plaintiff has not alleged that age was a determining factor in deciding to eliminate her position. Plaintiff disputes that her position has been eliminated but has failed to produce admissible evidence to document her belief. The production rate of the frames plaintiff was boxing decreased, so plaintiff's boxer position was no longer necessary. In fact, after plaintiff's termination, defendant eliminated another boxer position held by a younger employee, leaving only two boxers as of October 2000.

Plaintiff asserts that she was replaced by younger employees but the undisputed facts do not support this contention. The part-time employee who was laid off in 1999 at the same time plaintiff took voluntary layoff, Rosemary Majetich, is younger than plaintiff and was returned to work just a few weeks after the layoff. Nonetheless, Majetich filled positions for which plaintiff was not qualified. Although younger employees may have fulfilled boxer duties from time to time during plaintiff's layoff, no one was hired as a boxer. The two remaining boxers are older than plaintiff and were working as boxers at the time plaintiff took voluntary layoff and was later terminated. I conclude that no reasonable jury could find that defendant treated employees younger than plaintiff more favorably. Therefore, plaintiff's age discrimination claim must fail.

E. Family and Medical Leave Act

The Family and Medical Leave Act provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for certain situations, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(1). To guarantee this right, the act provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1).

Plaintiff contends that defendant terminated her in retaliation for her exercise of her right to take a leave under the act in violation of § 2615(a)(1) & (2). "An employer is prohibited from discriminating against employees . . . who have used FMLA leave." 29 C.F.R. § 825.220(c). In order to succeed on this claim, plaintiff must show that defendant discharged her "because of medical absence." Clay v. City of Chicago Department of Health, 143 F.3d 1092, 1094 (7th Cir. 1998). The McDonnell Douglas framework, set out above, applies to "claims that an employer discriminated against an employee exercising rights guaranteed by the FMLA." King v. Preferred Technical Group, 166 F.3d 887, 891-92 (7th Cir. 1999). To establish a prima facie case of retaliatory discharge, a plaintiff must establish that: (1) the plaintiff engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) there is a causal connection between the employee's protected

activity and the employer's adverse employment action. See id. Unlike claims of substantive violations of the act, the question of the employer's intent is important in retaliation cases. See id.

Defendant concedes that plaintiff has met the first two requirements of a prima facie case of retaliatory discharge. However, it argues that plaintiff has failed to demonstrate the existence of a causal link between her medical leave and her termination a year later. To establish this causal link, plaintiff must demonstrate that her employer would not have taken the adverse employment action "but for" the plaintiff's protected activity. See Johnson v. City of Fort Wayne, 91 F.3d 922, 939 (7th Cir. 1996). A "substantial time lapse" between the two events weakens any causal connection between the two. Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469, 480 (7th Cir. 1995) (20 months between teacher's EEOC complaint and nonrenewal of her contract is substantial time lapse).

In an effort to establish this causal link, plaintiff points to the fact that her overall production decreased because she took medical leave under the FMLA. As a result, plaintiff worked less and produced less. Although this link is not disputed, it fails to connect plaintiff's medical leave with her termination. Plaintiff links her medical leave to her decreased productivity but fails to link the decreased productivity to her termination. Plaintiff presents no evidence establishing that but for her medical leave and the resulting decrease in production,

defendant would not have terminated her employment. Instead, defendant's production needs in the boxing area declined, eliminating the need for plaintiff's position. In addition, defendant's records demonstrate that several other employees have taken substantial periods of leave nearly as long or longer than plaintiff's 142 days of leave yet were not terminated. Furthermore, a full year passed between plaintiff's medical leave and her termination. Although this lapse in time is shy of 20 months, it is significant enough to weaken plaintiff's contention that the two events are linked. See Johnson v. University of Wisconsin-Eau Claire, 70 F.3d at 480. Because I conclude that no reasonable jury could find that defendant retaliated against plaintiff for taking medical leave, plaintiff's FMLA retaliation claim must fail.

ORDER

IT IS ORDERED that

(1) Defendant Larson-Juhl's motion for summary judgment is GRANTED;

(2) Defendant's motion to strike the correction sheet to plaintiff Judith A. Erickson's deposition is GRANTED; and

(2) Plaintiff's motion to submit a supplemental affidavit is DENIED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 27th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge