IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JOYCE TAKLE,

Plaintiff,

v. MEMORANDUM AND ORDER

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY, 04-C-217-S

Defendant.

Plaintiff Joyce Takle commenced this civil action under the Americans with Disabilities Act (ADA) alleging that defendant University of Wisconsin Hospitals and Clinics Authority failed to reasonably accommodate her disability and discriminated against her because of her disability.

On July 8, 2005 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affined is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Joyce Takle is an adult resident of the State of Wisconsin. Defendant University of Wisconsin Hospital and Clinics Authority (UWHC) is a tertiary health care provider serving the State of Wisconsin.

Plaintiff began her employment at the UWHC on November 4, 1978. Until 1998 plaintiff worked as a nurse in the Cardiac

Special Procedure Area. As of June 1997 she also worked as an "on Call" nurse for the area which paid more than a scheduled shift. Plaintiff is an insulin dependent diabetic. In June 1997 she experienced low blood sugar while at work. Until this incident her performance reviews were very good.

As of July 30, 1998 plaintiff was no longer allowed to work the more lucrative "on call hours". In September 1998 plaintiff was temporarily reassigned to the Cardiology Clinic. This reassignment became permanent on October 26, 1998. On December 9, 1999 plaintiff was denied a transfer to a position in the Urology/GI Clinic.

In January 2000 plaintiff was working as a nurse clinician in the Cardiology Clinic. On January 19, 2000 plaintiff's supervisor, Joanne Ellingson, completed a performance appraisal for plaintiff which indicated her overall rating was below "Meets Criteria". In January 2000 Annette Severson assumed the role of plaintiff's supervisor.

Within the Cardiology Clinic registered nurses assume multiple roles including that of telephone triage nurse. In her deposition plaintiff testified she was not a competent telephone triage nurse but that her medical condition did not impact her ability to learn telephone triage. One of the duties of a triage nurse is to manage the patients in the clinic's anti-coagulation program. These patients take medications usually coumadin which decrease the

ability of their blood to clot. Patients taking coumadin are closely monitored by a blood test called the INR (International Normalized Ratio).

On January 13, 2000 plaintiff noted that a patient had an INR range that was at the top end of the target range and contacted the patient's doctor. A competent nurse would have concluded that the patient was on the borderline of having too much medication and would expect the doctor to decrease the patient's medication. At the time the patient's dose of coumadin was 5 milligrams two days of the week and 2.5 milligrams the remaining five days. Plaintiff thought that the doctor told her to increase the patient's medication to 5 milligrams seven days a week and she so advised the patient on the telephone. The patient questioned this increase so plaintiff called the physician to clarify his order. The correct order was to decrease the coumadin to 5 milligrams on one day and 2.5 milligrams the remaining six days.

Severson believed that on January 13, 2000 plaintiff had violated several safety and professional nursing practice standards and that the patient could have suffered very serious complications from over medication. On January 25, 2000 Severson believed that plaintiff had not properly advised a patient in the clinic that the doctor had left for day.

Severson concluded based on plaintiff's substandard performance review and the January 13 and 25, 2000 incidents that

plaintiff was not able to fully perform the duties of her position. UWHC scheduled plaintiff for a predisciplinary investigatory meeting on February 9, 2000 to investigate plaintiff's violation of work rules, I.A "Insubordination including disobedience or failure or refusal to carry out assignments or instructions", and I.G "Negligence in performance of assigned duties".

Plaintiff, her union steward Mary McBride, Ms. Severson, representatives from UWHC's human resources department and Samuel P. Case, the Director of Cardiovascular Services, attended the meeting. Plaintiff did not deny that she had given the patient the wrong advice on January 13, 2000 regarding the coumadin doses. Although Severson was aware that plaintiff had diabetes, plaintiff did not inform her that her actions on January 13 and 25 or shortcomings in her performance were caused by her diabetes.

Mr. Case, the human resources representative and Ms. Severson decided to permanently remove plaintiff from her nursing position because of her substandard performance and work rule violations. Instead of terminating her UWHC decided to place her on a leave of absence for six months because of her medical condition and her seniority. By letter dated February 25, 2000 plaintiff was placed on a medical leave of absence for six months. She was also advised that she could substitute benefit time for unpaid leave time.

Plaintiff filed her EEOC charge not later than December 5, 2000.

MEMORANDUM

Plaintiff claims that she was deprived of on call hours in 1997, transferred in 1998 and denied a transfer in December 1999. Defendant claims that these claims are time barred because they occurred more than 300 days prior to December 5, 2000, the date she filed her EEOC charge. It is well established that an employee must file a Title VII or Americans with Disabilities Act claim within 300 days of the alleged discriminatory incident. 42 U.S.C. § 2000e-5(e)(1); Dasgupta v. University of Wisconsin Bd. Of Regents, 121 F. 3d 1138, 1139 (7h Cir. 1997).

Plaintiff argues that her claims are not time barred because defendant's conduct was a continuing violation. In National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 113 (2002), the United States Supreme Court distinguished between discrete discriminatory acts and hostile work environment claims. The Court specifically held that discrete discriminatory acts are not actionable if time barred even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The Court identified discrete acts such as termination, failure to promote, denial of transfer or refusal to hire.

Plaintiff has alleged three discrete acts of discrimination, the denial of on call hours, her transfer and the denial of her transfer. Each act started a new 300 day clock for filing charges

for that act. Since plaintiff did not file her EEOC charge within 300 days of any of these acts, her claims concerning these discrete acts are time barred.

The Court held that hostile environment claims are different because their very nature involves repeated conduct. Id. at 115. The Court held as follows: "Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Id. at 117. Plaintiff does not claim she was subjected to a hostile environment. Accordingly, the discrete acts that occurred prior to February 8, 2000, 300 days before plaintiff filed her EEOC charge are time barred.

The Court in Morgan allows an employee to use prior discrete acts as background evidence in support of a timely claim. Id. at 113. Plaintiff has, however, not presented evidence that these discrete acts were discriminatory. Since the acts have not been shown to be discriminatory, they can not be used to show that a subsequent act was discriminatory.

Plaintiff claims that the defendant discriminated against her on the basis of her disability when it terminated her on February 25, 2000. To state a prima facie case of disability discrimination plaintiff must show that she was disabled or perceived by her employer to be disabled, her employer was aware of her disability, that she was otherwise qualified for her job and that she was

terminated because of her disability. Foster v. Arthur Andersen Constructing, LLP, 168 F. 3d 1029, 1032 (7th Cir. 1999).

Plaintiff has not submitted evidence to show that she was otherwise qualified for her job. Her employer gave her a substandard performance evaluation and found that she had committed two work rule violations in January 2000. She was unable to perform the duties of her job. In her deposition she stated that she was not competent in telephone triage which was a duty of her position and that her January 13, 2000 mistake concerning the coumadin dosage was not caused by her diabetes.

Further, plaintiff has not shown that she was removed from her position because of her diabetes. It is not disputed that she was to be terminated because of her performance. There is evidence that she was placed on a leave of absence rather than terminated because of her diabetes but there is no evidence that her removal from her position was for any reason other than her performance problems. Accordingly, plaintiff has not stated a prima facie case of disability discrimination.

Had plaintiff established her prima facie case, the employer would then have the opportunity to articulate a legitimate and non-discriminatory reason for the termination. McDonnell-Douglas Corp. V. Green, 411 U.S. 792 (1973). Defendant articulates that it terminated plaintiff because of her performance.

Plaintiff would then have to prove that this reason was pretextual for disability discrimination. Pretext means a dishonest explanation, a lie rather than an oddity or an error. Wells v. Unisource Worldwide, Inc. 289 F. 3d 191, 1006 (7th Cir. 2002). To establish pretext plaintiff must produce competent evidence showing either that the defendant's reason did not actually motivate the termination or that it was insufficient to motivate the decision. Id. Plaintiff would have to show that defendant did not honestly believe its reason for terminating her. Plaintiff has not produced any evidence to dispute that defendant honestly believed her performance was substandard and that she could not perform the duties of her position. Accordingly, defendant is entitled to judgment as a matter of law on plaintiff's disability discrimination claim.

In her complaint plaintiff alleges that the defendant failed to reasonably accommodate her disability. There is no evidence presented that plaintiff requested a reasonable accommodation. Accordingly, defendant is entitled to judgment as a matter of law on this claim. See Hunt-Golliday v. Metropolitan Water Reclamation Dist. Of Greater Chicago, 104 F. 3d 1004, 1012 (7th Cir. 1997). Defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING her complaint and all claims contained therein with prejudice and costs.

Entered this 25th day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge