IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CARMON COLE,

OPINION AND ORDER

Plaintiff,

04-C-633-C

v.

TEEL PLASTICS, INC.,

Defendant.

- -

Carmon Cole has been deaf and has had almost no ability to speak his entire life. After working for defendant Teel Plastics, Inc. in several capacities for almost twenty years, plaintiff was suspended and fired in January 2003 after an incident in which he threw a sharp tool after becoming frustrated with a co-worker. In this civil action for monetary relief, Cole contends that Teel Plastics violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, when it terminated his employment and when it failed to provide him with an interpreter. Jurisdiction is present. 28 U.S.C. § 1331.

This case is before the court on defendant's motion for summary judgment. For the reasons stated below, defendant's motion will be granted as to plaintiff's claims of disparate

treatment and failure to accommodate. Defendant is entitled to summary judgment on plaintiff's disparate treatment claim because plaintiff has not adduced any evidence from which a reasonable jury could infer that defendant terminated him because of his disability or made out a prima facie case for inferring discrimination under the McDonnell Douglas burden-shifting scheme. Specifically, plaintiff has failed to identify any non-disabled but otherwise similarly situated employees who received more favorable treatment. Defendant is entitled to summary judgment on plaintiff's claim that it failed to provide him with a reasonable accommodation because plaintiff has confused his right to an accommodation with his right to an opportunity to be heard before being discharged. The undisputed facts show that defendant did not give plaintiff an opportunity to be heard before terminating his employment. Because it did not afford him a hearing, there was no occasion for defendant to deny plaintiff an interpreter.

Although the parties have done a commendable job in creating a detailed factual account of the relevant events in this case, some of their proposed findings of fact and responses constitute legal conclusions, are argumentive or irrelevant, are not supported by the cited evidence or are not supported by citations that are specific enough to alert the court to the source for the proposal. I have disregarded any such proposals.

From the parties proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Carmon Cole is an adult resident of Baraboo, Wisconsin. He has been deaf since birth. Although his ability to speak is substantially impaired, he is capable of verbalizing sounds. His academic skills are below the fifth grade level and he has the reading comprehension of a third or fourth grade student. He has trouble understanding written communication, cannot read lips except for small one-syllable words and cannot understand any verbal communication.

From July 27, 1983 to January 22, 2003, plaintiff was employed by defendant Teel Plastics, Inc., a corporation formed under the laws of Wisconsin with its headquarters and operations in Baraboo, Wisconsin. Defendant specializes in the custom manufacture of plastic tubing for a variety of consumer products such as handles for lawn and garden tools, shovels, tampons, cotton swabs and other products. It operates four manufacturing facilities in Baraboo that are known by their location: Hitchcock, which is on Hitchcock Street, Lynn Avenue, Lake Street and GRT Lake Street. At all times relevant, defendant employed approximately 230 persons in Baraboo. Its employees worked on three shifts: A shift (7:00 a.m. - 3:00 p.m.); B shift (3:00 p.m. - 11:00 p.m.); and C shift (11:00 p.m. - 7:00 a.m.).

B. Plaintiff's Job Positions

Plaintiff began working for defendant at the Hitchcock facility as an inspector packer and an operator packer. An inspector packer is responsible for inspecting product and packaging it into delivery boxes. An operator packer is responsible for operating one line of production from start to finish in addition to inspecting and packaging product. In July 1989, plaintiff was promoted to operator technician and transferred to the Lake Street facility. As an operator technician, plaintiff had the same job duties as an operator packer but was responsible for multiple lines of production. At all relevant times, plaintiff has been qualified to perform the essential functions of his job position.

From approximately 1996 until his termination, plaintiff reported to Ken Popp, the B shift supervisor at the Lake Street facility. Plaintiff liked Popp and thought he was a fair supervisor, although he did have difficulty communicating with Popp from time to time. Plaintiff became frustrated at times at the Lake Street facility because his co-workers at that facility did not try to communicate with him in the same manner as his co-workers at the Hitchcock facility.

C. Efforts to Accommodate Plaintiff

Defendant attempted to compensate for plaintiff's deafness and speaking difficulties in a number of ways. It installed warning lights to supplement audible siren warnings throughout its facilities. For the first two weeks of plaintiff's employment, defendant

retained the services of an American Sign Language interpreter to help introduce plaintiff to defendant's operations. Periodically, defendant retained the services of an interpreter named Linda Leary when plaintiff requested an interpreter for company meetings or presentations and during plaintiff's performance reviews. An interpreter was not provided every time plaintiff made a request. In addition, defendant acquired an American Sign Language videotape and training book for its employees. On some occasions, defendant videotaped company meetings and made arrangements for an interpreter to watch the videotape with plaintiff at a later date. Two of plaintiff's supervisors learned sign language in order to improve communication with plaintiff.

Day-to-day communication between plaintiff and defendant's other employees occurred through the use of written notes and charade-like gestures. Although plaintiff does not write well on paper and is not comfortable with that means of communication, he requested the use of notes at several points during his employment. Plaintiff never told any of his co-workers or supervisors that using notes or gestures were ineffective means of communication. However, numerous employees of defendant knew that communication with plaintiff was often difficult. For example, Kelly Mooney, a member of defendant's human resources department, wrote the following in her notes to a September 24, 1996 meeting with plaintiff:

We found out that Carmon probably did not understand the context of the previous

> exchanges. Although notes were written to which Carmon responded, we were not aware that Carmon has the equivalent of a third grade reading level and doesn't understand much of what is written to him. In fact Carmon did not know what the word "termination" meant.
>
> I believe that it is important to realize that Carmon probably did not understand most of any previous verbal warnings about his temper. Therefore, this should be considered a first warning.

Mooney's notes indicate also that plaintiff requested that co-workers and supervisors use written notes to communicate rather than simply mouthing words.

The individuals involved in the investigation of the matter that led to plaintiff's termination – Kim Meyer, Doug Abelman and Ken Popp – believed that plaintiff could communicate through the exchange of written notes and the use of charade-like gestures, although they knew that the process was difficult and often frustrating for plaintiff and those around him.

D. Plaintiff's Disciplinary History

Plaintiff has difficulty controlling his temper. Defendant attempted to work with plaintiff to control his temper for years. Defendant noted plaintiff's problem with controlling his temper in several of its annual reviews of plaintiff's work performance. For example, plaintiff's 1997 review contained the following: "When you get frustrated, do not throw things, or throw hands in air, contact supervisor when something is making you mad."

However, these reviews contained positive comments about the efforts plaintiff was making to control his temper. Two 1997 performance reviews indicated that plaintiff had done a "great job" managing his temper and that "People can't believe it, he's more helpful + [and] understanding." His 1999 performance review indicated that plaintiff was "doing a great job in Extrusion and has had control of his temper on the production floor and is helping the packers when he has time."

In addition to the comments on the performance reviews, plaintiff was disciplined and received warnings for problems caused by his temper. Aside from one written warning in 1995 and one written warning in 1996, Popp was involved with the issuance of all warnings and other disciplinary action against plaintiff noted or contained in his personnel file. The first instance of disciplinary action being taken against plaintiff occurred on August 14, 1995. On that occasion, he received a verbal warning after scaring a fellow employee to the point of crying. In March 1996, an employee failed to pack a box of product properly. After confronting the employee, plaintiff discussed the incident with Popp, who told him to "be more helpful to your coworkers rather than yell at them when they make a mistake." In September 1996, plaintiff was warned again that he had to control his temper. He requested an interpreter to be present to discuss this warning. During this discussion, it was revealed that plaintiff may read at only a third grade level and that he did not know what the word "termination" meant. These revelations caused Kelly Mooney to suggest that plaintiff had

not understood most of the previous warnings issued to him.

In March 1997, plaintiff was reprimanded for getting upset with a co-worker. He was told not to get angry at the packers and reminded that he had already received a written warning for getting upset on the production floor. Plaintiff received a "verbal" warning in February 1998 after throwing parts and getting angry with a packer. In a written note, Popp told plaintiff the following: "Do not take your temper out on me or any packers on your line or you will be in my office getting a written warning." In July 1998, plaintiff received another warning after making an obscene gesture to another employee and shutting down a production line while it was "hot," an act that could have damaged the line seriously. Plaintiff did not receive a promotion in August 1998 because of his difficulty controlling his temper.

In May 1999, Popp told plaintiff not to get angry at his co-workers after he became upset with a packer for falling behind schedule. Popp told plaintiff that he should notify a supervisor if there was a problem to be addressed. Plaintiff received warnings about losing his temper when dealing with co-workers after incidents in April 2000 and April 2002. On April 14, 2000, Popp wrote the following email to Brad Hintz to explain how his time at work had been spent that evening:

> Nice Pak line 6 - Char found roundness out of spec and a fuzzy cut told Carmon to fix. I went over and found roundness .004 and the max is .003 so I told Carmon it needed corrected [sic] and he threw a fit, we wrote notes back and forth for a [sic]

> hour explaining roundness of spec of .003 is o.k. but .004 is bad, he said he knows can't get 100% perfect. I told him it had to be fixed or shut the line down, he told me to fix it and I told him it was his job, he said I need more $ to fix it. I told him to shut the line down and he walked away throwing his hands in the air.
>
> I was second away from bring [sic] him in the office again for this repetitive issue.
>
> If his parts are rejected on Monday he will be confronted on this issue, I'm not taking that kind of abuse from him, I bit my tongue just to be calm and polite to him. I have given him written warning on his attitude in the past and if it keeps up he will get a refresher course, he has been treating Debi the same way, doesn't like taking orders from a woman.
>
> I know he gets frustrated easily because he can't communicate and I go out of my way to accomidate [sic] it. Took over 3 hours of my time tonite [sic] going through this song and dance and it's just because he gets lazy. Try for one day with any of your piers [sic] just writing notes back and forth and see how easy it is or should I say time consuming. If he has rejects it will be on his review because he knew they were bad.

Plaintiff's performance reviews were in his personnel file, as were the written warnings plaintiff received and communication notes between plaintiff and Popp regarding some of the incidents. Kim Meyer, who worked as defendant's human resources director at the time plaintiff was fired, believed each occurrence in plaintiff's personnel file was accurate.

E. Events of January 16, 2003

On January 16, 2003, plaintiff was in charge of production lines 5 and 6. Shortly after his shift began, plaintiff confronted Barry Peters, the packer operator for production line 5, after Peters made gestures towards plaintiff that he did not understand. Later that

evening, Peters took a break and plaintiff relieved him. While relieving Peters, plaintiff discovered that someone had sealed several boxes incorrectly. When Peters returned to work, he saw that plaintiff was upset. He asked plaintiff what was wrong and then recognized that the boxes had been closed improperly. He told plaintiff that he understood what was wrong and that he would fix the boxes, but plaintiff did not understand what Peters had said. Plaintiff used a tool with a non-retractable razor blade on one end to open one of the boxes. Frustrated and angry, plaintiff threw the tool towards a workstation table. He did not throw the tool at Peters or any other employee. The tool traveled between four and ten feet before striking the table. Plaintiff retrieved the tool, put it in a drawer, and reported the matter to Debra Liska, the lead operator technician. Liska told plaintiff to take a break and went to speak with Peters, who told her that plaintiff had thrown the tool and that it struck the workstation table. Peters did not say that plaintiff threw the tool at him or anyone else. Liska reported the incident to Popp, the shift supervisor.

Popp spoke with Peters, who told him that plaintiff had thrown the tool out of anger but that he had not thrown it at anyone. After this conversation, Popp gave plaintiff a note informing him that Popp wanted to speak with him. After his break, plaintiff went to Popp's office to speak with him. The two men communicated by exchanging written notes. Plaintiff told Popp that Peters had teased him or made a "dirty teasing gesture" towards him. Popp believed that plaintiff was upset about the improper box folding, but he assured

plaintiff that he would tell Peters not to tease him. In addition, Popp told plaintiff that he could not get mad and kick or throw things in the workplace and that plaintiff could have hurt someone by throwing the tool. Plaintiff tried to take responsibility and apologize for tossing the tool onto the workstation table. During the exchange, Popp wrote that he was giving plaintiff a warning and asked plaintiff if he wanted Leary to explain it to him when she came to the workplace. Plaintiff responded by writing "I think Jay Smith will have meeting as [sic] soon." Popp knew that plaintiff was referring to an upcoming company-wide meeting with the company's president and that plaintiff was usually allowed to have an interpreter at company-wide meetings or to review a videotape of the meetings with the interpreter.

Because Popp did not have a clear understanding about how plaintiff threw the tool, he spoke with Peters a second time. During their second conversation, Peters indicated that plaintiff had thrown the tool with more force than Popp thought originally. This prompted Popp to call his supervisor, Doug Ableman. Ableman told Popp to call Kim Meyer and suggested that plaintiff leave the workplace while the incident was investigated. Meyer agreed that plaintiff should be removed from the workplace during the investigation. Popp did not speak with plaintiff a second time on January 16.

F. Plaintiff's Suspension and Termination

After speaking with Meyer, Popp gave plaintiff a note indicating that he was suspended from work for three days and that he could come back to work on Wednesday, January 22, 2003. After plaintiff left the workplace, Popp sent Meyer the following email:

> Everything went O.K. when I told Carmon he would be off for three days without pay and that he had to leave tonight. I will put a copy of the note that I wrote him in your mailbox Kim. When I first heard that Carmon threw a knife blade I figured he just aggressively put it on the podium but then when I brought Barry in he said Carmon threw it as hard as a softball and he didn't care where it went because he threw it out of anger. I was thinking at least a 3 day suspension but thought better see what you thought. Barry said if it would not have hit the podium, it was headed towards line 4 where Rich was working (facing the opposite direction) and it probably would have cut half his face off or done very serious damage. Very questionable at the time for termination, especially when all Carmons reviews talk about controlling his temper. I will talk to you tomorrow.
>
> We will need to talk to Carmon on Wednesday before he returns to work, do we need an interpreter? Probably not, probably can't find one by then.
>
> For what it's worth Carmon was sorry for what he did and knew it was wrong.

The following day, Meyer and Ableman met with Popp, Peters, Liska and Ryan Johnson, a packer who was working on another production line the previous evening. Peters, Liska, Popp and Johnson wrote statements describing their recollections of the incident. In his statement, Popp indicated that he had contacted Ableman and Meyer the previous day because he "could see by Carmon's actions he was having a hard time answering my questions." Meyer reviewed these statements along with the contents of plaintiff's personnel file and the notes exchanged between plaintiff and Popp the previous evening. No one met

with plaintiff or took a statement from him. Meyer concluded that plaintiff had admitted throwing the tool because he was angry.

On Monday, January 20, Meyer, in conjunction with Popp and Ableman, decided to terminate plaintiff's employment because of the seriousness of the incident, the fact that plaintiff threw the tool while angry and plaintiff's extensive history of warnings about controlling his temper. Only Meyer and Jay Smith have the authority to make termination decisions, although Popp and Ableman were consulted and agreed with Meyer's decision. On January 21, Meyer called Linda Leary and asked whether she would be available for the meeting with plaintiff on January 22. Leary told Meyer that she could not attend the meeting January 22 but that she would be available January 23. In addition, she gave Meyer the names and telephone numbers of several other interpreters. Meyer called the other interpreters and left messages for them but none returned her call. She decided to meet with plaintiff on January 22 without an interpreter and communicate with him through written notes.

Before the meeting, Ableman drafted a "Notice of Non-Standard Performance" that would be used to document plaintiff's termination. The form identified the tool-throwing incident and plaintiff's history of warnings regarding his temper as the reasons for his termination. When plaintiff came to work on January 22, he met with Popp and Ableman. They gave him the notice and Popp gave plaintiff a written note explaining that plaintiff was

being terminated and that he could no longer work for defendant. Plaintiff told Popp that he understood some of the writing on the documents; he believed the note Popp gave him constituted a warning only. Popp escorted plaintiff to pick up his belongings and plaintiff left the workplace and went to the house of his mother, Lois McCutchin. McCutchin called Meyer and asked why an interpreter had not been present for the meeting. Meyer told her that defendant had been unable to arrange for an interpreter but suggested that an interpreter would be available on January 23. In addition, she told McCutchin that the purpose of the meeting had been to explain to defendant that his employment was being terminated.

Meyer, Popp, Ableman, McCutchin and plaintiff met with Linda Leary on January 23. During the meeting, they reviewed the Notice of Non-Standard Performance, a COBRA notification and plaintiff's 401(k) paperwork. Plaintiff did not say that anything in the notice was incorrect during the meeting. Defendant replaced plaintiff with Jim Beckius, an individual who was not deaf. Beckius was more qualified for the position, had more years of service with defendant than plaintiff and did not have a history of disciplinary warnings.

Meyer, Peters, Abelman, Popp and Liska have not told or overheard jokes or derogatory comments about plaintiff or about deaf or mute persons.

G. Other Disciplined Employees

1. Mark Aberle

On September 7, 2000, an employee of defendant named Mark Aberle was observed yelling obscenities at a co-worker, throwing a drain pipe on the floor and throwing a clamp at a machine. Aberle received a final warning from Popp for his conduct but was not terminated. Before that incident, Aberle had three disciplinary warnings in seven years of work, including one for dumping two boxes of parts over the head of a co-worker and one for throwing equipment parts on the floor. Kim Meyer was not involved in the investigation or disciplining of Aberle because she did not begin working for defendant until August 2001.

2. Chris Barganz

On September 4, 2001, an employee of defendant Chris Barganz kicked a blue screen near the end of a production line and threw a pair of scissors on the floor. He did not throw the scissors at another employee. Barganz had two written warnings in seven years of work before this incident, one for using profane language and another for circulating offensive material in the workplace. Barganz's performance evaluations contained comments indicating that he should control his temper in talking with subordinates along with positive comments about his performance. Barganz was not suspended or terminated as a result of the September 2001 incident. Meyer was not involved in the investigation or disciplining of Barganz related to the September 2001 incident.

3. Ewa Martynski and Nyima Tsering

On December 18, 2002, employees of defendant named Ewa Martynski and Nyima Tsering were engaging in horseplay. Inadvertently, Martynski threw a small piece of tube that hit a bystander, causing a contusion. Before this incident, neither employee had any history of throwing things documented in their personnel files. Tsering had no prior warnings of any kind and Martynski had two warnings for failing to follow directions. After the incident, Martynski and Tsering were sent home pending an investigation. Meyer issued a Notice of Non-Standard Performance and a final warning to each employee. Neither was suspended further or terminated in connection with the incident.

4. Denise Schulz and Pam Leverenz

In January 2004, employees Denise Schulz and Pam Leverenz, intending to play a joke on another employee, blew dust through a tube at the employee at the same time the employee was looking into the tube. Not surprisingly, the employee got dust in his eye. Before this incident, Schulz had received a warning regarding her attendance and Leverenz had received a verbal warning for making an obscene gesture at another employee. Meyer issued a final warning and a Notice of Non-Standard Performance to each employee and suspended them for three days without pay. Neither employee was terminated because of this incident.

5. Marvin Summers

In March 2004, an employee of defendant named Marvin Summers had a physical altercation with an employee who was teasing him. Summers threatened another employee and tried to pull the employee's apron with one hand while holding scissors in his other hand. He scraped the employee's hand with the scissors inadvertently. Before this incident, Summers had no history of problems with controlling his temper and no disciplinary history for behavioral issues or other misconduct. A Notice of Non-Standard Performance and a final warning were issued to Summers and Meyer suspended him for three days without pay. Summers's employment was not terminated as a result of the incident.

6. Thom Stewart

Defendant hired Thom Stewart in June 1994. Five years later, an incident occurred in which a co-worker stated that Stewart had thrown things on a production line. Before this incident, Stewart did not have a record of prior disciplinary action or a history of failing to control his temper at work. Stewart was not terminated as a result of the June 1999 incident. Meyer and Popp were not involved in disciplining Stewart.

7. Theresa Clark

Defendant hired Theresa Clark in December 1994. In October 1999, Clark received

a final warning for using vulgar language, threatening employees with physical harm and slandering employees. The warning stated that Clark had to enroll in an anger management course. Before this incident, Clark had not been disciplined by defendant. Meyer and Popp were not involved in disciplining Clark for her conduct. She was suspended for three days but instead quit her job.

DISCUSSION

Title I of the Americans with Disabilities Act prohibits certain entities from discriminating 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). The definition of "discriminate" in the Act is broad. Of importance to this case, it covers situations in which a disabled employee is treated differently because of his disability (disparate treatment) and those in which a covered entity fails to provide a reasonable accommodation to a disabled employee. 42 U.S.C. § 12112(b); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). In this case, plaintiff raises claims of disparate treatment and failure to reasonably accommodate; he argues that defendant fired him because of his disability and that defendant failed to reasonably accommodate his disability by not providing an interpreter for him during the investigation of the tool-throwing incident or at the meeting on January

22, 2003.

Under either theory of liability, plaintiff must meet the threshold requirements of showing that defendant is a "covered entity" under Title I and that he is a "qualified individual with a disability." Hoffman v. Caterpillar, Inc., 256 F.3d 568, 572 (7th Cir. 2001); Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1022 (7th Cir. 1997). In its proposed conclusions of law, defendant concedes that it qualifies as an "employer" and therefore, is a "covered entity," for the purpose of the Title I. 42 U.S.C. § 12111(2). Moreover, defendant concedes that plaintiff was a "qualified individual with a disability" at all relevant times. Dft.'s Resp. To Plt.'s PFOF, dkt. #38, at 89-90.

A. Disparate Treatment

A plaintiff bringing a disparate treatment claim under Title I may attempt to prove his case directly through direct or circumstantial evidence or indirectly by utilizing the burden-shifting approach set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff proceeds under both methods but his efforts under each fall short.

1. Direct method

Under the direct method of proof, plaintiff must present direct evidence (an acknowledgment of discriminatory intent by defendant), Buie v. Quad/Graphics, Inc., 366

F.3d 496, 503 (7th Cir. 2004), or construct a "convincing mosaic" of circumstantial evidence that provides the basis for an inference of intentional discrimination, Rhodes v. Illinois Dept. of Transportation, 359 F.3d 498, 504 (7th Cir. 2004).

Plaintiff argues that direct or circumstantial evidence of discrimination exists somewhere in the following: (1) Ken Popp's April 14, 2000 email to Brad Hintz; (2) Popp's refusal to provide an interpreter despite plaintiff's request; (3) defendant's knowledge that plaintiff did not understand the investigation of the tool-throwing incident or the fact that defendant was terminating his employment at the meeting on January 22, 2003; (4) Meyer's decision to hold the meeting with plaintiff on January 22 without an interpreter; (5) the multiple explanations defendant offered for terminating plaintiff's employment; (6) Popp's failure to collect plaintiff's version of events regarding the tool throwing incident; (7) defendant's reliance on the inconsistent accounts of two employees who witnessed the incident; (8) defendant's admission that it was required to provide plaintiff with an interpreter; (9) defendant's failure to investigate plaintiff's complaint about Peters's "teasing" him on January 16, 2003; (10) the fact that plaintiff was not disciplined for the first twelve years of his employment and began receiving warnings only after he transferred from the Hitchcock facility to the Lake Street facility; and (11) defendant's refusal to transfer plaintiff back to the Hitchcock facility. Because plaintiff does not indicate which of these facts he believes constitute direct evidence and which facts constitute circumstantial

evidence, I will analyze the evidence under each category.

a. Direct evidence

Direct evidence is that which proves discrimination without reliance on inference or presumption. Miller v. Borden, 168 F.3d 308, 312 (7th Cir. 1999). It "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003). None of the evidence cited by plaintiff constitutes direct evidence of discrimination because it does not show that defendant discharged plaintiff because of his disability without reliance on inference or presumption. Nowhere in this evidence is there an acknowledgment by any of the individuals involved in plaintiff's termination that his disability was the cause for his termination. The closest plaintiff can come to direct evidence is the email written by Popp in April 2000, which contains the following:

> I know [plaintiff] gets frustrated easily because he can't communicate and I go out of way my to accomidate [sic] it. Took over 3 hours of my time tonite [sic] going through this song and dance and it's just because he gets lazy. Try for one day with any of your piers [sic] just writing notes back and forth and see how easy it is or should I say time consuming.

In his brief, plaintiff describes this comment as reflecting nothing more than Popp's frustration with the slow pace of the written note method of communicating with plaintiff. Plaintiff could have gone a step further and argued that, construing Popp's comments in the

light most favorable to plaintiff, it is possible to interpret Popp's email as the manifestation of discriminatory animus towards deaf persons. However, this argument would not have helped plaintiff because the email does not constitute direct evidence of unlawful discrimination.

To be probative, allegedly discriminatory statements must be made by a decision maker and must be related to the adverse decision at issue. Stopka v. Alliance of American Insurers, 141 F.3d 681, 688 (7th Cir. 1998); Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996) (citations omitted) ("To be probative of discrimination, isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process."). The statements of a person who provides critical information to the actual decision makers may qualify as direct evidence if the statements are made around the time of the adverse decision and in reference to it. Hunt v. City of Markham, 219 F.3d 649, 652 (7th Cir. 2000). Although the record indicates that Meyer made the decision to terminate plaintiff's employment after consulting with Popp, who agreed that termination was the proper course of action, there is no indication that Popp's email was related temporally or causally to the decision to discharge plaintiff. He wrote the email on April 14, 2000, almost three years before defendant terminated plaintiff. Markel v. Board of Regents of University of Wisconsin System, 276 F.3d 906, 910 (7th Cir. 2002) (statements made two months before adverse decision not contemporaneous); Conley v. Village of Bedford

Park, 215 F.3d 703, 711 (7th Cir. 2000) (statements made two years before failure to promote "too distant temporally to provide support" for discrimination claim); Robin v. Espo Engineering Corp., 200 F.3d 1081 (7th Cir. 2000) (two-year span between allegedly discriminatory comments and termination lacked "temporal proximity" to termination). Not surprisingly, the substance of Popp's email does not address the decision making process or the discussions that occurred between Meyer, Ableman and Popp before plaintiff's discharge. Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 724 (7th Cir. 1998). Finally, there is no indication in the record that the email was in plaintiff's personnel file at the time Meyer reviewed the file's contents. For these reasons, the email does not constitute direct evidence of discrimination.

b. Circumstantial evidence

The Court of Appeals for the Seventh Circuit has identified three different types of circumstantial evidence that may show intentional discrimination. Troupe v. May Dept. Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). "The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group and other bits and pieces from which an inference of discriminatory intent might be drawn." Id. The second type of evidence is that which shows the systematically better treatment of employees similarly situated to the plaintiff other than

in the forbidden characteristic. Id. The third type of evidence is that which shows the plaintiff was qualified for the job but was "passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." Id. Regardless of the form it takes, circumstantial evidence must "point directly to a discriminatory reason for the employer's action." Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003).

Plaintiff does not sort his laundry list of evidence according to the categories set forth in Troupe. In fact, he provides no analysis of the evidence other than a prefatory statement that he has presented "an abundance" of evidence "that proves that Mr. Cole's disabilities were the motivating factor behind Teel's decision to fire him." Plt.'s Br., dkt. #27, at 51. However, it is clear that the evidence cited by plaintiff falls under the first category as "bits and pieces" from which he attempts to draw an inference of discriminatory intent. A review of this evidence demonstrates that it does not provide a sufficient basis for a reasonable fact finder to draw an inference that plaintiff was terminated because of his disability.

The first piece of evidence cited by plaintiff is Popp's email to Brad Hintz. As discussed above, the email is not related in time or substance to the decision to terminate plaintiff. Therefore, it is similar to a stray remark that does not prove discrimination even though it may reveal a derogatory attitude of the speaker. Curry v. Menard, Inc., 270 F.3d

473, 477 (7th Cir. 2001) (citing Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir. 2001)).

In addition to the email, plaintiff argues that an inference of discrimination can be drawn from the fact that plaintiff's disciplinary history began only after he transferred from the Hitchcock facility to the Lake Street facility and from defendant's refusal to transfer him back to the Hitchcock facility. He contends that his co-workers and supervisors at the Lake Street facility did not make as much of an effort to communicate with him in a way he could understand and that this failure caused him stress. Moreover, he states that he requested a transfer back to the Hitchcock facility on multiple occasions but that defendant did not make him aware of transfer opportunities aside from posting notices on its bulletin board. I agree with defendant that none of this information supports an inference that plaintiff was discharged because of his disability. The fact that plaintiff's disciplinary history began after he was transferred to Lake Street suggests that Popp, Meyer and the other supervisors at Lake Street were more familiar with plaintiff's problems with his temper and that they had good cause to terminate plaintiff's employment. Defendant's failure to make a more concerted effort to help plaintiff obtain a transfer back to the Hitchcock facility sheds no light on the motivations of the individuals involved in terminating his employment. In fact, it is difficult to think of any reason why Popp, Meyer and the other Lake Street supervisors would not have encouraged and assisted plaintiff in transferring out of their facility if they

harbored discriminatory animus towards him because of his disability.

The rest of the evidence cited by plaintiff is little more than a list of things plaintiff believes defendant did wrong in its investigation of the tool-throwing incident and at the meeting on January 22, 2003. Plaintiff contends that Popp refused to provide an interpreter at the January 22 meeting despite plaintiff's request and that Meyer chose to hold the meeting on January 22 instead of waiting until January 23, when an interpreter could have been present. He argues that Popp failed to collect his version of the tool-throwing incident and failed to investigate plaintiff's complaint that Barry Peters had been "teasing" him before he threw the tool. He criticizes Meyer's, Popp's and Ableman's reliance on the statements of Barry Peters and Ryan Johnson, which he believes are inconsistent, and contends that Meyer, Popp and Ableman knew that plaintiff did not understand the investigation of the tool-throwing incident or realize that he was being fired on January 22, 2003. Finally, plaintiff contends that defendant has offered changing and contradictory justifications for his termination.

None of this evidence supports an inference that plaintiff was terminated *because of* his disability. Federal courts do not sit as super-personnel departments to reexamine the adequacy of an employer's investigation into employee misconduct. Kariotis v. Navistar Int'l Transportation Corp., 131 F.3d 672, 678 (7th Cir. 1997) (citing McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)). This court's only

concern is whether defendant terminated plaintiff's employment because of his disability. The fact that an employer does not conduct an investigation into employee misconduct according to its own internal procedures or in the way most agreeable to the employee being investigated does not support an inference that any adverse action that follows the investigation is the product of unlawful discrimination. Indeed, so long as an employer's belief that an employee has engaged in misconduct is reasonable, it has no obligation to investigate further. Waters v. Churchill, 511 U.S. 661, 680 (1994). In the same vein, Meyer's decision to inform plaintiff of his firing through written notes does not support an inference that the reason Meyer fired plaintiff was because he is deaf or has trouble speaking. Finally, assuming plaintiff is correct that defendant has offered contradictory reasons for plaintiff's termination, this would only support an inference that defendant's stated reason for plaintiff's termination was pretextual under the indirect method. "Circumstantial evidence under the direct method, however, must allow a jury to infer more than pretext; it must itself show that the decisionmaker acted because of the prohibited animus." Venturelli v. ARC Community Services, Inc., 350 F.3d 592, 601 (7th Cir. 2003). None of the evidence identified by plaintiff passes this test.

The second type of circumstantial evidence is that which shows the systematically better treatment of employees similarly situated to the plaintiff other than in the forbidden characteristic. Troupe, 20 F.3d at 736. Although plaintiff has proposed facts concerning

other Teel employees who have been disciplined but not terminated for incidents of misconduct, he does not argue that these facts constitute circumstantial evidence of discrimination under the direct method. Instead, he relies on these facts to establish his prima facie case under the indirect method. Accordingly, I conclude that defendant has waived any argument regarding with respect to these other employees under the direct method. Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived.").

The third type of circumstantial evidence in a discrimination case is evidence that shows the plaintiff was qualified for the job but was replaced by "a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." Troupe, 20 F.3d at 736. The Court of Appeals for the Seventh Circuit has held that the third type of circumstantial evidence in a direct method case is substantially the same as the evidence required under the burden-shifting approach set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Huff v. UARCO, 122 F.3d 374, 380 (7th Cir. 1997). Therefore, I will consider the parties' arguments under the indirect, or burden-shifting approach.

2. Indirect method

Under the indirect method of proving unlawful discrimination, plaintiff has the initial burden to establish a prima facie case of discrimination. Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1261 (7th Cir. 1993). If plaintiff makes out a prima facie case, he is entitled to "a presumption that the employer unlawfully discriminated against the employee." EEOC v. Our Lady of the Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996) (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). Once plaintiff has met his burden, defendant has the burden of rebutting the presumption by coming forward with a legitimate nondiscriminatory reason for the discharge. McDonnell Douglas, 411 U.S. at 802. If the defendant satisfies this standard, plaintiff must demonstrate that there is a genuine issue of material fact whether the defendant's stated reason for plaintiff's termination is pretextual in order to defeat a motion for summary judgment. Hudson v. Chicago Transit Authority, 375 F.3d 552, 561 (7th Cir. 2004). "Although the burden of production shifts under [the indirect] method, 'the burden of persuasion rests at all times on the plaintiff.'" Haywood, 323 F.3d at 531 (quoting Klein v. Trustees of Indiana Univ., 766 F.2d 275, 280 (7th Cir. 1985)).

a. Prima facie case

In order to make out a prima facie case, plaintiff must show that (1) he is a member of a protected class; (2) he was meeting his employer's legitimate expectations; (3) he

suffered an adverse employment action; and (4) similarly situated employees not in the protected class were treated more favorably. Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 530 (7th Cir. 2003) (citing McDonnell Douglas, 411 U.S. at 802). Defendant concedes that plaintiff has satisfied the first and third prongs of the prima facie case. It argues that plaintiff cannot prove that he was meeting defendant's legitimate expectations or that similarly situated employees were treated differently.

Plaintiff's attempt to make out a prima facie case of discrimination is internally inconsistent. On one hand, he argues that he met defendant's legitimate job expectations because "he received numerous positive reviews regarding his performance at Teel and was often praised as an asset to the company." Plt.'s Br., dkt. #27, at 60. Yet in the next paragraph of his brief, he cites Flores v. Preferred Technical Group, 182 F.3d 512, 515 (7th Cir. 1999), for the proposition that when an employee concedes that he is *not* meeting his employer's legitimate expectations, the second prong of the prima facie case becomes irrelevant. By citing Flores and not disputing the fact that he engaged in the conduct that precipitated his termination (throwing a tool with a sharp edge in the workplace), plaintiff appears to concede that he was not meeting defendant's legitimate expectations. He cannot have it both ways. Because plaintiff admits that he threw the tool on January 16, 2003, he has foreclosed any argument that he was meeting his employer's legitimate expectations at the time of his termination. (As a result, plaintiff may not make out his prima facie case

simply by noting that his replacement was not deaf.)

This does not doom plaintiff's attempt to make out a prima facie case of discrimination, however. Plaintiff has presented evidence regarding nine individuals employed by defendant who were disciplined but not terminated for various acts of misconduct. He argues that these individuals engaged in conduct similar to or worse than the tool-throwing incident but were not punished as severely as plaintiff. This is a "disparate punishment" theory of discrimination. Lucas v. Chicago Transit Authority, 367 F.3d 714, 728 (7th Cir. 2004); Flores, 182 F.3d at 515. In a disparate punishment case, an employee need not prove that he was meeting his employer's legitimate expectations because the employees he claims to be similarly situated to have not met those expectations either. In Flores, the employee conceded that she had participated in an unauthorized work stoppage but argued that she had been disciplined more harshly than non-Hispanic employees who had participated. The court of appeals stated that it made "little sense in this context to discuss whether she was meeting her employer's reasonable expectations" because none of the employees who participated were meeting those expectations. Id. Instead, the second and fourth prongs of the prima facie case merge, and the critical inquiry is whether plaintiff can show that he was punished more severely than the other misbehaving employees. Lucas, 367 F.3d at 728.

To meet his burden of showing that the individuals identified by plaintiff were

similarly situated, plaintiff must show that they are "directly comparable to [him] in all material respects." Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002). A court must look at all relevant factors to determine whether employees are similarly situated. In a disparate punishment case, a plaintiff must show that he and the other employees "dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-18 (7th Cir. 2000).

Plaintiff is not similarly situated to Mark Aberle, Chris Barganz, Thom Stewart or Theresa Clark because they were not disciplined by Kim Meyer, the individual who decided to terminate plaintiff's employment. (In addition, there is no indication that Popp was involved in the disciplining of Barganz, Stewart or Clark). Moreover, he is not similarly situated to any of the other employees because none had a record of disciplinary warnings as extensive as plaintiff, who received at least seven written warnings or verbal reprimands between 1995 and 2002 for incidents resulting from his inability to control his temper. At the time they were disciplined, Ewa Martynski had two warnings for failing to follow directions and Nyima Tsering had no warnings of any kind. Denise Schulz and Pam Leverenz had one warning each before being disciplined for blowing dust into another employee's eyes in January 2004. Marvin Summers had no history of temper-related

incidents and no disciplinary warnings when he was suspended for fighting with another employee in March 2004. In sum, none of the employees identified by plaintiff are similar to him in all material respects. Therefore, he has failed to establish a prima facie case of discrimination.

Assuming plaintiff had made out a prima facie case, defendant would still be entitled to summary judgment on his disparate treatment claim because it produced a legitimate, nondiscriminatory reason for plaintiff's termination and plaintiff has not raised a genuine issue of material fact that defendant's reason is pretextual. The record indicates that Meyer decided to terminate plaintiff's employment because he became angry and threw a sharp tool in the workplace and because he had a long history of being warned about the need to control his temper. This is sufficient to satisfy defendant's burden and require plaintiff to present evidence from which a reasonable jury could infer pretext. Pretext means more than just a decision made in error or in bad judgment; it means a lie or a phony reason for the action. Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996). The issue is not whether the employer's evaluation of the employee was correct but whether it was honestly believed. Olsen v. Marshal & Ilsley Corp., 267 F.3d 597, 602 (7th Cir. 2001). The employer's explanation can be "foolish or trivial or even baseless" so long as the employer honestly believed in the reasons it offered for the adverse employment action. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997); see also Wade v. Lerner N.Y., Inc.,

243 F.3d 319, 323 (7th Cir. 2001). A plaintiff can prove pretext through direct evidence that shows that an employer is lying or through indirect evidence that shows that the employer's reasons are not factually supported, were not the real reason for the adverse action or were not sufficient to prompt the adverse action. Ajayi v. Aramark Business Services, Inc., 336 F.3d 520, 534 (7th Cir. 2003); Vukadinovich v. Board of School Trustees of North Newton School Corp., 278 F.3d 693, 699-700 (7th Cir. 2002).

Despite plaintiff's insistence to the contrary, he has presented no direct evidence that defendant fired him because he is disabled. As discussed above, the closest he comes to direct evidence of discrimination is the email written by Popp in April 2000, but as I have already explained, that email does not constitute direct evidence because it is not related in time or substance to plaintiff's termination. It provides no basis for inferring that Meyer, Popp or anyone else involved in plaintiff's termination was lying about the reasons why he was terminated. Thus, plaintiff must rely on indirect evidence. His attempt to show pretext by criticizing defendant's "shoddy" investigation of the tool-throwing incident is a non-starter. Kariotis, 131 F.3d at 677 (burden to show pretext not "an invitation to criticize the employer's evaluation process"). In addition, plaintiff argues that the evidence of the other disciplined employees raises an issue of pretext. "The disparate treatment of similarly situated employees who were involved in misconduct of comparable seriousness, but did not have a similar disability, could establish pretext." Buie v. Quad/Graphics, Inc., 366 F.3d

496, 508 (7th Cir. 2004) (citing Hiatt v. Rockwell Int'l Corp., 26 F.3d 761, 770 (7th Cir. 1994)). However, I have concluded that plaintiff is not similarly situated to any of the nine employees who were disciplined but not fired after instances of misconduct.

Plaintiff has failed to establish a genuine dispute whether Meyer honestly believed that defendant had thrown the tool and had a history of temper-related disciplinary warnings. It is undisputed that plaintiff threw a tool with a non-retractable razor blade in the workplace on January 16, 2003. It is undisputed that this was not an isolated incident but rather the latest in a series of instances in which plaintiff failed to control his frustration and temper when interacting with other employees. More important, it is undisputed that Meyer honestly believed that plaintiff's disciplinary history was accurately recorded in his personnel file and that he had thrown a sharp tool in the workplace. There is no evidence suggesting that Popp and Ableman, the individuals Meyer consulted before deciding to terminate plaintiff's employment, did not share her beliefs or knew them to be unfounded. In short, no evidence exists from which a reasonable jury could infer that defendant's stated reasons for plaintiff's discharge were pretextual.

Because plaintiff has not met his burden of showing unlawful discrimination under the direct or indirect methods, defendant's motion for summary judgment will be granted as to plaintiff's disparate treatment claim.

B. Failure to Accommodate

In addition to his disparate treatment claim, plaintiff contends that defendant violated the ADA by failing to provide him with an interpreter during its investigation of the tool-throwing incident and at the termination meeting on January 22, 2003. The ADA defines discrimination in part as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). As plaintiff notes, the statute lists "the provision of qualified readers or interpreters" as an example of a reasonable accommodation. 42 U.S.C. § 12111(9). To establish a claim for failure to accommodate under the ADA, plaintiff must show that is a qualified individual with a disability, that defendant knew of his disability and that defendant failed to reasonably accommodate it. Hoffman, 256 F.3d at 572. There is no dispute that plaintiff is a qualified individual with a disability or that defendant was aware of his disability. The parties disagree whether defendant failed to reasonably accommodate plaintiff's disability by not having an interpreter present during the investigation of the tool-throwing incident or at the meeting on January 22, 2003.

At the outset, I note that it is not clear whether the ADA requires an employer to accommodate an employee's disability during the disciplinary process. Several federal courts

of appeals have noted that the statute requires an employer to provide only those reasonable accommodations that enable a disabled employee to perform the *essential functions* of a job. Gile v. United Airlines, Inc., 213 F.3d 365, 372 (7th Cir. 2000) (ADA imposes duty to accommodate "only if accommodation would permit the disabled employee to perform her job"); Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1017 (7th Cir. 1996); McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 1999) (ADA imposes duty to accommodate "in order to remove barriers that could impede the ability of qualified individuals with disabilities to perform their jobs"); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) ("The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions."); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) ("An 'accommodation' is 'reasonable' – and therefore, required under the ADA – only if it enables the employee to perform the essential functions of the job."). Regulations promulgated by the Equal Employment Opportunity Commission pursuant to Title I reinforce the idea that reasonable accommodations are related to the tasks of a particular job by defining the term "reasonable accommodation" in terms of

> Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.

29 C.F.R. § 1630.2(o)(ii) (1995). Because it is undisputed that plaintiff was able to perform the essential functions of the operator technician position at all times, it is arguable that the investigation of the tool-throwing incident and the decision to terminate plaintiff's employment did not trigger an obligation to reasonably accommodate his disability. However, defendant does not present this as a ground in support of its motion for summary judgment. It does not argue that the investigation and termination of plaintiff did not implicate an essential function of his operator technician position. Thus, I will proceed, as the parties have, on the assumption that the statute requires an employer to reasonably accommodate the known disability of an employee during the disciplinary process.

Plaintiff argues that he requested an interpreter during his exchange of notes with Popp on January 16, 2003 but that defendant refused to provide one at any time during its investigation of the incident or at the meeting on January 22, 2003 at which Popp and Ableman informed him that his employment was being terminated. The record indicates that Popp told plaintiff that he was being given a warning on January 16 and asked plaintiff whether he wanted Linda Leary to explain the warning to him the next time she came to the Lake Street facility. Assuming that plaintiff's response to Popp's question can be construed as a request for an interpreter, he was responding to a question about whether he wanted an interpreter to *explain the warning.* In other words, plaintiff did not request that he be given an opportunity to explain his actions with an interpreter present. Jovanovic v. In-Sink-

Erator Div. of Emerson Electric Co., 201 F.3d 894, 899 (7th Cir. 2000) (though subject to exceptions, standard rule is that employee must request accommodation before liability under ADA attaches).

Plaintiff does not identify specifically where in the chain of events leading to his termination he should have been provided an interpreter. At the beginning of his brief, plaintiff identifies Popp's admission that plaintiff had difficulty answering his questions on January 16 and states that "the written exchange with Mr. Popp was worth very little without the aid of an interpreter." Plt.'s Br., dkt. #27, at 3. In addition, plaintiff cites Mohamed v. Marriott International, Inc., 905 F. Supp. 141 (S.D.N.Y. 1995), in support of his argument that defendant's failure to provide an interpreter on January 16 tainted the entire decision making process. To the extent plaintiff is arguing that defendant failed to accommodate him during his exchange of notes with Popp shortly after the incident on January 16, there is no indication in the record that plaintiff requested the presence of an interpreter at that time. Moreover, assuming plaintiff had requested an interpreter or that Popp should have realized that an interpreter was needed, there is no indication that Popp could have obtained one on the spot. Instead, needing to confirm quickly that plaintiff had thrown the tool, Popp communicated with plaintiff through written notes, the method he had used since plaintiff started working at the Lake Street facility. Plaintiff may have had difficulty communicating the details of the incident to Popp, but he did admit to throwing

the tool out of anger.

Although Mohamed is factually similar to the present case, it is distinguishable. In Mohamed, a deaf employee was questioned by several supervisors, one of which had rudimentary skills in sign language, following an incident in which the employee had picked up several hundred dollars in cash that had been left in a cloakroom by another employee. Because of the poor translation, the employee's supervisors were led to believe that the employee was offering inconsistent explanations for his behavior. Id. at 147. After the plaintiff was fired, he sued under the ADA, contending that defendant's failure to obtain a qualified interpreter for the meeting "led the parties present to garner the false impression that Mohamed was repeatedly changing its story, that he was lying, and that he had stolen the money without intent to return it." Id. at 151.

Although plaintiff argues that he was unable to communicate his version of the incident in the exchange of notes with Popp shortly after the incident, the record indicates that plaintiff was able to confirm that he had thrown the tool and explain his behavior as a reaction to Barry Peters' "dirty teasing gesture." In response, Popp told plaintiff that he would instruct Peters not to tease him. Thus, the factual situation differs from that in Mohamed. It appears that plaintiff did not require the services of an interpreter to make this point clear. More important, plaintiff admits to throwing the tool; he does not argue that he tried to tell Popp that he had not thrown the tool but was unable to do so without

an interpreter. In Mohamed, the deaf employee did not engage in misconduct but could not communicate that fact to his superiors because of the lack of a qualified interpreter.

At bottom, plaintiff's claim is not that defendant failed to accommodate his disability during its investigation of the tool-throwing incident. Instead, plaintiff's arguments stem from defendant's refusal to afford him any opportunity whatsoever to explain his side of the story. He contends that he would not have been terminated had he been given the opportunity to explain his version of the incident through an interpreter because an interpreter would have been able to communicate to Meyer, Popp and Ableman that he did not hurl the tool recklessly but merely tossed it onto the workstation table in an underhand motion. By not giving him a chance to present his version of events with an interpreter present, plaintiff argues, defendant violated its employee handbook, which provides that: "All employees will be allowed an opportunity to tell his or her side of the story. This will allow us to give full consideration to the problem or complaint." Further, he insists that he should have been given an opportunity to clarify his version of events with an interpreter because the statements given by Peters, Popp and Johnson were inconsistent.

These arguments are not about Meyer's, Popp's and Ableman's refusal to accommodate plaintiff's disability; they are about these employees making the decision to terminate plaintiff's employment without affording him a hearing or any other opportunity to explain his behavior. But terminating an employee without giving him a hearing to plead

his case does not violate the ADA simply because the employee happens to be disabled. Plaintiff would have a stronger case for failure to accommodate if defendant had afforded him a hearing to explain his conduct and denied him an interpreter at that hearing. However, the undisputed facts indicate that defendant did not give plaintiff this opportunity. Instead, Meyer decided to discharge plaintiff while he was suspended. She made this decision on the basis of (1) plaintiff's admissions to Liska and Popp on January 16 that he had thrown the tool out of anger; (2) the statements of Popp, Barry Peters, Debra Liska and Ryan Johnson, which confirmed the truth of plaintiff's admission; and (3) plaintiff's history of disciplinary warnings and reprimands for temper-related outbursts. In Meyer's estimation, these facts provided sufficient justification for the termination.

Plaintiff's arguments confuse his right to an accommodation with his right to be heard before being terminated. The fact that Popp, Meyer and Ableman did not speak with plaintiff a second time after the incident to verify the accounts offered by Peters and Johnson does not constitute a failure to accommodate his disability. Their refusal to give plaintiff a chance to show that his conduct was justified or not as severe as they believed might have violated his right to procedural due process had defendant been a governmental entity, but it did not constitute a failure to reasonably accommodate his disability. Therefore, defendant is entitled to summary judgment as to plaintiff's failure to accommodate claim.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Teel Plastics, Inc. is GRANTED as to plaintiff Carmon Cole's claims of disparate treatment and failure to accommodate under the Americans with Disabilities Act. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 8th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge